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REPORTS

OF

CASES

ARGUED and ADJUDGED in the COURTS of

KING'S BENCH

AND

COMMON PLEAS,

In the REIGNS of

The late King *William*, Queen *Anne*, King *George* the First, and King *George* the Second.

Taken and collected

By the Right Honourable *ROBERT* Lord *RAYMOND*, late Lord Chief Justice of the COURT of KING'S BENCH.

VOL. I.

The FOURTH EDITION, Corrected; with Additional References to former and later Reports;

By JOHN BAYLEY.

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RIGHT HONOURABLE

SIR RICHARD PEPPER ARDEN, KNT.

MASTER OF THE ROLLS,

AND

One of his MAJESTY'S moſt Honourable PRIVY COUNCIL,

THIS EDITION OF THE FIRST VOLUME

OF THE

REPORTS of LORD RAYMOND,

IS WITH

GRATITUDE, RESPECT AND DEFERENCE,

INSCRIBED

BY

The EDITOR.

WE, well knowing the great learning, ability and judgment, of the author, do allow and approve of the printing and publiſhing of this book, entituled, *Reports of caſes argued and adjudged in the courts of King's Bench and Common Pleas, taken and collected by the Right Honourable* Robert *Lord* Raymond, *deceaſed, late Lord Chief Juſtice of the court of King's Bench.*

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TO the former Editions of the Reports of Lord *Raymond* the principal Objections are, that the Marginal Abſtracts are incomplete, and many of the References inapplicable: to obviate theſe in the preſent, the Editor has given a full Marginal Abſtract of the Points of every Caſe which did not, from its peculiar Shortneſs, preclude the Neceſſity of any Abſtract; and after examining all the References to be found in the Margins of the former Editions, and many of thoſe contained in the Body of the Work, has expunged ſuch as he found irrelevant.—In Addition to which, he has ſpecified how almoſt all of thoſe which he has left or added apply, he has compared each Caſe with the different Reports of it to be met with in other Books, and ſtated any Particulars in which it varies from them, and has ſhewn which of the Points reported by Lord *Raymond* the other Reports do, and which they do not comprehend, by placing the References to them immediately under the Name of the Caſe, where they comprehend all the Points, and where they do not, by placing them under the Points they do contain. With Reſpect, however to the Marginal Abſtracts, he thinks it neceſſary to obſerve, that in a Work like this, it is more than probable that ſome of them are inaccurate, and he would therefore caution the Reader againſt relying implicitly upon them, without adverting to, and conſidering the Caſe to which they are annexed.

KING'S BENCH WALKS,
10th *Dec.* 1789.

An EXPLANATION of ſome of the ABBREVIATIONS made uſe of in the following Work.

S. C.	Same caſe.	Agr.	Agreed.
R.	Ruled.	Acc.	Accordingly.
D.	Dictum.	Arg.	Arguendo.
Adm.	Admitted.	Cont.	Contra.

A TA-

A

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THE

THE

Principal Officers of the Law,

Paſch. 6 *Will. & Mar.* 1694.

SIR John Somers *knight, lord keeper of the great ſeal of* England, *ſo created about* Eaſter Term, 1693, *being then attorney general.*

Sir John Trevor *knight, maſter of the rolls, created ſo when Sir* John Somers *was made lord keeper.*

Sir John Holt *knight, chief juſtice.*
Sir William Gregory *knight,*
Sir Giles Eyre *knight,*
Sir Samuel Eyre *knight, made a juſtice of the King's Bench this vacation in Sir* William Dolben's *room, who died laſt term.*
} *Juſtices of the King's Bench.*

Sir George Treby *knight, Chief Juſtice.*
Sir Edward Neville *knight,*
Sir John Powell *knight,*
Sir Thomas Rokeby *knight,*
} *Juſtices of the Common Pleas.*

Charles Montague *eſquire, Chancellor of the Exchequer.*

Sir Robert Atkins, *knight of the Bath, Chief Baron.*
Sir Nicholas Lechmere *knight,*
Sir John Turton *knight,*
Sir John Powell *knight,*
} *Barons of the Exchequer.*

Sir Edward Ward *knight, Attorney-general.*

Sir Thomas Trevor *knight, Solicitor-general.*

Sir

Sir Ambroſe Philips *knight*,
Sir William Wogan *knight*,
Sir Nathaniel Bond *knight*,
Sir John Trenchard *knight*,
Sir George Hutchins *knight*,
Sir Henry Gould *knight*,
} *King's ſerjeants.*

Sir William Williams *knight and bart.*
Sir William Whitlock *knight*,
Sir Nathaniel Powell *knight and bart.*
John Conyers *eſquire*,
—— Cowper *eſquire*,
William Aglionby *eſquire*,
Edward Clerk *eſquire*,
William Farrar *eſquire*,
} *King's Counſel.*

Term

Term. Paſch.

6 Will. & Mar. B. R.

Sir John Holt, *Knt. Chief Juſtice.*
Sir William Gregory, *Knt.*
Sir Giles Eyre, *Knt.* } *Juſtices.*
Sir Samuel Eyre, *Knt.*

Rex & Regina *verſ.* Tucker.

Intr. Hil. 4 & 5 Will. & Mar. Rot. 22. B. R.

On an indictment for high treaſon it muſt appear unequivocally that the criminal owed allegiance to the crown. S. C. Skinn. 360, 425, 442. Carth. 317. Holt 678. 3 Lev. 396. 12. Mod. 51. Salk. 630. and more at large 4 Mod. 162 Duce. Hob. 271. Dyer 145. a. and in Marg. Co. Litt. 129. a. 3. Inſt. 11. 1 H. P. C. c. 10. p. 59. Foſt. 185. f. 5. Com. Dig. vol. 3. Tit. Indictment, G. 6. Ed. 1780. p. 507. 2 Hawk. c. 25. f. 55. Q. Whether the award quod fecreta membra amputentur is a neceſſary part of the judgment in high treaſon. S. C. Skinn. 338. 425. 442. 4 Mod. 162. Carth. 317. It is omitted 3 Inſt. 210. 211. Co. Ent. 422. 423.

REGINALD TUCKER brought a writ of error to reverſe his attainder of high treaſon, before the juſtices of gaol-delivery in *Somerſetſhire*, in 2 *Jac.* 2. for having been in the rebellion of the duke of *Monmouth*. The counſel for *Tucker* aſſigned ſeveral errors in the record, but all were over-ruled except two; one, That the words *contra ligeantiae ſuae debitum* were omitted in the indictment; the other, That the words *ſecreta membra amputentur* were omitted in the Judgment. This caſe was often argued by counſel, as well for the king as for *Tucker*; and this term the judges gave their opinions *ſeriatim*, that the attainder ought to be reverſed. And the reaſon of their reſolution (wherein they are all agreed) was, for that (*a*) allegiance is the mutual bond between the king and his ſubjects, by which the ſubjects owe duty to the king, and the king protection to his ſubjects; and (*b*) treaſon is the breach and violation of that duty of allegiance which the ſubject owes to the king. If there is no allegiance, there can be no treaſon. Where the king does not owe protection to the criminal, nor the criminal allegiance to the king, the criminal cannot be a traitor (*c*). For this reaſon an alien enemy cannot be indicted of treaſon, but ſhall be tried and executed by martial law. 15 *Hen.* 7. *Perkin Warbeck*'s caſe. 7 *Rep.* 6. *b.* *Calvin*'s caſe. (*d*) But an alien friend, who abides in the kingdom, owes allegiance to the

(*a*) Co. Lit. 129. a. (*b*) Foſt. 183. 4 Bl. Com. 75. (*c*) 3 Inſt. 11. Dyer 145. a. 1 H. P. C. c. 10. p. 59. 1 Hawk. c. 17. f. 6. 5 Bac. Abr. 109. (*d*) Co. Litt. 129. a. Hob. 171. Dyer 145. a. and in margine. 1 H. P. C. 6. 10. p 59. 1 Hawk. c. 17. f. 5. 1 Bl. Com. 370. Foſt. 185. f. 3. 5 Bac. Abr. 109

king, and therefore he may commit treaſon; and if he does, his indictment ſhall be *contra ligeantiae ſuae debitum.* The caſe of *Stephono Ferrara de Gama* and *Emanuel Lewis Tinoco*, 7 *Rep.* 6. *a. Calvin's* caſe. *A fort ori* in the caſe of a man naturally born a ſubject to the king, the indictment for treaſon ought to conclude ſo. As to what was ſaid by *Levinz* and *Gould* ſerjeants, that the omiſſion of theſe words was ſupplied by the words *ligeantiam ſuam minime ponderans*, and by the other words which follow after, *contra dominum regem verum naturalem et ſupremum dominum ſuum*, which words (as they ſaid) neceſſarily imply, that *Tucker* was a liege ſubject to the king, and conſequently that this treaſon was committed by him *contra ligeantiae ſuae debitum*: the court gave this anſwer; that indictments cannot be made good by implication. *St. Pl. Cor.* 96. *a.* As to the omiſſion of the words *ſecreta membra amputentur* in the judgment, juſtice *Samuel Eyre* gave his opinion, that the attainder ought not to be reverſed for this reaſon, becauſe there is a multitude of books which warrant that omiſſion. But juſtice *Giles Eyre* ſeemed to think, that theſe words ought to be inſerted in the books, becauſe the conſtant practice now warrants it; but by reaſon of the multitude of precedents in the books, doubted as to the point. *Holt* chief juſtice would not give any opinion upon this point. But for the other reaſons the attainder was reverſed. And upon error brought in parliament this judgment of reverſal in *B. R.* (*a*) was affirmed *Jan.* 22, 1694-5.

Indictments cannot be made good by implication. De acc. poſt 529. 1467. Burr. 1127. Cro. Jac. 20. and vide. 5 Co. 121. *a.* Co. Litt. 303. *a*, and 2 Hawk. c. 25. ſ. 54 to 129.

Sho. P. C. 186.

Note; *Holt* Ch. J. declared, *Mich.* 7 *Will.* in argument on the caſe of the (*b*) king and *Walcot*, that in this caſe of the king and queen and *Tucker*, no notice was taken of the omiſſion of the words *ſecreta membra amputentur*, neither in the king's bench nor in parliament; but that the judgment was reverſed only for the omiſſion of the words *contra ligeantiae ſuae debitum* in the king's bench, and for the ſame reaſon the judgment was affirmed in parliament.

Acc. Sho. P. C. 187.

(*a*) By the majority of one voice only. 3 Lev. 396. (*b*) This caſe is reported in Comb. 369. Carth. 348. 4 Mod. 395. Salk. 632. Holt 680. and 12 Mod. 95. but in none of thoſe books does this circumſtance appear.

Oliver *verſ.* Thomas.

Intr. Paſch. 5 Will. & Mar. C. B. Rot. 653.

S. C. 3 Lev. 367. more at large.

ASSUMPSIT for fees due to the plaintiff as an attorney. The defendant pleaded the ſtatute of limitations. On a demurrer by plaintiff, adjudged a good plea.

Goodright

Goodright *verſ.* Corniſh.

Intr. Trin. 5 Will. & Mar. B. R. Rot. 20.

S. C. Comb. 254. Holt 227. 12 Mod. 52. Skinn. 408. with the arguments of counſel. 4 Mod. 255. rather more at large, Salk. 226. 1 Eq. Abr. Tit. Deviſes E. pl. 14. Ed. 1756. p. 189.

EJECTMENT. Special verdict that *John Knolls* ſeiſed of the lands in which, &c. had iſſue *John* and *Richard* his ſons, and deviſed the lands to *John* for fifty years, if he ſo long lived, (*a*) remainder to the heirs male of the body of *John*, and for default of ſuch iſſue, remainder to *Richard* in tail male, remainder to the right heirs of the deviſor: the deviſor died. *John* the ſon ſuffered a common recovery to the uſe of himſelf for life, and after to the defendant in fee: the plaintiff claimed under *Richard*, *viz.* leſſee of the eldeſt ſon of *Richard*. And it was adjudged, 1. That this limitation to the heirs male of *John*, was not an executory adviſe, but a plain contingent remainder. 2. That it was ill, becauſe there was no freehold to ſupport it, and therefore that the remainder over to *Richard* well took effect. And Judgment was given for the plaintiff. 2 *Leon.* 70. *Challoner* verſ. *Bowyer*. (*c*)

Under a deviſe to the heirs male of the body of one who takes an eſtate for 50 years, if he ſo long lived under the ſame will, tho' the eſtate is only limited over in default of his iſſue, the anceſtor does not take an eſtate tail. S. C. 3 Danv. Abr. p. 237. pl. 4. R. acc. 1 Wilſ. 225. Burr. 2157. Bl. 643.

Such deviſe if it has no freehold to ſupport it is void as a remainder. S. C. cit. and agr. Fearne. 207. R. acc. poſt. 37. And ſo is it as an executory deviſe (*b*) if limited *per verba de præſenti*. And as a remainder S. C. cit. 2 P. Wms. 56. cit. and dub. Fearne 426. R. acc. poſt. 37. D. acc. Raym. 83. *ſed* R. cont. 2 P. Wms. 28. 1 Wilſ. Bl. and Burr. *ubi ſupra*.

(*a*) Note the words of this deviſe according to Salk. 1 Eq. Abr. and 3 Danv. *ubi ſupra* and 2 P. Wms. 56 were "And as to my inheritance after the ſaid term I deviſe the ſame, &c.

(*b*) Vide Salk. *ubi ſupra*. (*c*) Note the two latter points were unneceſſary to the determination of this caſe, and ſo the court conſidered them. Vide Salk. 1 Eq. Abr. 12 Mod. and Comb. *ubi ſupra*.

Orby *verſ.* Hales.

Intr. Trin. 4 Will. & Mar. C. B. Rot. 763.

S. C. cit. 4 Mod. 353.

IT was adjudged in this caſe, *Mich.* 5 *Will.* & *Mar.* that if the juſtices at the quarter ſeſſions make an order, by virtue of 2 *W* & *M. c.* 15, for the diſcharge of poor priſoners, which order is not warranted by the ſtatute, (as if the priſoner was in execution for more than 100*l.*) and the ſheriff diſcharge the priſoner accordingly, he ſhall not be liable to an eſcape. *Ex relatione m'ri place.*

R. cont. Salk. 273. and vide Cro. Eliz. 893.

Qu. *Becauſe in that caſe the juſtices had no juriſdiction, and the ſheriff is bound to take notice at his peril for what ſum his priſoner was charged in execution?*

Richards *verſ.* Newton.

Intr. Paſch. 6. Will. & Mar. B. R. Rot. 97.

S. C. Comb. 298. Salk. 296. Skin. 565.

IN *ſcire facias* againſt an executor, upon a judgment againſt the teſtator, he pleaded *plene adminiſtravit* gene-

General *plene adminiſtravit* to a *ſcire facias* upon a judgment had upon ſpecial demurrer. R. acc. Cro. Eliz. 575. 793. and vide Moor 858. 3 P. Wms 117. cont. Off. Ex. c. 9. p. 138. Ed. 1763.

rally. The plaintiff demurs ſpecially, becauſe the defendant hath not ſhewn how he hath adminiſtred. And it was adjudged not to be a good plea. *Mich. 6 Will & Mar. Ex relatione m'ri place.*

Vide Al. 47.

Qu. How it would have been upon a general demurrer, or if iſſue had been joined thereon?

Note; *in 4 Mod. 296. this very caſe is ſtated to have been on a general demurrer, and the court are made to determine in favour of the plea.*

Hanſon *verſ.* Hellwell.

Intr. Trin. 4 Will. & Mar. C. B. Rot. 1470.

R. acc. Cro. Eliz. 185. 330. Lutw. 1180. *ſed. nunc vide* 5 G. 1. c. 13. ſ. 1.

IN treſpaſs the writ was, *Quare bona et catalla ſua cepit*; and the count was of a cow. Not guilty pleaded, and a verdict for the plaintiff. Judgment was arreſted, *Mich. 5 Will. & Mar.* See *Hob.* 37. *F. N. B.* 68. 20 *Hen.* 6. 42. 7 *Ed.* 4. 31. *Keilw.* 35. 211. *b. Ex relatione m'ri place.*

Intr. Hil. 5 Will. & Mar. C. B. Rot. 1700.

Officer cannot detain for fees. R. acc. Str. 908. & vide poſt. 703.

Maſon *verſ.* Cutterſon.

IN treſpaſs and falſe impriſonment the defendant juſtified under an arreſt by virtue of a warrant, *&c.* and that he detained the plaintiff until he paid him 1 *s.* and 4 *d.* for fees. And judgment this term, was given for the plaintiff, becauſe the defendant could not detain for his fees. *Ex relatione m'ri place.*

Ball *verſ.* Rowe. C. B.

Court will take notice of the end of a Trinity term. R. acc. poſt. 1557. and vide poſt. 354. Burr. 2586.

IN debt for rent. The defendant pleaded an eviction by *elegit, teſte* 15 *July.* And adjudged, *Mich. 5 Will. & Mar.* that the *elegit* was void, for the court will take notice that it was *teſted* out of term. *Ex relatione m'ri place.*

Naſh *verſ.* Hemmings.

Paſch. 6 Will. & Mar.

INDEBITATUS aſſumpſit for ſo much money *pro uno dolio vini pyracei, Anglice* perry. Upon a demurrer, adjudged for the plaintiff. *Ex relatione m'ri place.*

Term

Term. Trin.

6 Will. & Mar. B R. 1694.

Sir John Holt *Chief Juſtice.*
Sir William Gregory
Sir Giles Eyre } *Juſtices.*
Sir Samuel Eyre

16 Com Inst 46 Hob 96

Philips *verſ.* Bury.

Intr. Hil. 4 Will. & Mar. Rot. 148.

S. C. Comb. 265. Holt 715. 1. Show. 360, with the arguments of counſel, 4 Mod. 106. very fully with the reſpective opinions of the judges, and ſeveral material differences in the ſtate of the caſe, Skinn. 447. which report is probably the moſt accurate, Skinner having been counſel in the cauſe in the houſe of lords.

THE plaintiff brings an ejectment againſt the defendant for the rectory houſe of *Exeter college* in *Oxford*, and declares upon a demiſe to him by *John Painter*, &c. (*a*) Upon the general iſſue pleaded the jury find a ſpecial verdict. They find, that *Exeter college* in *Oxford* (to the rectors and ſcholars of which the rectory houſe in which, *&c.* appertains) was founded by *Walter Stapleton* biſhop of *Exeter*, for a rector and a certain number of fellows: that the rector and fellows are a body politic, *&c.* incorporated by letters patent of queen *Elizabeth* by the name of *rector and fellows of* Exeter *college in* Oxford, *&c.* They find divers ſtatutes of the college, 1. They find one which appoints the biſhop of *Exeter* and his ſucceſſors to be viſitors; but that he ought not to viſit *ex officio*, but once in five years, (unleſs he be requeſted by the rector and four of the ſeven ſenior fellows) and that this viſitation ought not to continue longer than three days: they find alſo another ſtatute, which enables the viſitor to deprive the rector, (*c*) if he obtain the concurrent aſſent of the ſeven ſenior fellows, in caſe the rector miſbehave himſelf. They find another ſtatute which enables the rector to deprive any of the fellows, for incontinency, *&c.* The jury find further, that the defendant Dr. *Bury* was rector of this *Exeter college A. D.* 1689. 1 *Will. & Mar.* That he upon

If the members of a college prevent the viſitor from entering into the place he has appointed for the viſitation, the adminiſtration of an oath by him elſewhere to the officer concerning the ſervice of the citation is a viſitatorial act. (*b*)

Where the viſitor muſt have the conſent of the ſeven ſenior fellows to the removal of particular members, though ſome of ſuch members may have been ſuſpended, their conſent is nevertheleſs eſſential to the removal.

(*a*) In Skinn. and 4 Mod. ubi ſupra there is a ſpecial plea and replication, and the iſſue is "*rector or not.*"

(*b*) In Skinn. ubi ſupra, it is ſtated that on the next viſitation day the biſhop cauſed the adminiſtration of this oath to be regiſtered; without which circumſtance Mr. J. G. Eyre is repreſented to have been of opinion that the adminiſtration of the oath would not have amounted to a viſitatorial act; and Mr. J. Gregory is made to rely in ſome degree on that circumſtance; and Mr. J. S. Eyre is ſtated to have conſidered the hearing of the appeal in March 1690, as a viſitatorial act.

(*c*) In Skinn. and 4 Mod. ubi ſupra, this ſtatute is ſet out in very different terms: and Holt C. J. is made to argue that upon the very words of it the viſitor had an unconditional power of removal; and Mr. J. G. Eyre and Mr. J. Gregory are ſtated to have reaſoned upon it; which had the terms of it been unequivocal, they would not have done.

the

On the reverſal of a judgment for a defendant, a new judgment ſhall be given for the plaintiff if he appears to have any cauſe of action. S. C. Skinn. 514. 4 Mod. 125. Salk. 403. Holt. 402. Carth. 180, 319. R. acc. Salk. 262. Yelv. 74. Cro. Jac. 206. Noy. 129. 1 Lev. 310. agr. Cro. Car. 319. D. acc. Burr. 2156. 2490. ſee alſo 1 Roll. Abr. 805. 2 Inſt. 23. F. N. B. 19 D.

the 16th of *October* in that year deprived Mr. *John Colmer*, one of the fellows, for incontinency: that *John Colmer* entered his appeal with the biſhop of *Exeter* viſitor of the college, who after having heard his appeal, ſent his chancellor in *March* 1690 with him to the college, to reſtore him: that the rector and the ſeven ſenior fellows denied to give him admittance: they find, that the biſhop of *Exeter* iſſued his citation, for appointing a viſitation the 16th of *June* following, which citation was ſerved upon the defendant, then rector, by *Webber*: that the biſhop upon the 16th came to the college, where he found the gates of the college ſhut againſt him, ſo that he could not obtain admiſſion: that the biſhop then and there adminiſtered an oath to *Webber*, concerning the ſervice of the citation. They find, that upon the 20th of *July* in the ſame year, the biſhop iſſued another citation, for appointing a viſitation to be held the 24th following: they find, that upon the 24th the biſhop held a viſitation: that upon the 25th he ſuſpended five of the ſeven ſenior fellows for contumacy: that upon the 26th, with the conſent of the then ſeven ſenior fellows, he deprived the defendant then rector, for contumacy: the jury find that Mr. *John Painter* was made, &c. rector, and entered in the premiſes, and demiſed to the plaintiff for five years, who entered: that the defendant entered upon him, and that the plaintiff brought this ejectment. *Et ſi ſuper totam materiam*, &c.

The houſe of peers upon error before them, may if the damages have been aſcertained, enter ſuch new judgment. S. C. Skinn. 514. 4 Mod. 125. Salk. 403. Holt 402. Carth. 180, 319.

After ſeveral arguments at the bar in this caſe, the court of king's bench was divided in opinion, *viz.* the three puiſne judges, *Gregory*, and *Giles Eyre*, and *Samuel Eyre* juſtices, were of opinion, that this judgment ought to be given for the defendant. *Holt* chief juſtice *contra* held, that it ought to be given for the plaintiff.

The three judges who argued for the defendant, made two points in this caſe. 1. If the king's bench had any juriſdiction to examine into the proceedings of the viſitor of the college, and to give relief to the party oppreſſed by them. 2. Admittting that the king's bench had a juriſdiction to examine the proceedings of the viſitor; if his proceedings in this caſe were warrantable by the ſtatutes of the college, or any law.

K. B. corrects miſdemeanors extrajudicial.

1. As to the firſt point, they reſolved, that to the king's bench belongs authority, not only to correct errors in judicial proceedings, but other errors and miſdemeanors extrajudicial, tending to the oppreſſion of the ſubject, for which they relied on 11 *Co.* 98. *a. Bagge's* caſe.

College a lay corporation. acc. 1 Bl. Com. 471.

2. They held that a college was a temporal or lay corporation, of the ſame nature with an hoſpital. And they took the difference in *Bagge's* caſe 99. *b.* that if a layman be

be patron of an hoſpital, he may viſit it, and depoſe or deprive, upon good cauſe, the maſter; but if he deprive him without juſt cauſe, and by colour thereof the maſter be ouſted, he ſhall have an aſſiſe, becauſe the common law will not permit any perſon grieved to be without remedy. And though the founder had an abſolute power over his foundation, yet he could not exclude the juriſdiction of the common law; (*a*) no more than if a man ſhould deviſe lands between *A.* and *B.* and his intent was, that if any difference ſhould ariſe between them about the lands, it ſhould be determined by *J. N.* without proceſs; this appointment would be vain, and the party grieved might have his remedy by the law. Beſides that the law will not allow any cuſtom, which in any manner may tend to the ſupport of arbitrary power, *Litt. ſect.* 12. *Co. Lit.* 141. *a.* and for this reaſon will not permit the viſitor to be without controul. And for theſe reaſons they were of opinion, that they had here juriſdiction (the whole matter being found ſpecially) to examine and correct the erroneous proceedings (if they were ſuch) of the viſitor. But they agreed, that if the ordinary deprive a maſter, who is eccleſiaſtical, without juſt cauſe, he ſhall not have an aſſiſe, becauſe he hath other remedy by appeal. 8 *Aſſ.* 29. 31. 13 *Rep.* 70. *Dy.* 209. *a. Coveney's* caſe, *Dyer* 273 *a.*

(*a*) D. acc. 1 Mod. 83. R. acc. 1 Will. 129.

As to the ſecond point, if the proceedings of the viſitor were warranted in this caſe by the ſtatutes of the college, or any law.

1. Firſt they reſolved, that the common law takes no notice of viſitors; but that they were introduced by the canon law, (*b*) which law obliges not the ſubjects of this realm, unleſs it be incorporated into the common law by act of parliament, or received time out of mind, &c. and then it is become part of the common law. But the canon law concerning viſitors hath not been incorporated into the common law by any of theſe means, and conſequently is not binding to the ſubject. But the means, by which the proceedings of the viſitor ought to be tried and examined, are the ſtatutes of the college; and therefore it is now to be ſeen, if he hath purſued the authority that they have given him: for they were of opinion that he had but a bare authority, and conſequently (*c*) any act greater or leſs than was warranted by this authority, was void.

(*b*) acc. 1 Bl. Com. 79, 80.

(*c*) Vide Co. Lit. 258. a.

2. They reſolved, that the viſitor had not here purſued the ſtatutes of the college, for two reaſons. 1. Becauſe they held, that the adminiſtring of the oath to *Webber* was a viſitatorial act the 16th of *June*, and for this reaſon, accounting that day one of the three days of viſitation, he had not any authority to viſit upon the 26th of *July*, upon which day he deprived the defendant, becauſe the ſtatutes provide expreſsly, that he ſhall not hold a viſitation but

Dyer 62. a.

once

once in five years, unleſs he be requeſted by the rector and four of the ſeven ſenior fellows, (which was not as the jury hath found in this caſe) and that the viſitation ſhall not continue more than three days; but the 26th of *July* (ſuppoſing the 16th of *June* to be one of the days of viſitation) was the fourth, and conſequently all acts done upon it void. 2. The ſtatutes appoint that the viſitor ought to have the concurrence of the ſeven ſenior fellows to the deprivation of the rector; but they were of opinion, that the ſuſpended fellows continued fellows, notwithſtanding the ſuſpenſion, and for that reaſon, the viſitor in this caſe had not the concurrence of the ſeven ſenior fellows, and therefore the deprivation of the rector was void. And for theſe reaſons, judgment by them ought to be given for the defendant.

Two ſorts of corporations. Vide 1 Bl. Com. 470.

Holt chief juſtice *contra* for the plaintiff argued, that there are two ſorts of corporations, the one conſtituted for public government, the other for private charity. The firſt, being duly created, (*a*) although there are no words in their creation, for enabling their members to purchaſe, implead, or be impleaded, yet they may do all theſe things, for they are all neceſſarily included in, and incident to the creation. 10 *Co.* 30. *b.* 1 *Ro. Abr.* 513. *Tit Corporations. G. pl.* 2.

(*a*) acc. 1 Bl. Com. 475.

What corporations are viſitable vide 1 Bl. Com. 480, 481. 8 Ed. 3. 70. Yelv. 60. Cro. Jac. 63.

And theſe ſorts of corporations are not ſubject to any founder, or viſitor, or particular ſtatutes, but to the general and common laws of the realm; and by them they have their maintenance and ſupport. But the laſt ſort of corporations, which is conſtituted for private charity, is entirely private, and wholly ſubject to the rules, laws, ſtatutes and ordinances which the founder ordains, and to the viſitor whom he appoints, and to no others, and if the founder has not appointed any viſitor, then the law appoints the founder and his heirs to be viſitors. For viſitation (by him) was not introduced by the common law, but of neceſſity was created by the common law 10. *Rep.* 23. *a.* the caſe of *Sutton's Hoſpital.* Patronage and viſitation both riſe from the founder; and the office of the viſitor by the common law is to judge according to the ſtatutes of the college, to expel and deprive upon juſt occaſions, and to hear appeals of courſe. And from him, and him only, the party grieved ought to have redreſs; and in him the founder hath repoſed ſo entire confidence that he will adminiſter juſtice impartially, that his determinations are final, and examinable in no other court whatſoever.

Founder, without appointment of a viſitor, is viſitor. vide Str. 798, 1 Bl. Com. 480.

Office of viſitor.

His determination final

R. acc. T. Jones 75. 1. Wilſ. 206. Semb. acc. 1. Mod. 82. adm. Str. 798. D. acc. B. R. H. 218, 219, Burr. 200. Cowp. 322.

College and hoſpital of the ſame nature.

As to the objection of the other ſide, that if the maſter of an hoſpital be deprived by the patron without juſt cauſe, that he may have an aſſize, and that a college and hoſpital are of the ſame nature; he agreed, that a college and hoſpital were of the ſame nature; but as to the objection, that

that the maſter may maintain an aſſize, he anſwered, that the maſter could not maintain an aſſize, becauſe he is not ſole ſeiſed: and of that opinion, he ſaid, *Hale* chief juſtice had been often heretofore; and for this reaſon he denied the opinion in (*a*) *Coveney*'s and (*b*) *Bagge*'s caſes to be law, as *Hale* chief juſtice had done before; beſides that theſe caſes are grounded upon an error, for they rely upon the 8 *Aſſ.* 29, 30. for warranting that opinion, where in truth the 8 *Aſſ.* does not warrant any ſuch opinion.

Maſter of a college is not ſole ſeiſed, and therefore cannot have aſſize.
(*a*) Dyer 209. a.
(*b*) 11 Co. 99. b.

2. He was of opinion, that the proceedings of the biſhop in this caſe were well warrantable by law; for (by him) the arrival of the biſhop at the college the 16th of *June*, and the adminiſtring of the oath to *Webber*, were not viſitatorial acts, becauſe the gates were ſhut againſt him; ſo that he could not obtain admittance.

3. By him alſo, contumacy was a good cauſe of deprivation, which all the other juſtices agreed, and then (by him) although the ſuſpended fellows continue fellows ſtill, and although the viſitor had not the concurrence of the ſeven ſenior fellows to the deprivation of the rector, according to the ſtatutes of the college; yet the deprivation in this caſe was well warrantable by the law; becauſe that (by him) the viſitor by the common law had the ſole power of depriving as incident to his office, which the founder, having created him viſitor, could not reſtrain; no more than if the (*c*) king creates a corporation of a mayor and aldermen, with a clauſe in the patent, that upon the death or amotion of any of the aldermen, the mayor and the other aldermen may within eight days after the death or amotion of the alderman, elect another in his place; although no election be made within the eight days, yet they may make election at any time after; for the power of election is incident to them as being a corporation, (*d*) and the affirmative power in the patent could not take away the implied power given to them by the law. 1 *Roll. Abr.* 513. For which reaſons he was of opinion, that the biſhop in this caſe had not done more than the law approves. But however that be, he concluded, that this college was a private corporation, that the founder having created the biſhop viſitor, the juſtice of his proceedings was not examinable in this court, or in any other; for which reaſons he was of opinion, that judgment ought to be given for the plaintiff. But the three other juſtices being of a contrary opinion, judgment was entred for the defendant.

Contumacy good cauſe of deprivation.

Viſitor has incidentally full power of deprivation.
D. acc. poſt. 541.
(*c*) 1 Roll. Abr. 513. l. 50. 2 Danv. Abr. 215. pl. 5.
(*d*) Poſt. 31.

Upon a writ of error brought in parliament (becauſe this was by original) the judgment was reverſed. And afterwards in *Hilary* term 1694. Sir *Edward Ward* attorney general, and Mr. ſerjeant *Pemberton*, moved, that this court would

Sho. P. C. 35. Skinn. 491.

would enter judgment for the plaintiff; for judgment ought to be entered, and that ought to be, either by this court, or the houſe of lords: but the houſe of lords cannot enter judgment, becauſe they have only the tranſcript of the record, therefore this court of King's Bench ought to do it, *ne deficeret juſtitia*. And they compared it to the caſe of *Faldo* verſ. *Ridge*, *Yelv.* 74. where upon judgment *in B. R.* for the defendant in treſpaſs, error was brought in the Exchequer chamber, and the firſt judgment was reverſed, and upon the record returned *in B. R.* the court there gave judgment, that the plaintiff ſhould recover; otherwiſe, they ſaid that the law would be defective; and a precedent was ſhewn in *Winchcombe's* caſe, 38 *Eliz.* where the ſame courſe was taken.

The record itſelf is removed out of *B. R.* into the houſe of lords by error.

When the exchequer chamber ſhall enter the new judgment upon reverſal.

But by *Holt* chief juſtice, The houſe of lords have in judgment of law the true record before them, and not the tranſcript; for the writ of error ſays, *recordum et proceſſum*, and not *tranſcriptum*. And he took this diverſity; if ejectment is brought *in B. R.* and upon ſpecial verdict judgment is given for the defendant, if upon error in the exchequer chamber this judgment be reverſed, the exchequer chamber ſhall enter the new judgment for the plaintiff; but if it had been given *in B. R.* for the defendant upon demurrer, and this judgment reverſed in the exchequer chamber, the king's bench ſhall enter the new judgment for the plaintiff; becauſe the exchequer chamber could not award a writ of inquiry of damages. He ſaid further, if judgment be firſt given for the plaintiff, and this judgment be reverſed upon error, the defendant is *in ſtatu quo*, and there he has no need to enter a new judgment. But when judgment is given firſt for the defendant, and this is reverſed upon error, a new judgment ought to be entred, to put the plaintiff in poſſeſſion of that which he demands. And it was adjudged by all the court in the principal caſe, that the king's bench cannot enter the new judgment for the plaintiff; becauſe when the king's bench had given judgment upon the original, it had wholly executed its authority, ſo that it could do no more. And there is no precedent that ever the king's bench did enter a new judgment upon a reverſal in parliament of a judgment given *in B. R.* And afterwards, upon application to the houſe of lords, they gave the new judgment, as *Holt* chief juſtice reported *in B. R. Mich.* 8 *Will.* 1696.

Exchequer chamber cannot award a writ of inquiry of damages.

Rex & Regina *verſ.* Knollys.

S. C. Salk. 509. 3 Salk. 242. Comb. 273. more at large Skinn. 517. and with the arguments of all the judges 12 Mod. 55.

Miſnomer abates an indictment R. acc. Cro. Eliz. 224. Vide 1. H. 5. c. 5. A peer indicted for murder by his chriſtian and ſirname as a commoner may plead the miſnomer in abatement S. C. Carth. 297.

AN indictment was found at *Hicks's Hall* againſt the defendant by the name of *Charles Knollys* eſq; for the murder of captain *Lawſon*, (who had married the ſiſter of the

defendant

defendant) and this indictment was removed by *certiorari* into the king's bench, where the defendant pleaded a *misnomer* in abatement, *viz.* that *William Knollys* Viſcount *Wallingford*, by letters patent under the great ſeal of *England*, (which he produceth in court) bearing date the 18th day of *Auguſt* 2 *Car.* 1. was created earl of *Banbury*, to have and to hold the dignity to him and the heirs male of his body lawfully begotten, &c. that *William* had iſſue *Nicolas*, who ſucceeded *William* in the dignity, from whom the dignity deſcended upon the defendant, as ſon and heir to *Nicolas; et hoc paratus eſt verificare*, &c. The attorney general replies to this plea, that the defendant, upon the thirteenth of *December* 4 *Will. & Mar.* preferred a petition to the houſe of peers then in parliament aſſembled, that he might be tried by his peers, and that after long conſiderations and debates the houſe of peers diſmiſſed his petition, *ſecundum legem parliamenti*, and diſallowed his peerage, and made an order, that the defendant ſhould be tried by the courſe of the common law, &c. To this replication the defendant demurred, and the attorney general joined in demurrer. And after divers arguments at the bar by Sir *Edward Ward* attorney general, Sir *Thomas Trevor* ſolicitor general, Sir *William Williams* king's counſel for the king and queen, and by ſerjeant *Pemberton*, ſerjeant *Levinz*, and Sir *Bartholomew Shower* for the defendant, this day, *viz.* the 20th of *June*, the court of king's bench in ſolemn arguments at the bench unanimouſly gave their opinions for the defendant. But becauſe the reaſons of Sir *Samuel Eyre*, Sir *Giles Eyre*, and Sir *William Gregory* juſtices, were comprehended in the argument of my lord chief juſtice *Holt*, I have omitted them here to avoid repetition, and have only collected here the following imperfect notes of his moſt excellent argument.

In ſuch plea the defendant need not aver that the place from whence he takes his title is in England.

Nor, If he ſhews that his creation was by patent, that he is one of the peers of England.

Nor (particularly) if he claims by deſcent conclude to the record. S. C. Carth. 297.

An order of the houſe of lords upon a petition for a trial by his peers diſallowing his peerage, and directing that he ſhould be tried at common law; is no anſwer to ſuch plea. S. C. Carth. 297.

He ſaid at the beginning, that ſince this caſe was of ſo great importance, that in ſome manner all the nobility of *England* had ſome concern in it, and ſince this caſe had given occaſion to many debates in the houſe of lords, and ſince there were many perſons of great quality, who had made reflections upon the judges of the king's bench, for not having before this time brought the defendant to his trial, he hoped that the audience would give him their pardon, if he examined the queſtions hereafter ariſing, a little at large.

In this caſe (he ſaid) two queſtions would ariſe.

1. If the plea be good?

2. Suppoſing it to be ſo, if the replication confeſſes and avoids the plea?

To

To the plea (he ſaid) the counſel for the king had taken three exceptions.

1. That it does not appear that *Banbury* is in *England*.

2 That Mr. *Knollys* ought to have averred, that he is *unus pariuin regni Angliæ*, for it may be that he is an earl of *Ireland*, or of *Scotland*, and then he has not any title to be tried by the lords in this realm.

3. That he ought to have concluded his plea with *prout patet per recordum*, or ought to have produced a writ to certify that he was earl of *Banbury*, *F. N. B.* 247. *C. Reg. orig.* 287. *Cro. Car.* 149. Lord *Savil's* caſe. Baron or not baron being triable by record. 22 *Aſſize* 24. *Br. Aſſize* 241.

In what an earldom conſiſts.

To give anſwers to theſe objections more effectually, he thought it much to the purpoſe to conſider,, what an earldom was originally; and he ſaid, that an earldom conſiſted in three things heretofore.

1. In dignity.

2. In office.

3. In divers poſſeſſions.

(*a*) Dav. 60. Dignity of an earl; how created.
(*b*) Co. Lit. 9. b, Seld. Jan. Angl. b. 2. c. 15. ſub finem. Seld. tit. Hon. par. 2. c. 5. p. 615. 3d. Ed. 12 Co. 7. a. Sho. P. C. 9.

As to the firſt, (*a*) before the time of *Edward* 3. there were but two titles of nobility, *viz.* earls and barons. Barons were originally created by tenure, afterwards by writ; and laſtly, (*b*) *Richard* 2. in the eleventh year of his reign, by letters patent under his great ſeal created *John Beauchamp* of *Holt* baron of *Kidderminſter*, and left a precedent, which all his ſucceſſors have followed down to this time. But earls were always created by letters patent. The empreſs *Maud* created *Milo* of *Glouceſter* earl of *Hereford* by her letters patent. *Seld. Titles of Honour. par.* 2. *c.* 5. 3. *Ed. p.* 536.

Office of an earl. Dav 60. Intailable D. acc. Co. Lit. 20. a. 13th Ed. N. 3. 12 Co. 81. Forfeitable. vide 12 Co. 81. 3 Inſt. 18. 19.

As to the ſecond, an earldom conſiſted in office, for the defence of the king and realm. *Bract. l.* 1. *c.* 8. Earls [*comites*] had not their denomination from the county, but *a comitando regem.* 9 *Co.* 49. *a.* 7 *Co.* 34. *a.* And becauſe it is an office, it may be intailed within *Weſtm.* 2. *cap.* 1. 7. *Co.* 33, 34. *Nevil's* caſe; and although the ſtatute 26 *Hen.* 8. *cap.* 13. had never been enacted, an earldom had been ſubject to forfeiture by the committing of high treaſon. 7 *Co.* 34. *a.*

As

As to the third, an earldom conſiſted in rents, poſſeſſions, &c. but in proceſs of time they decreaſed to 20*l. per annum*, and nevertheleſs the heir ſhould pay 100*l.* relief within *Magna Charta*; but at this day it conſiſts only in dignity and office, which extend over all the land.

2. He conſidered, that the great ſeal in *England* is appropriated to this realm, and that which is done under it ought to bear relation to *England*, and to no other place. If the king of *England* before the conqueſt of *Ireland*, had by letters patent conferred a title of honour, the patentee ſhould have been an *Engliſh* peer. It is true that the king may create an *Iriſh* earl under the *Engliſh* great ſeal. *Seld. tit. of honour p.* 2. *c.* 6. 3*d Ed. p.* 694. *Prynne's Animadverſions* 316. but then there ought to be expreſs words; for where by the prerogative a ſpecial act is done, there ought to be expreſs words; and it ſhall not be taken by implication. And farther, an act of parliament ſhall not extend to *Ireland*, unleſs it be particularly named. And therefore, to intend the defendant in this caſe to be an *Iriſh* peer is foreign, and ought to be rejected.

Great ſeal relates to this realm. But now ſee 5, Ann. c. 8. art 24.

The king may create an Iriſh peer under the great ſeal of England. See a patent for that purpoſe. Seld. p. 2. c. 6.

King's grant ſhall not be taken by implication.

Statutes extend not to Ireland without naming it. Acc. 1. Bl. Com. 101. 103.

3. He was of opinion, that the place from whence the patentee takes his title, is not neceſſarily to be in *England*; nor in reality is there any neceſſity, that there be any place. *Albemarle* is not within *England*, and nevertheleſs, at the time of the making of *Magna Charta* there was an earl of that title, and there have been dukes who have borne that title very lately. A man was an earl, and he had no county. *Seld. tit. of honour p.* 2. *c.* 6. 3*d Ed. p.* 696. 39 *Ed.* 3. 35. *Rot.* 6 *Edw.* 3. *n.* 16. in the *Tower*. He ſaid that he had often made inquiry, if there was any ſuch place as *Rivers*, but he had never been able to find any ſuch place, only that it was the name of the earls of *Devonſhire* in the time of king *Stephen*. Here is then a ſufficient anſwer to the firſt objection to the plea; for if in the creation of an earl the place is not neceſſary, (as by what he had been ſaying it is apparent that it is not) it was not neceſſary nor material to make an averment, that *Banbury* is within *England*; but the defendant being heir to *William*, who was created earl of *Banbury* under the great ſeal of *England*, ſhall be an *Engliſh* peer.

Place of title not neceſſary. acc. Co. Litt. 20. a. 13th Ed. n. 3.

earl without county.

As to the ſecond objection to the plea, that the defendant ought to have averred, that he is *unus parium regni Angliæ*, he anſwered, that what is apparent has no need to be averred; but that he is an earl appears by the letters patent which he hath produced, and then, that he muſt be of *England*, is ſufficiently demonſtrated by what goes before.

That which appears, has no need to be averred.

Beſides

Beſides that, he does not plead this plea here, to make a right of title to the earldom of *Banbury*, but only by way of *miſnomer* in abatement of the indictment: and that *miſnomer* is a good plea, ſee 2 *Inſt.* 595. If a knight be indicted by the name of eſquire, the indictment ſhall abate.

Baron or not, triable by record. acc. Co. Litt. 16. b. and 13th Ed. n. 3. 12. Co. 71. 96. Sho. P. C. 3.

The third objection to the plea was, that the defendant ought to have concluded his plea with *prout patet per recordum*, baron or not baron being triable by record. 22 *Aſſ.* 24. *Br. Aſſiſ.* 241. 35 *Hen.* 6. 46, 6 *Co.* 53. *a. Counteſs of Rutland's* caſe, 9 *Co.* 31. *a.* Or, 2. He ought to have produced a writ out of chancery, to certify the deſcents, and that he is earl of *Banbury*. *F. N. B.* 247. *C. Reg. orig.* 287. *Cro. Car.* 149.

Peerage how triable.

As to the firſt part of this objection, he confeſſed, that if the peerage of the defendant had been created by writ, it had then been triable only by record, and it had been a fatal exception; but letters patent may be pleaded and ſhewn to the court, (as in this caſe is done) and they cannot be queſtioned, but by pleading *non conceſſit*; and therefore in this caſe there cannot be any ſuch iſſue as baron or not baron; moreover there being deſcents here, which are mere matters of fact, and triable only by the country, ſuch concluſion had been ill; becauſe it cannot appear by the record, if *Nicolas* was the ſon of *William*, or *Charles* the ſon of *Nicolas*. And the books of 22 *Aſſiſ.* 24. *Bro. Aſſiſ.* 241. ought to be underſtood of peerage created by writ, for there was no baron created by letters patent, until the eleventh year of king *Richard* 2. There is alſo nobility gained by marriage, and this is triable by jury. 6 *Co.* 53. *a.*

Ante 12.

Writ out of chancery to certify peerage.

And as to the ſecond part of this objection, that the defendant ought to have produced a writ out of chancery, &c. he anſwered, that theſe are only cautionary writs, and writs of privilege, and were not of neceſſity but for expedition. And ſuppoſing that the defendant might have had one, yet it is no conſequence, that the omiſſion of it ſhall be a determination of his peerage. And further, in all the precedents cited on the other ſide, there were no letters patent pleaded, (as in our caſe) ſo that it could not apppear to the court, without ſuch writ, that the party was a peer. So that he was of opinion (and all his brothers agreed with him in all theſe points) that the plea was very good.

The queſtion then will be, if the replication confeſſes and avoids the plea? which is in effect, if the defendant is concluded from his peerage by this order of the houſe of lords: and he was of opinion, that he was not for four reaſons.

1. Becauſe

1. Becauſe this order was not a judgment by parliament. Order by the houſe of peers is not a judgment by parliament.

2. Admit that it was a judgment, yet of an original cauſe the houſe of lords has no juriſdiction.

3. There was no plea depending in the houſe of lords, concerning the right of the earldom of *Banbury*.

4. There is not here any judgment to bar him of his title.

As to the firſt, he ſaid that the parliament conſiſted of the king, the lords ſpiritual and temporal, and the commons. The judicial power is only in the lords, but legally and virtually it is the judgment of the king as well as of the lords, and perhaps of the commons too. *Ryl. pl. parl.* 124, 145, 184, 195, 198. Writs of error to remove records out of the king's bench into the houſe of lords run, *coram nobis in preſens parliamentum*; but in this ſuppoſed judgment the king is excluded. If one may give credit to an old advocate, *Fleta, B. c* 17. *at the beginning* he ſays, that all matters of authority and juriſdiction are derived from the king.

Of what the parliament conſiſts.

Judicial power in whom.

Error in parliament.

Juriſdiction is derived from the king.

The houſe of lords has a double authority, as the parliament, and the courſe of the houſe; between which we muſt diſtinguiſh by their ſtile. And their proceedings are of different effects in law; for journals are not records of parliament, and therefore we cannot take notice of them. *Heb.* 110. 111.

The houſe of peers has a double authority.

Journals are not records, and B. R. cannot take notice of them. Vide 1. Saund. 133.

Judgments ought alſo to be given in their proper ſtile; and therefore if the king's bench, which is held *coram rege*, enter judgment "*by the juſtices of the king's bench*" it is void. But in the principal caſe there is no mention made of the king; therefore this judgment is not given in the proper ſtile, as appears by what has been ſaid before.

Judgment given "*by the juſtices of B. R.*" void.

As to the ſecond he ſaid, that the houſe of lords has no juriſdiction in an original cauſe, becauſe that ſupreme court is the laſt reſort. Beſides, that for the moſt part original cauſes are mixed with matter of fact, and it is unworthy of ſo ſupreme a court, to try matters of fact, for which reaſon error of fact *in B. R.* muſt of neceſſity be brought before the ſame judges of *B. R.*

The peers have not juriſdiction of original cauſes.

Cannot try matters in fact.

Error in fact in B. R. muſt be brought in B. R. R. acc. Com. 597.

2 If the parliament took conuſance of original cauſes, the party would loſe his appeal, which the common law indulgeth in all caſes, for which reaſon the parliament is kept for the laſt reſort; and cauſes come not there, until they have

have tried all judicatories. Within these four years judgment was given against the earl of *Macclesfield* in the exche-
Error out of the exchequer lies not immediately in parliament
quer, he brought error in the house of lords, and the question was, if by the 31 *Edw* 3. the exchequer chamber ought not to interpose. And adjudged that it ought, and the writ abated. 4 *Inst.* 21. The case of the bishop of *Norwich*, to the same purpose.

3. He was of opinion, that this dignity differed not from an original estate at common law, for it was granted under the great seal of *England*, and therefore descendible according to the course of the common law; and it was at common law an estate in fee simple, but since *Westm.* 2. *cap.* 2. it is an estate tail. 7 *Co.* 34. And if the patentee be disturbed of his dignity, the regular course is to petition the king, and the king indorses it, and sends it into the chancery, or the house of peers. *St. prer.* 72. 22 *Edw.* 3. 5. *L. Quint. Edw.* 4.——for the lords have no power to judge of peerage, unless it be given to them by the king. 11 *Co.* 1. *Delaware*'s case. *W. Jones* 96. For as no peer can be created without the king's consent, who is the fountain of honour, no more can any be degraded without his consent. And an ordinance of the house of peers cannot confer peerage. *W. Jones* 104.

Ante 12.

Patentee disturbed ought to petition the king, &c.

Peer cannot be created without the king. Acc. 1. El. Com. 271.

Peers have jurisdiction over their own members.

The house of peers (he agreed) has jurisdiction over its own members, 4 *Inst.* 15, 363. and is a supreme court; but it is the law which hath invested them with such ample authority, and therefore it is no diminution to their power to say, that they ought to observe those limits which this law hath prescribed for them, which in other respects hath made them so great.

The precedents which Mr. attorney general hath cited are not to this purpose. That of the lords *Mountjoy*, *Bellasys*, and *Lovelace* 1628 was matter of privilege. The lord *Mountjoy* claimed precedency in the house of peers of the lords *Lovelace* and *Bellasys*, being created 5 *June*, 3 *Car.* 1. baron of this realm by letters patent, in which there was a clause to precede the two other lords, for which he petitioned the house of lords, but they would not allow it to him: for although the king might give precedency by the common law, nevertheless in this case he was bound by the 31 *Hen.* 8. *cap.* 10.

How the king may give precedency.

The cases of the lords *Pembroke*, *Stamford*, and *Mohun*, were only petitions by them for a trial by their peers. If a peer commits treason, &c. he ought to be tried by his peers, and therefore it is decent to submit his trial to them, but he cannot by that submit his title to his peerage; besides that

if

If the peers make an order that the petitioner ſhall be tried by his peers, and they make an addreſs to the king to make a high ſteward, the king may chuſe whether he will or no, notwithſtanding their order and addreſs. 3 *Inſt.* 27. to 31.

Although the peers addreſs the king to make a high ſteward, he may refuſe.

The caſe of the lord *Preſton* is leſs to the purpoſe, for his patent was void, being made by king *James* 2. after the revolution.

The caſe of *James Percy* was alſo a caſe of privilege

So that there is no precedent to warrant the proceedings in this caſe. Therefore he concluded this point, that the caſe coming before the lords originally, all proceedings were *coram non judice*, for they have not juriſdiction of an original cauſe; but, as is before ſhewn, it might have been brought before the lords regularly, and then their determination had been final.

3. Concerning the right of the earldom of *Banbury*, there was no plea depending before the houſe of lords; for the defendant did not petition to enjoy the earldom, but ſuppoſed himſelf in poſſeſſion.

4. There is not here any judgment to bar the defendant of his title to the earldom; for no court can give judgment in a cauſe not depending, or which comes not in a judicial method before that court; but here it is proved by what he had been ſaying, that the title of the earldom was not in queſtion before the peers. If treſpaſs be brought for a treſpaſs done in the land belonging to a houſe, and it appear at the trial that the plaintiff hath no title to the houſe, yet the court cannot give judgment, to put the party out of poſſeſſion of the houſe.

Judgment cannot be in a cauſe not depending.

2. A judgment ought to be complete and formal. Therefore if *quo warranto* be brought for uſurping royal franchiſes, the court give their opinion that the defendant hath no title to them; unleſs they proceed and ſay, *ut abinde excludatur*, it avails nothing. In the ſame manner, in the caſe between *Level* and *Hall*, *Cro. Jac.* 284. where in debt upon bond the defendant pleaded acquittal by verdict in another action upon the ſame bond, and the entry upon the verdict was, that the defendant ſhould recover damages againſt the plaintiff, *et quod eat inde ſine die*, and becauſe there was no judgment *quod querens nil capiat per breve*, it was adjudged ill.

Judgment ought to be formal.

Judgment in *quo warranto* without *ut abinde excludatur* ill.

3. Diſmiſſion is no judgment in a court of law.

Diſmiſſion is not a judgment.

Ard as to the objection, that the judgment was ſaid to be given *ſecundum legem parliamenti*, which the defendant by his demurrer hath confeſſed.

Demurrer confeſſes fact only, and not even that unleſs well pleaded, D. acc. poſt. 1553. 6 Bro. P. C. 190.

He anſwered, 1. That a demurrer confeſſes only matter of fact, and that only when it is well pleaded, but it never confeſſes matter in law. *Plowd.* 85.

Lex Parliamenti is the law of the land. *B. R.* ought to determine that which comes before them. Acc. Salk. 502. 503. Filing an original againſt a member of parliament is no breach of privilege. R. acc. 14 Car. 2. C. B. Binion v. Evelyn, cit. Carth. 137. 1 Show. 99. D. acc. Salk. 504. and vide 12 & 13 W. 3. c. 3. ſ. 1, & 10 G. 3. c. 50. *B. R.* will grant *habeas corpus* to a man committed by parliament after prorogation.

2. *Lex parliamenti* is to be regarded as the law of the realm; but ſuppoſing it to be a particular law, yet if a queſtion ariſe determinable in the king's bench the king's bench ought to determine it. *Dyer* 60. The filing an original againſt a member of parliament was adjudged no breach of privilege. If a man be committed by parliament, and the parliament is prorogued, the king's bench will grant a *habeas corpus*. The common law then does not take notice of any ſuch law of parliament to determine inheritance originally. If there is any ſuch, it ought either to be by act of parliament, and there is no ſuch act; or it ought to be by cuſtom, and no more is there any ſuch cuſtom. But if inheritance ſhall be originally determinable in parliament, where the parliament, *viz.* the houſe of peers, hath no juriſdiction, the peers would have an uncontroulable power, *et ubi jus eſt vagum, res eſt miſera.* For which reaſons he was of opinion, that judgment ought to be given for the defendant. And accordingly with the concurrence of all the other judges for the ſame reaſons the indictment abated.

Note, that this judgment was very diſtaſteful to ſome lords, and therefore, *Hilary* term 1697, 9 *Will.* 3. the lord chief juſtice *Holt* was ſummoned to give his reaſons of this judgment to the houſe of peers, and a committee was appointed to hear and report them to the houſe, of which the earl of *Rocheſter* was chairman. But the chief juſtice *Holt* refuſed to give them in ſo extrajudicial a manner. But he ſaid, that if the record was removed before the peers by error, ſo that it came judicially before them, he would give his reaſons very willingly; but if he gave them in this caſe, it would be of very ill conſequence to all judges hereafter in all caſes. At which anſwer ſome lords were ſo offended, that they would have committed the chief juſtice to the tower. But, notwithſtanding, all their endeavours vaniſhed in ſmoak.

Mich.

Mich. Term.

6 Will. & Mar. 1694.

Sir John Holt *Chief Juſtice.*
Sir William Gregory
Sir Giles Eyre } *Juſtices of* B. R.
Sir Samuel Eyre

Memorandum, at the beginning of this term, Sir *Robert Atkins*, lord chief baron of the exchequer, reſigned his office of chief baron.

John Hawles Eſq. of *Lincoln's Inn* was laſt vacation made king's counſel.

Sir Wilfred Lawſon *verſ.* Story.

S. C. Carth. 321. Salk. 205. Skinn. 555. & Holt 172.

IT is enacted by the ſtatute 2 *Will. & Mar. ſeſſ.* 1. *cap.* 5. that upon any pound-breach or *reſcous* of goods diſtrained for rent, the perſon grieved ſhall have a ſpecial action upon the caſe, and recover treble damages and coſts of ſuit againſt the offenders, *&c.* Now the queſtion upon a motion was, whether the coſts ſhould be trebled in ſuch action, as well as the damages? And Mr. *Northey*, for the defendant, argued that they ſhould not; becauſe that at common law the word *damna* included as well damages as coſts, and therefore if the ſtatute had given treble damages without more ſaying, the coſts had been treble alſo. But now when the parliament inſerts the word coſts after the word damages, it ſhews that it was not their intent that coſts ſhould be included in the word damages, for then it had been in vain to inſert the word coſts; but it was their intention to make a diſtinction between the coſts and damages. And by the omiſſion of the word treble when the coſts are ſpoken of, it is apparent

1. Where a ſtatute gives "treble damages and coſts of ſuit," the coſts ſhall be trebled as well as the damages. Vide Com. Dig. tit. coſts C. Vol. 2. Ed. 1780. p. 556. where a ſtatute gives treble damages the coſts ſhall be trebled of courſe. Vide Co. Lit. 257. b. Cro. Eliz. 582. 2 Inſt. 289. Dyer 159. b. pl. 38. Cowp. 368. 1 Term. Rep. 72.

 that

that it was their intent that the party ſhould recover treble damages, but only ſingle coſts. *Sed non allocatur.* For, *per curiam*, the word treble ſhall be referred, as well to the word coſts, as to the word damages. And therefore it was adjudged that the coſts ſhould be treble alſo.

Intr. Trin. 6 Will. & Mar. Rot. 551.

Camphill *verſ.* St. John.

S. C. Comb. 306. Salk. 219.

Trover for ſo many ounces of plate, good. A demurrer upon a demurrer is a diſcontinuance

TROVER of a box *et ducentis unciis argenti, Anglice plate, &c.* The defendant demurred to the declaration, the plaintiff demurred to the demurrer of the defendant, and the defendant joined in demurrer. Exception was taken to the declaration, that it was uncertain, becauſe it hath not ſpecified what ſort of plate, &c. ſo that the defendant cannot defend himſelf if the plaintiff ſhould bring another action againſt him for the ſame plate, by pleading the recovery in this action. *Sed non allocatur*; (*a*) for *trover pro ducentis ponderibus medicamenti* hath been adjudged good. And there is here as much certainty as there. Then Mr. *Northey*, for the defendant, took exception to the plaintiff's demurring to the demurrer of the defendant, when he ought to have joined in demurrer, ſo that here is a diſcontinuance, for which he cited *Yelv.* 137, 138. 1 *Brownl.* 103. *Alexander* verſ. *Lamb.* Juſtice *Giles Eyre* ſaid, that he doubted whether the caſe of *Alexander* and *Lamb* was law as to the point of the diſcontinuance; but all the court was of opinion that there was a diſcontinuance here in the principal caſe.

(*a*) Trover for two hundred weight of drugs, good. R. Sty. 224. (1)

(1) N. according to Style this was after verdict.

Wilſon *verſ.* Law.

S. C. Comb. 293. Carth. 231. Skinn. 443. and more at large Skinn. 551 Pleadings, vol. 3. 70. 4 Mod. 287.

To a writ commanding the ſheriff to attach, *attachiare feci* is a good return. S. C. 4 Mod. 290. Skinn. 549. Salk. 589. Upon a return *ita quod corpus paratum habeo ubicunque*, the word *ubicunque* ſhall be rejected. S. C. Salk. 589. In an appeal for murder it is ſufficiently certain to charge that the fact was committedabout ſuch an hour.

WILSON ſued (*a*) an appeal of murder againſt *John Law*, for the murder of *Edward Wilſon*, brother to the appellant. And the appellee prayed over of the writ and return, and demurred to the writ, return and county, and pleaded over, not guilty, to the felony. The appellant joined in demurrer. And upon divers arguments by Serjeant *Thompſon*, Serjeant *Levinz*, and Mr. *Carthew*, on the part of the appellee, ſeveral exceptions were taken, two to the return of the writ, four to the count, and one to the joinder in demurrer.

The firſt exception to the return of the writ was, that the writ commanded the ſheriff, *quod attachies* J. Law *ita quod habeas corpus ejus, &c.* And the return was in theſe words, *viz. quod attachiare feci*, which was not (as they ſaid) any performance of the command of the writ; for the command was perſonal to the ſheriff, that he himſelf ſhould

(*a*) For the manner of proceeding upon ſuch an appeal, ſee Burr. 2643. & 2793. Com. Dig. tit. appeal C. vol. 3. Ed. 1780. p. 368.

attach

attach *Law*, and he has returned, that he hath cauſed him to be attached, which muſt be intended by ſome other perſon. And ſo the writ is not purſued, *&c.* S. C. 4 Mod. 290. Salk. 59. Holt 62. acc. 2. Inſt. 318.

But to this exception it was anſwered by the court and adjudged, that the ſheriff is not bound to execute ſuch ſort of proceſs in perſon, but may do it by his bailiff. *Dyer* 241. *a.* 2 *Roll. Abr.* 457. And that which is done by the warrant of the ſheriff is done by the ſheriff himſelf, for *qui facit per alium facit per ſe.* And if the ſheriff had returned *attachiatus eſt*, it had been good, as *captus eſt* is a good return of a *capias*. *Kitchin* 258. For if there is the ſubſtance, it matters not, if there is not the expreſs form, as 1 *Hen.* 6. 6. *Scire facias* was returned *ſcire feci A.* without ſaying *infra nominat. A.* but becauſe it was returned *virtute brevis praedicti prout mihi praecipitur*, it was adjudged good. That the priſoner ſtruck the deceaſed giving him a mortal wound. S. C. 4 Mod. 290. Salk. 59. Holt 62. acc. Burr. 2643. poſt. 145. On the upper part of the belly near the breaſt in the middle of the body S. C. Salk. 59. vide 2 Inſt. 318. 4 Co. 40. a. 41. b. 5 Co. 121. b. and the note infra.

The ſecond exception to the return of the writ was, that the ſheriff hath returned, *ita quod corpus paratum habeo ubicunque.* This word *ubicunque* (ſaid they) has vitiated the return, for it is altogether uncertain, nonſenſe, and impoſſible.

But to this the court anſwered, that the *ubicunque* was only ſurpluſage, and that the return was good enough without it. That ſurpluſage will not vitiate an indictment or writ, much leſs a return of a writ, which requires not ſo much certainty, and which may be ſometimes ſupplied by intendment. 2 *Roll. Abr.* 460. 5 *Co.* 121. *b. Long*'s caſe. But juſtice *Giles Eyre* was of opinion, that if the return had been ill, the appearance of the appellee would not have aided it; for appearance aids when the party comes in and pleads to iſſue; but when the party comes and demurs upon the proceſs, this appearance will not aid any defects in the proceſs. 1 *Rol. Abr.* 780. 1 *Bulſtr.* 142. *Bradley* verſ. *Banks*, *Yelv.* 204. *Cro. Jac.* 283. But as to this the other judges gave no opinion. The venue ſhould be laid at a vill. S. C. 4 Mod. 290. Salk. 59. 3 Salk. 380. Holt 62. vide 2 Inſt. 317. But a pariſh ſhall be intended a vill. S. C. 4 Mod. 290. Salk. 59. 3 Salk. 380. Holt. 62. acc. 2 Inſt. 669. If the defendant demurs ſeverally to the writ and count, the jeſtder ſhould be ſeveral. S. C. Skinn. 549. A demurrer is a plea. S. C. Skinn. 549.

The firſt exception to the count was to the time, for the fact was laid to be *circa horam primam poſt meridiem ejuſdem diei*; it was objected, that this *circa* was uncertain, but it ought to have been laid preciſely, as *ad horam primam*, &c. But it was adjudged, that this was certain enough, for the law does not bind to a minute.

Another exception was taken to the count, that the place of the wound was not certainly expreſſed, it being laid to be *ſuper ſuperiorem partem ventris juxta pectus* (*a*) *in medio corporis*, &c. But this exception was over-ruled, for it cannot be more certain.

(*a*) Note in the entry Vol. III. 71. Carth. 231. Salk. 59. and Comb. 293. the words are *juxta pectus & medium corporis*: in Skinn. 551. *juxta pectus in medio corpore*, and in the entry 4 Mod. 287. *juxta pectus in medium corporis.*

Another

Another exception to the count was, that it is not averred positively, that the appellee gave the mortal wound, for it is said, *quod percussit, pupugit, et inforavit, dans mortale vulnus*; so that having expressed it by (*dans*) it is but by way of recital; but it ought to have been *dedit*, and that had been a positive averment. *Sed non allocatur*, for all the precedents are thus, and if it had been (*a*) *dedit mortale vulnus* (*per Holt*) it had been less certain.

(*a*) R. acc. post. 145.

The fourth exception to the count was, that it is said, that *John Law* murdered *Wilson* at *D.* in the parish of St. *Giles*, and so there is no *vill* shewn where the fact was committed, which is ill, for the statute of *Glouceſter* provides that the *vill* shall be shewn.

But adjudged, that the count is good enough notwithstanding that, for a parish shall be intended *prima facie* a *vill*, 1 *Inst.* 125. *b.* and if it comprehends more *vills* than one, the other party must shew it. And therefore in this case the parish of St. *Giles* shall be intended a *vill*, and so it is good.

The last exception was, that the appellant, by joining in demurrer *quoad breve*, &c. and then *quoad placitum*, &c. hath divided that which the defendant hath united, and so discontinued the whole.

But it was answered, that a demurrer is properly called a plea; *Co. Intr.* 80. and he could not make a joint reply to both. For which reasons the defendant was ordered to answer over, and a day was given for his trial; but he escaped out of prison, and fled into *Scotland*, his own country, and so evaded justice.

Wilson *verſ.* Bird.

If the master of a captured vessel agrees for her ransom, and gives himself up as a hostage, and the owners neglect to pay the money, he may proceed against the ship in the admiralty for his redemption. semb. acc. 6 Mod. 11. *sed nunc vide* 22 G. 3. c. 25.

THE ship was libelled against in the admiralty, for that the master being taken by a *French* privateer, had ransomed the ship for 300*l.* and had sued for the payment of it, and was carried prisoner to *Dunkirk*, and the money was not paid, *&c.* And sentence was given in the admiralty against the ship; and upon motion for a prohibition it was denied by *Holt* chief justice, then alone in court; because the taking and pledge being upon the high sea, the ship by the law of the admiralty shall answer for the redemption of the master by his own contract. *Ex relatione m'ri place.*

Rex

Rex & Regina *verſ.* Epiſcop. London & Doctor Birch.

Int. Hil. 3 Will. & Mar in B. R. Rot. 695.

S. C. 3 Lev. 382. Holt 586. Salk. 540. With the arguments of counſel and rather more at large, 4 Mod. 206, but particularly 1 Show. 441. to 505.

THE king and queen, by their attorney general; brought a *quare impedit* againſt the defendants, for hindering them to preſent a rector to the parochial church of St. *James*; and declared, that the pariſh of St. *Martin in the Fields* being a very great pariſh, a private act of parliament was made 1 *Jac.* 2. by which the pariſh of St. *James* was taken out of the pariſh of St. *Martin*, and made a pariſh independant of that; and that the act conſtituted a rectory with cure of ſouls, and created Dr. *Teniſon*, vicar of St. *Martin's*, the firſt rector, and perpetualized the ſucceſſion, and gave the patronage after his death to the biſhop of *London* and his ſucceſſors, and to the lord *Jermyn* and his heirs, *viz.* to the biſhop of *London* to preſent one time, and then to the lord *Jermyn* to preſent one time, and then to the biſhop of *London* and his ſucceſſors to preſent two times, and to the lord *Jermyn* and his heirs one time, *et ſic viciſſim*, &c. By virtue of which act Dr. *Teniſon* was the firſt rector, and being ſo, was the third year of the king and queen, promoted to the biſhoprick of *Lincoln*, upon the promotion of whom, it pertained to the king and queen to preſent a rector to the church of St *James* by their prerogative, *&c.* and that the defendants hindered them, *&c.* To this declaration the biſhop of *London*, demurred. Dr. *Birch* in his plea confeſſed the act of parliament, and that Dr. *Teniſon* was rector, and that he was afterwards elected biſhop of *Lincoln*; and he farther pleaded the ſtatute 25 *Hen.* 8 of diſpenſations, and that by virtue of that act, Dr. *John Tillotſon* the archbiſhop of *Canterbury* diſpenſed with him to hold *in commendam* for ſix months, and that the king confirmed the diſpenſation; that Dr. *Teniſon* held this rectory *in commendam* from the 22d of *October* 1691, till the firſt of *July* following; and that then he was conſecrated biſhop of *Lincoln*, by which the rectory became void; and the biſhop of *London*, as patron, collated the defendant; and concluded with an averment, *&c.* The attorney general demurred. And the caſe was argued at the bar by Sir *Edward Ward* the king's attorney, and Sir *Henry Gould* king's ſerjeant for the king and queen, and Sir *Bartholomew Shower* and Mr. *Finch* for the defendants. And this day, the 19th of *November*, the court of king's bench unanimouſly gave their judgment for the king and queen, in ſolemn arguments.

Upon the creation of a biſhop the king has a prerogative to fill all the preſentative benefices he vacates. R. acc. Comb. 300. Carth. 313. 3 Lev. 377. 4 Mod. 200. Holt 585. Dyer. 228. b. in marg. Semb. acc. Cro. Eliz. 542. agr. Vaugh. 18. Str. 837. Bl. 770. and 3 Wilſ. 221. Com. Dig. Tit. Eſgliſe. H. 6. vol. 3. Ed. 1780. p. 198. This prerogative is not ſatisfied by a temporary commendam retinere, which expires in the life time of the biſhop, R. acc. Comb. Carth. 3 Lev. 4 Mod. and Holt, *ubi ſupra*, ſee alſo Str. 1006. Dyer 233. a. b. in marg. Hob. 143. and Com. Dig. *ubi ſupra*. Nor barred by a ſtatute directing that the ſeveral patrons ſhould preſent in particular turns. S. C. arguments of defendant's counſel very full, 1 Show 413. R. acc. Bl. & Wils. *ubi ſupra*.

The queſtions that were made in this caſe were three.

1. If,

1. If the crown ought by prerogative to preſent an incumbent to a church become void by the promotion, by the king, of the former incumbent to a biſhoprick.

2. Admitting that the king had ſuch prerogative, then whether he hath not barred himſelf by confirmation of the *commendam*.

3. Suppoſing that the king was not barred by his own confirmation, yet if he was not barred by the act of parliament.

As to the firſt queſtion, the counſel for the defendant objected, that this prerogative had no reaſon to ſupport it, but that it was a prerogative, only becauſe it was a prerogative.

But to this the court anſwered, that the king, by the exerciſe of his prerogative in making the incumbent a biſhop, makes the church void, upon which, as an immediate conſequent, the preſentation is devolved to the king. Nor is there any conſiderable prejudice (if there is any at all) to the patron, for it is only the exchange of one life for another. And Sir *Giles Eyre* juſtice ſaid, that it was agreed by all, that when the incumbent was made biſhop, the church became void; what then ſhall there be, if it was by the common, or by the eccleſiaſtical law? And he was of opinion, that it was by the laſt: and as that law made the promotion of the incumbent to a biſhoprick to be an avoidance of the church, ſo it gave to the king this prerogative of preſentation. He was alſo of opinion, that the avoidance by promotion was not occaſioned by any incompatibility, (as Sir *Samuel Eyre* juſtice was of opinion in his argument) for there was not any ſuch thing; for the (*a*) biſhop originally was incumbent to the whole dioceſe, and deputed perſons to diſcharge the cure, whom he paid as he judged proper. 11 *Hen.* 4. 60. *b.* *Davis's Rep.* 81. *Vaugh.* 22. *Eades* verſ. *Ep. Oxford.*

(*q*) D. acc. 2 Will. 182.

2. It was objected, that if the king had any ſuch prerogative, it was very probable, that the ſtatute *de praerogativa regis*, or the old books, would have made mention of it; but both the one and the others are ſilent as to any ſuch matter.

As to the ſtatute *de praerogativa regis* the court anſwered, that neither does this ſtatute make any mention of the title of the king to preſent by lapſe, and yet this prerogative is not nor ever was diſputed. And *Holt.* ch. juſt. ſaid, that if a man holds lands of the king *in capite*, and die, his ſon being within age, the king by his prerogative ſhall have the

the lands held of all the other lords in ward, which is mentioned in the act, and yet it is a much more prejudicial prerogative than this of which the queſtion is. And *Stanford praerog.* 36. ſays, that a prerogative, which is *de jure poſitivo*, is no leſs law, if it has not natural reaſon to ſupport it; for no reaſon can be given, why a collateral warranty ſhall bind, (*a*) yet without doubt it is law.

(*a*) But now ſee the ſtat. 4 An. c. 16. ſ. 21.

Then, ſecondly, there is no wonder that the old books are ſilent as to this prerogative; for the pope, by degrees, whilſt the people were blinded with ſuperſtition, had uſurped the royal authority in all matters eccleſiaſtical, as is manifeſt by the ſtatute of proviſors, which was provided as a remedy for this grievance; 25 *Ed.* 3. And although that ſtatute was deſigned to prevent this uſurpation of the pope, yet the bigotted clergy being very powerful, he continued it; for he collated to the church, when the incumbent was made a biſhop. 41 *Edw.* 3. 5. *Owen* 144. Then the ſtatute 7 *Hen.* 4. *cap.* 8. was made, to hinder proviſions from *Rome*. And yet 8 *Hen.* 4. *Cotton's records* 458. *a.* 92. *Thomas Langley* clerk was elected biſhop of *Durham* by proviſion from *Rome*. And this uſurped power was continued here until the (*b*) ſtatute of ſupremacy, which reſtored the crown to it's ancient right. And always ſince that act, upon the promotion of the incumbent to a biſhoprick, the king has filled up the vacancy. For authority of which the court relied upon *Moor* 399. *pl.* 522. *Wright's* caſe, where the prerogative was allowed upon ſight of many precedents. Same caſe *Cro. Eliz.* 526. *Owen* 144. *pl.* 243. and in the caſe of *Woodley* verſ. *Manwaring*. *Cro. Jac.* 691. *Hutton* juſtice was of opinion that the king had not any ſuch prerogative, but *Winch* juſtice cited many precedents from the time of *Henry* 8. to the contrary. *Bro. Abr. tit. Preſentment al eſgliſe* 61. is an expreſs authority, where it is ſaid, that the biſhop of *Ely* told him, that he had ſeen a preſentation of the time of *Ed.* 3. where the king *ratione praerogativæ* preſented to a church upon making of the incumbent biſhop. And *Holt* chief juſtice ſaid, that this preſentation is a peculiar emanation of the power which the king hath of making biſhops; and therefore when the pope made the biſhop the king could not preſent, becauſe the creation of the biſhop was not within the exerciſe of his prerogative.

(*b*) 26 H. 8. c. 1. & 1 Eliz. c. 1.

And as to *Dyer*. 228. *b*. which was objected againſt this prerogative, the court anſwered, that it was but a ſudden opinion, beſides that, the plaintiff did not demur upon the prerogative of the queen, but took iſſue, that the church was void by reſignation before the creation.

In

In the ſame manner as to the books of 11 *Hen.* 4. 37. 41 *Edw.* 3. 5. 4 *Inſt.* 356. 17 *Ed.* 3. 40. 44 *Edw.* 3. 25. which were cited by the defendant's counſel, to prove that the king preſented to the church after he had made the incumbent biſhop, not by any prerogative, but becauſe that he had the temporalties of the biſhoprick in his hands where the church was, or otherwiſe upon the account of wardſhip, *&c.* the court anſwered, that the prerogative conſiſts in the preſentation in the turn of another patron, and not in ouſting the king himſelf. For when the king hath intereſt in the preſentation, and the prerogative happens at the ſame time, the intereſt ſhall be preferred. As if the king be ſeiſed in fee of an advowſon, and he creates the incumbent biſhop, he ſhall preſent as patron, that being a title precedent to that of the prerogative.

Intereſt of the king ſhall be preferred before his prerogative.

And as to 5 *Ed.* 2. *Maynard* 140. which was objected, *&c.* the court anſwered, that admitting the book was an expreſs authority againſt the prerogative, nevertheleſs it is but one inſtance, to controul the continual current of uſage to the contrary. As lately (*a*) *Covent-garden* was made a rectory in the time of king *Charles* 2. and the patronage was given by the parliament to the duke of *Bedford* and his heirs. Yet upon promotion of Dr. *Patrick* to the biſhoprick of *Chicheſter*, this king preſented Dr. *Freeman*, and it was never diſputed. But the caſe of *Edw.* 2. is not to the purpoſe; for at that time many biſhops were collated from *Rome*, as one may ſee in *Walſingham* 1319, 20. for which reaſons the court were clear in opinion, that the king had ſuch prerogative, as they had held the term before the caſe between (*b*) the king and queen, and the biſhop of *London* and Dr. *Lancaſter*, upon the ſame title.

(*a*) St. 12 Car. 2. cap. 37.

(*b*) Comb. Carth. 3 Lev. 4 Mod. & Holt *ubi ſupra.*

A diſpenſation ſaves avoidance. Vide Vaugh. 18.

The ſecond queſtion was, if the king had barred himſelf, or ſerved his turn, by the confirmation of the *commendam*. And the court were of opinion, that he had not; for the deſign of the diſpenſation was only to ſave the avoidance, which otherwiſe would have incurred. *W. Jones* 161. And the king by his confirmation only continued the poſſeſſion, but did not transfer his right. But by *Giles Eyre* juſtice, if the king grants confirmation of a diſpenſation for life, this amounts to a diſpenſation. The ſame law of a diſpenſation for ſix days, (*c*) if the parſon dies before the expiration of the diſpenſation.

(*c*) Sed vide Noy. 138.

The third queſtion was, if the act did not bar the king. And the court were of opinion, that the deſign of the act was only to eſtabliſh an agreement between my lord *Jermyn*, and the biſhop of *London*, and the vicar of St. *Martin's*, but never intended to meddle with the prerogative.

The

The defendant's counſel objected, that Dr. *Tenijon* was not preſented, inſtituted, and inducted: and therefore it was donative in him, and that the patronage did not veſt, but in *futuro, viz.* after his death, *&c.* that the promotion of the incumbent of a donative to a biſhoprick will not make a ceſſion; that the ordinary cannot viſit, *&c.* To which it was anſwered, that the right of patronage veſted immediately upon the paſſing of the act, at preſent (when the church ſhould become void) in point of eſtate, though not in point of intereſt. See 10 *Co.* 107. and *Milbourn* verſ. *Daſhburn*. *Cro. Eliz.* 328.

2. If it was a rectory (it was objected) yet it ſhall be a new rectory, and therefore the prerogative cannot attach it. But it was anſwered by the court, that there will be no difference between the one and the other. For when the act (though it is a new act) makes it a rectory, it ſhall have all the incidents to and properties of a rectory. And as a wife ſhall be endowed of a new eſtate, 8 *Co.* 1. *The prince's caſe*, in the ſame manner a new rectory ſhall be ſubject to the prerogative. For which reaſons all the judges being of the ſame opinion gave judgment for the king and queen, which judgment was afterwards affirmed in the houſe of lords, upon error brought by the defendants.

Where a ſtatute makes a new rectory, it ſhall have all the incidents of a rectory at common law.

Sho. P. C. 164.

Kirkham *verſ.* Whaley.

S. C but with the determination the other way. Salk. 30. 3 Salk. 282. 12 Mod. 74. & Comb. 319.

IN action *qui tam* for continuing ſheriff longer than a year, the defendant pleaded privilege *in C. B.* The plaintiff demurred. And it was argued by *Shower*, that the king is party to this action: for if the plaintiff entered a *retraxit*, yet the king may proceed, *quod fuit conceſſum per curiam*. Then where an action is ſued by the king, the defendant ſhall not have privilege, for privilege is not good againſt privilege; and of that opinion the court ſeemed to be. *Sed adjournatur.*

A *qui tam* action is the king's ſuit. R. *contra.* Lutw. 196. 3 Lev. 398. Sir T. Raym. 275. Britten v. Teaſdaile. Barnes 4to. ed. 48. D. cont. Cowp. 367. and Bl. 373. And an attorney defendant ſhall not have his privilege therein. R. cont. Lutw. 3 Lev. and Barnes. ubi ſupra. D. cont. Bl. 373.

Lampton *verſ.* Collingwood.

Intr. Trin. 5 Will. & Mar. Rot. 509. See Hill. 6 Will. & Mar. Rot. 309.

S. C. Salk 262. 3 Salk. 145. Carth. 282. Comb. 325. Holt 270.

ERROR coram vobis reſidet. The caſe was thus: *Lampton* was bail to *J. S.* in an action of debt brought againſt him by *Collingwood*, and judgment was given againſt *J. S.* Upon which *Collingwood* ſued a *ſcire facias* againſt the plaintiff, and upon two *nihils* returned, judgment was entred againſt the principal died before any *ca. ſa.* ſued.

If judgment in *ſcire facias* is obtained againſt the bail upon two *nihils*, they cannot aſſign for error that Vide Str. 197.

But if that was the fact they may have an *audita querela*. (1) Sed vide Salk. 93. 264. Str. 1075. & Bl. 1183, that the court would now relieve on motion. See alſo poſt. 439. 1295.

againſt him. Whereupon the plaintiff *Lampton* brought this writ of error, and aſſigned for error in fact, that *J. S.* died before any *capias ad ſatisfaciendum* was ſued againſt him. Upon which the defendant took iſſue, and it was found for the plaintiff in error, that *J. S.* died before a *capias ad ſatisfaciendum* ſued againſt him. And now the queſtion was, if error lay. And Mr. *Northey*, to maintain the writ, cited *Cro. Eliz.* 145. *Hill.* verſ. *Tempeſt*, and *Rainsford* verſ. *Mallet*. 4 *Leon.* 24. *pl.* 76. *Hunt and Gonnell's* caſe, and 36 *pl.* 99. *Cro. Eliz.* 730. expreſs in the point, *Cockyn* verſ. *Lady Hawkins*. *Cro. Eliz.* 733. *Price* verſ. *Price*. *Cro. Car.* 345. *South adſ. Griffith*. But on the other ſide againſt the writ were cited. *Hobbes* verſ. *Todcaſtle*. *Cro. Eliz.* 597. and *Gouldſh.* 174. *pl.* 108. *Mo.* 432. *pl.* 607. 1 *Rol. Ab.* 450. *pl.* 7. *Stile* 281, 288, 323. 1 *Rolls Ab.* 308. *pl.* 13. and 762. *pl.* 2. *Barcock* verſ. *Thompſon*. And it was adjudged by the whole court, that a writ of error will not lie in this caſe, for there is no error in the court; but it is reaſonable, that the party ſhould have an *audita querela*, becauſe he had not notice to come in and plead this matter.

(1) An audita querela was accordingly brought and relief given thereon. See the Entry vol. 3. 327.

Nurſe *verſ.* Frampton.

S. C. Salk. 214.

If it does not appear in the body of a deed who are the parties to it, the perſons who execute it ſhall be conſidered as ſuch. Adm. Cro. Eliz. 56. 2 Inſt. 673. 2 Rol. Abr. 22. l. 20. See alſo 3 Lev. 138.

NURSE brought debt againſt *Frampton* for a certain ſum of 25*l.* due to *Nurſe* by agreement by deed between the plaintiff and the defendant. Upon *oyer* of the deed it appeared to be thus: *viz.* 'Tis agreed, that a grey nag bought of *J. S.* by Mr. *Frampton* ſhall run twenty-five miles in two hours time, for, *&c.* in witneſs whereof we have ſet our hands and ſeals, *&c.* omitting the names of the perſons between whom this deed was made, but the plaintiff and defendant had ſigned the deed. And after demurrer the court was of opinion, that inaſmuch as the plaintiff and defendant had ſigned this, although it was not mentioned in the body of the deed, by whom or to whom it was made; yet it will warrant the declaration's reciting, that it was made by the plaintiff and defendant. And judgment was given for the plaintiff.

Hilary

Hilary Term.

6 & 7 Will. and Mar. 1694. B. R.

Sir John Holt *Chief Juſtice.*

Sir William Gregory
Sir Giles Eyre
Sir Samuel Eyre
} *Juſtices.*

Rex & Regina *verſ.* Larwood.

9. C. Salk. 167. 3 Salk. 134. Skinn. 574. Comb. 315. 12 Mod 67. Carth. 336. and with the arguments of Counſel 4 Mod. 269.

To an information for not ſerving the office of ſheriff in a corporation a plea ſetting forth the corporation act, and then averring that the defendant was at the time of his election a proteſtant diſſenter, and had not received the ſacrament within a year of which he gave (a) notice to the electors, is bad. S. C. Holt. 505. ſed vide 2 Vent. 247. 6 Bro. P. C. 181. Cowp. 392. 393. 535. 536. And to a replication that he ought to have done ſo, a rejoinder ſetting forth the toleration act is a departure. The toleration act is a private act.

INformation, brought againſt *Larwood* for not ſerving the office of ſheriff in the town of *Norwich*, being duly elected, ſets forth, that *Norwich* is, and time whereof, &c. hath been an ancient town. And that the citizens thereof are and have been time whereof, &c. a body politic known by divers names, heretofore by the name of the bailiffs and citizens of *Norwich*, and now by the name of the mayor, citizens and commonalty. That king *Henry* 4. in the fifth year of his reign, by charter bearing date the 23d of *January* in the ſame year, granted to the corporation of the city of *Norwich*, that the city ſhould be a county by itſelf, and that the commonalty ſhould chooſe two ſheriffs in lieu of the four bailiffs. That king *Charles* 2. in the 15th year of his reign by charter confirmed the charter of *Henry* 4. and granted over, that in the election of the ſheriffs this form ſhall be obſerved, *viz.* that the mayor, ſheriffs and aldermen, between the 24th of *June* and the firſt of *September*, ſhould chooſe *unam perſonam habilem* to execute the office of ſheriff for the year enſuing, and that the commonalty ſhould chooſe another. That the defendant *Larwood* was elected ſheriff the ninth of *July* by the mayor, ſheriffs and aldermen, to enter into his office the 29th of *September* next enſuing. That *Larwood* had notice of this election, but without any reaſonable cauſe, he appeared not, nor took the oaths, nor executed the ſaid office, to the great hindrance of the affairs of the king, &c. The defendant pleaded the ſtatute of 13 *Car.* 2. *cap.* 1. for the regulation of corporations, and

(a) Note in Skinn. Comb. 12. Mod. and 4. Mod. ubi ſupra the defendant is made to aver in his plea that he had taken the oaths and ſubſcribed the declaration according to the toleration act.

that

that he was a proteſtant diſſenter from the church of *England*, and had not received the ſacrament within the year preceding the election, (as that act provides) whereby he was incapacitated to execute the ſaid office, and the election was void; and that he after this election, and before the firſt of *Auguſt*, gave notice to the mayor, &c. of this diſability, &c. The attorney general replied, that the defendant ought to have received the ſacrament yearly, and that he ought not to take advantage of his own wrong or default. The defendant in his rejoinder pleads, the act of 1 *Will. & Mar. cap.* 18. which gives liberty of conſcience to all proteſtant diſſenters, and ſhews that he took the oaths of 1 *Will. & Mar.* and had ſubſcribed the declaration at the general quarter ſeſſions, &c. and brings himſelf within the compaſs of the act, &c. To which the king's attorney demurs, and the defendant joins in demurrer.

This caſe was argued by Sir *Bartholomew Shower*, Mr. ſerjeant *Wright*, and Mr. ſerjeant *Rotherham* for the defendant; and by Sir *Thomas Powis*, Mr. ſerjeant *Pemberton*, and Mr. ſerjeant *Levinz* for the king; and afterwards by all the judges on the bench, who all concurred in opinion.

1. That the rejoinder was a perfect departure, becauſe it did not ſtrengthen the bar, and it ought to have been pleaded at the beginning, becauſe he might and had opportunity to do it.

2 They all agreed, that the act of 1 *Will. & Mar.* which indulges diſſenters, is a private act, and therefore the court could not take notice of it without pleading. And they were of opinion that it is a private act, becauſe,

1. Time out of mind, &c. there was a diſcipline eſtabliſhed in the church of *England*, which all perſons were obliged to obſerve by the canon law before the reformation, *Lindwood* 8. and ſince the reformation, by the ſtatutes of *Edw.* 6. and 1 *Eliz.* ſo that the law took no notice of any ſuch perſons as diſſenters before this act, and therefore it is private.

2. Becauſe that it does not extend to all diſſenters from the church, but only to thoſe who go to the ſeſſions, and there take the oaths, and ſubſcribe the declaration. And Sir *Giles Eyre* juſtice declared, that his opinion was, that if the defendant had pleaded this act, yet it would not have aided the defendant. For the intent of the act was only to give the diſſenters liberty to exerciſe their religion, but not to exempt them from ſerving their country in employments agreeable to their ſeveral capacities. Beſides, he ſaid, if this were

were allowed, all the people of *England* ſhould turn diſſenters, to avoid the execution of troubleſome offices, and ſo there would be no body to diſcharge them, by which there would be a failure of juſtice. But to this point the other two juſtices gave no opinion. But as to the judgment in the principal caſe, Sir *Samuelr Eye* juſtice was of opinion for the defendant. Sir *Giles Eyre* juſtice, and my lord chief juſtice *Holt* for the king. Sir *William Gregory* juſtice, though abſent, agreed with Sir *Giles Eyre* and my lord chief juſtice, as Sir *Giles Eyre* ſaid he declared to him.

Sir *Samuel Eyre* Juſtice, for the defendant argued,

1. That it is apparent by the information, that they who elected the defendant ſheriff, had no power to make any ſuch election; for the liberties granted by the charter of *Henry* 4. could not be diveſted but by ſurrender or forfeiture, and neither the one nor the other appears by the record; nor is it apparent that the corporation accepted the charter of *Charles* 2. But *Charles* 2. could not alter the liberties once ſettled by the charter of *Henry* 4. An affirmative ſtatute will not take away not change a power-precedent. *Hob.* 137. *Stukely* verſ. *Butler. Co. Litt.* 111. *b.* 11 *Co.* 64. *a.* & *ante* 9. much leſs can the ſubſequent grant of the king do it. And then the mayor, ſheriffs and aldermen, had not any power to elect a ſheriff; and by conſequence the defendant is unlawfully elected, and ſo the election was void.

Liberties granted by charter cannot be diveſted, but by ſurrender or forfeiture.

2. Admit that the mayor, *&c.* had power to elect a ſheriff, yet he was of opinion, that the plea was good. For, he ſaid,

1. That the deſign of 13 *Car.* 2. *cap.* 1. was to exclude men who were not of the church of *England*, out of all offices which concern the government; and therefore the defendant being a diſſenter was altogether diſabled.

2. By law no man ought to be puniſhed twice for the ſame offence; but if the court here ſhall puniſh the defendant, this rule will be infringed. For the ſtatute puniſhes the defendant once, by diſabling him to exerciſe the office; for the office of ſheriff (ſaid he) was a profitable office, and by the common law, offices were honourable places and not burthens; and therefore an ambitious man, who will prefer honour before profit, (admitting that theſe offices are not profitable) will eſteem ſuch a diſability a great puniſhment.

3. It

3 It is unreaſonable to puniſh a man for not doing that, which the law diſables him from doing. But if he had taken upon him the office here, he had been puniſhable, becauſe he was incapacitated by the act.

To conclude, he cited a caſe between the mayor of *Guilford*, &c. and *Clark*, 2 *Will. & Mar. in C. B.* which ſee now reported in 2 *Vent.* 247. where in debt upon a by-law for not having ſerved an office, (*a*) being duly elected, the defendant pleaded this act of 13 *Car.* 2. *cap.* 1. and it was held a good plea; which in effect was the ſame with this principal caſe. And therefore he was of opinion, that judgment ought to be given for the defendant.

My lord chief Juſtice *Holt*, and Sir *Giles Eyre* juſtice, argued for the king.

1 That the election was good.

2. That the plea was ill.

As to the firſt, they agreed, that it was not in the power of the king to take away liberties before granted by him, &c. But if a corporation accept ſuch a charter, it is good. And here is evidence of their acceptance, for the commonalty uſed heretofore to elect both the ſheriffs, and now they elect but one of them; beſides that, if the corporation had not accepted this laſt charter, the defendant ought to have ſhewn it; but now he has admitted it by his ſpecial plea. If the mayor, &c. had refuſed to accept the charter of *Charles* 2. the charter had been void. But when a corporation takes a new charter concerning liberties, one may make uſe of it as a grant, or confirmation. *Cro. Jac.* 313. *Goodſon* verſ *Daffield.* 21 *Hen.* 7. 5. *a.*

Corporation takes a new charter of liberties, it may be uſed as a grant or confirmation.

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As to the ſecond point, they held that the plea was ill; for (by them) the deſign of 13 *Car.* 2. *cap.* 1. was not to exempt any perſon from executing any office to which he was obliged before, but ("to oblige every perſon") to qualify himſelf for the execution of it; for the act intended to diſcourage diſſenters, and not to favour them. But if this plea ſhall be allowed, it will be to conſtrue the act much to their advantage; for theſe offices are not profitable, but chargeable, and full of trouble.

2. The king has a natural intereſt in every ſubject, and may compel him to ſerve him in any function, in which he ſhall judge him capable. *Moore* 111 *Knowles* verſ. *Luce*

(*a*) In a Corporation.

And

And no body can be exempt from the office of ſheriff but by act of parliament, or letters patent. *Savil* 43. *Pelham's* caſe. 2 *Co.* 46. *b.* Earl of *Salop's* caſe.

3. No man ſhall take advantage of his own diſability, as no man can plead that he is a fool, or *non compos*: but if a man *non compos* be indicted, the judges *ex officio* ſhall acquit him, becauſe the king takes care of all ſuch perſons. But if a man be diſabled by judgment to bear an office, there he is excuſed, *quia judicium redditur in invitum*. But where he may remove the ſentence, as excommunication, he ſhall take no advantage of it. See Sir *John Read's* caſe. 2 *Mod.* 299. 1 *Freem.* 327. And in this caſe the defendant not having qualified himſelf as he ought to have done, ſhall not take advantage of his own diſability. For which reaſons judgment was given by theſe judges for the king, againſt the opinion of Sir *Samuel Eyre* juſtice. 2 Bl. Com. 291.

Tipping *verſ.* Cozens.

S. C. Carth. 272. Comb. 312. Holt 731. & 4 Mod. 310.

THE jury find a ſpecial verdict, that *Edward Cozens*, ſeiſed in fee of the lands in queſtion, by indenture dated the ſixteenth of *October* 1654, in conſideration of a marriage intended to be celebrated between him and Mrs. *Grace Fry*, and of 1000*l.* portion, conveyed theſe lands to truſtees, to the uſe of himſelf and his heirs until the marriage took effect, and then to the uſe of Mrs. *Grace Fry* for life, for her jointure, then to truſtees and their heirs during the life of *Edward Cozens*, in truſt to ſupport contingent remainders, and for that purpoſe to make entries, &c. but to permit *Edward Cozens* to receive the rents and profits during his life, remainder to the uſe of the firſt, ſecond, third, &c. ſons of that marriage in tail male ſucceſſively, remainder to the heirs male of *Edward Cozens* and his then intended wife, remainder to the heirs of their bodies, remainder to the heirs male of *Edward Cozens*, remainder to the right heirs of *Edward Cozens*; and in this indenture *Edward Cozens* covenanted to levy a fine to thoſe uſes, which fine was levied accordingly: they find further that this marriage took effect, and that *Edward Cozens* had iſſue of that wife but one daughter, *Elizabeth*, who married afterwards *George Tipping*: They find farther, that *Edward Cozens* in 1686 covenanted with *John Sheppards*, &c. to levy a fine to the uſe of himſelf for life, remainder to his wife for life, with divers remainders over for life and in tail, excluſive of his daughter, remainder to his own right heirs; in purſuance of which covenant a ſecond fine was levied with warranty againſt *Edward Cozens* and his heirs, with proclamations according to the ſtatute; and at the time of the fine levied

Tenant for life of an equitable eſtate with a legal remainder in tail, cannot levy a fine. R. acc. 8. Vin. 262. pl. 19. 1 Bro. C. C. 73. 75.

An uſe cannot be executed upon an uſe. D. acc. 2 Bl. Com. 335. Bac. on uſes 316.

Under a conveyance to truſtees and their heirs to the uſe of them and their heirs during the life of *J. S.* in truſt, to preſerve contingent remainders, but to permit *J. S.* to take the profits, &c. *J. S.* has only an equitable intereſt. Semb. acc. Bro. C. C. 75. and Vin. *ubi ſupra*. 1 See alſo poſt. 873.

Where the owner makes a full diſpoſition of his entire eſtate, he ſhall not have a reſulting uſe. See Bac. on uſes. 350.

Lineal warranty deſcending upon an infant is no bar, and now See 4 Ann. c. 16. ſ. 21.

Edward Cozens was in actual poſſeſſion, and had no iſſue male: that the firſt of *Auguſt* 1686, *Elizabeth* the daughter died in the life of her father, and left an infant daughter, *Lucretia Tipping*, leſſor to the plaintiff: and 1 *Febr.* 1690, *Edward Cozens* died, and *Grace* his wife entered, and enjoyed the lands during her life, and that *Lucretia* was an infant at the time of the death of *Edward Cozens*; and that when *Grace* the wife of *Edward Cozens* died, the defendant entered claiming under the ſettlement in 1686; and that the leſſor of the plaintiff entred upon him, and leaſed to the plaintiff; that the defendant re-entred upon him, and the plaintiff brought this ejectment. *Et ſi, &c.*

(a) Vide Co. Lit. 299. 8. 13. Ed. u. 1. poſt. 37. 1 Co. 104. a.

And ſerjeant *Wright* for the defendant argued, that *Edward Cozens* had an eſtate tail in himſelf, and then he barred it by his fine in 1686, and by conſequence the title was in the defendant. And to prove this, he ſaid, that (*a*) where the anceſtor took an eſtate for life, and afterwards a limitation is made to his right heirs, or his heirs male, *&c.* the fee, be it ſimple or tail, veſts in the anceſtor, and the heir ſhall take only by deſcent. *Co. Lit.* 22. *b. Fenwick* and *Mitford*'s caſe. *Moor* 214. 1 *Leon* 182. 1 *And.* 288. Then in this caſe *Edward Cozens* took an eſtate for life, for there is here an expreſs limitation to *Edward Cozens* during his life, for the truſt being limited to *Edward Cozens* to take the profits during his life, is an eſtate of freehold executed in himſelf by the ſtatute 27 *Hen.* 8 *cap.* 10. For the feoffees take by the common law, becauſe the uſe is limited to them, and the ſtatute ſaith, other, and not the ſame, perſon to take the uſe. *Br. Tit. Feoffment al uſe, pl.* 58. 1 *Anderſ.* 328. Feoffment to *A.* to the uſe of *B.* for life, remainder to the uſe of *C.* in tail, remainder to the uſe of *A.* in fee; the firſt and ſecond uſes are executed by the ſtatute, and the third by the common law. And this will not break in upon the rule, that the ſtatute ſhall not execute a uſe upon a uſe; for in this caſe the feoffees do not take by way of uſe, but by the common law. But if a man bargains and ſells to *B.* to the uſe of *B.* and his heirs to truſt for *A.* this truſt cannot be executed by the ſtatute; becauſe the uſe was raiſed before in *B.* and executed. And altho' the ſtatute ſhall be executed in *Edward Cozens*, yet a *ſcintill juris* ſhould remain in the truſtees, to ſerve the contingent remainders, when they ſhould happen. *Sed non allocatur.* For by *Holt* and *Eyre* juſtices, (no other juſtices being in court) the truſtees take by the ſtatute, and then this limitation being to them in truſt for *Edward Cozens* to take the profits, there cannot be an execution by the ſtatute, for that would be to raiſe a uſe upon a uſe. If a feoffment be made to *A. &c.* to the uſe of *A.* and his heirs, in truſt for *B. A.* takes by the ſtatute, becauſe he takes a different eſtate by the uſe, from that which he

he hath in the land and then the truſt to *B.* cannot be executed. Then ſerjeant *Wright* argued, that by a reſulting uſe, and operation of law, an eſtate of freehold ſhall be raiſed to *Edward Cozens*, for which he relied upon *Co. Lit.* 22. *b.* *Fenwick* and *Mitford*'s caſe, *ubi ſupra*. And it is no objection to ſay that he has made a diſpoſition here during his life: for the eſtate to the truſtees is but a bare eſtate of freehold, forfeitable and mergeable; and therefore the law may well create to him an eſtate for life upon ſuch poſſibility. As if land is limited to *A.* for the life of *B.* remainder to *B.* for his own life; this remainder to *B.* is good, becauſe *A* might forfeit, *&c.* 2 *Co.* 51. *a.* *Sed non allocatur*; for, *per curiam*, there cannot be here any reſulting uſe to *Edward Cozens*, becauſe he has made a full diſpoſition of the intire eſtate, and then the law has no need to make it. But in the caſe of *Fenwick* and *Mitford* the party had not diſpoſed of the freehold during his life, and the law caſt it upon him, becauſe whatſoever part of the uſe the feoffer has not aliened, will remain to himſelf. But in this caſe the deſign was, that the whole eſtate ſhould be diſpoſed of; ſo that it ſhould not be in the power of *Edward Cozens*, to deſtroy the contingent remainders. So that if the court will raiſe a reſulting uſe here, it will be contrary, as well to the intent of the parties, as to the rules of the law. 2. It was anſwered and admitted by all, that the warranty had no operation, becauſe the leſſor of the plaintiff was an infant at the time of the deſcent. *Litt. ſect.* 726. Judgment was given for the plaintiff, *niſi*, *&c.*

Rex *verſ.* Ely.

THE return of the reſcue was quaſhed, becauſe it was *recuſſit*, inſtead of *reſcuſſit*. *Ex relatione m'ri Nott.*

Wate *verſ.* Briggs, Marſhall, B. R.

S. C. Salk. 565. 5 Mod. 8.

In debt upon an eſcape the commitment is but inducement. D. acc. 2 Keb. 206. And tho' it is not ſet forth with a *prout patet per recordum*, it will be well enough on a general demurrer. Vide poſt. 93. 2 Keb. 206. Co. Litt. 303. a 4 Ann. c. 16. ſ. 1. (*a*)

DEBT upon eſcape, for the eſcape of *J. S.* The plaintiff in his declaration ſhewed his recovery, and that *J. S.* was brought by *habeas corpus* before Mr. Juſtice *Gregory*, and was by him committed in execution to the *Marſhalſea*; but does not ſay, *prout patet per recordum* of the commitment. The defendant demurs generally. And it was urged for the plaintiff, that this omiſſion was only matter of form, and therefore aided by the general demurrer. See 1 *Sid.* 216. *Middleton* verſ. *Bail of Sylveſter*; for it is only inducement to the action, and not the foundation of it. And *per curiam*, when the record is the ground of the plaintiff's action, he ought to conclude, *prout patet per recordum*:

(*a*) That it would be bad on a ſpecial demurrer, vide Str. 1226.

An adminiſtrator cannot bring an action in his own right for the eſcape of a perſon in execution on a judgment recovered by the adminiſtrator in right of his inteſtate. Semb. cont. Dougl. 4. 5.

but here the eſcape is the foundation of this action; and although the commitment is not diſtinctly put in iſſue, yet it may be found upon the general iſſue; and the defendant is not eſtopped by this record, but he may aver, that *J. S.* was not in priſon, notwithſtanding that; and the plaintiff ought to prove him an actual priſoner. Judgment for the plaintiff. *Ex relatione m'ri Nott.* Adjudged *Mich.* 6 *Will. & Mar. in B. R.* See *Hob.* 233. 2 *Saund.* 402.

Debt was brought by the plaintiff *in jure ſuo proprio*, for the eſcape of a priſoner in execution upon a judgment recovered by the plaintiff as adminiſtrator. And *per curiam* the action is ill brought; for the firſt judgment being in right of the inteſtate the action of eſcape ought to be in right of the inteſtate alſo. Mr. *Nott. Hill.* 6 *Will.* 3. *B. R.*

Borough's caſe.

D. acc. Burr. 1719. 9, v. Vide alſo 9 G. 1. c. 29.

DEBT will not lie againſt an infant for a copyhold fine upon his admiſſion. And therefore an infant arreſted upon ſuch an action, being five years of age, was diſcharged. *Ex relatione m'ri Place.*

The king cannot reſerve rent to an officer, removeable at will. Vide Co. Lit. 143. b.

THE king made a leaſe of a houſe belonging to his houſe-keeper of *Whitehall*, reſerving a rent to the houſe-keeper for the time being, and it was held an ill reſervation. For though the king may reſerve rent to a ſtranger, yet ſuch a reſervation as this is ill, becauſe he cannot reſerve rent to ſuch an officer who is removeable at the will of the king. *Ex relatione m'ri Nott. Hill.* 6 *Will.* 3. *B. R.*

Atkins *verſ.* Uton.

S. C. Comb. 318.

Covenant by a mortgagor, for further aſſurance ſhall not oblige him to releaſe his equity of redemption.

MORTGAGOR covenanted with the mortgagee, for the more abſolute aſſurance of the lands mortgaged, to make ſuch farther aſſurance, *&c.* Adjudged that this covenant did not oblige him to releaſe his equity of redemption, but only to make ſuch farther aſſurance of the land, *&c.* under the ſame condition as in the mortgage. *Hill.* 6 *Will.* 3. *B. R. Ex relatione m'ri Nott.*

Eaſter

Eaſter Term
7 Will. 3. B. R.

Moore *verſ.* Parker.

S. C. with the Arguments of Counſel 4. Mod. 316. Skinn. 558.

A deviſe to the iſſue male of one who is intitled to an eſtate for life under a conveyance from the deviſor will not veſt in the anceſtor even tho' the will recites his intereſt. S. C. 1 Eq. Abr. Tit. Deviſes D. pl. 22. 4 Ed. p. 182. 3 Danv. Abr. 182. pl. 23. cit. Co. Litt. 299. b. 13 Ed. n. 1. R. acc. 1 Lev. 135. Dougl. 470. See alſo Burr. 873.

IN a feigned action to try an iſſue directed out of the houſe of peers, a ſpecial verdict was found, in which the caſe was thus. *A.* had iſſue *B.* his ſon, and upon the marriage of *B.* ſettled lands to the uſe of *B.* for life, remainder to the wife of *B.* for life, remainder to the firſt, ſecond, &c. ſons in tail, remainder to his own right heirs. And afterwards *A.* deviſed theſe lands to ſuch iſſues male as *B.* ſhould have by any other wife, (*a*) in tail male; and in caſe of failure of iſſue male in *B.* he deviſed that all his lands ſhould go to his grandchildren by his daughter *Parker* in fee, under whom the defendant claims, as grand-child to *Parker*. *A* dies; *B.* ſuffers a common recovery, and dies without any iſſue male; under whom the plaintiff claims. And upon this ſpecial verdict, what eſtate had *B?* and after argument at the bar by Sir *Thomas Powis*, &c. by *Holt* chief juſtice, it is impoſſible to make this an eſtate tail in *B.* for nothing is given to him by this deviſe, but he has only the eſtate that he had by the firſt ſettlement. In 29 *Ed.* 3. 2. *Leon.* 7. eſtate for life is given to *A.* remainder to the heirs of the body of *B.* *A.* aſſigns his eſtate to *B.* by which *B.* becomes tenant for the life of *A.* remainder to the heirs of his body, yet he has not an intail executed in himſelf, but the remainder continues in contingency. So here, there being two ſeveral conveyances, this deviſe cannot be tacked to the eſtate for life limited by a different conveyance, *quod fuit conceſſum* by the other juſtices. See *Dyer.* 303. *pl.* 58. But by *Holt* chief juſtice, the queſtion is here, if this immediate deviſe be good to the iſſue not being *in eſſe*. Deviſe to an infant *en ventre ſa mere* is good as a future deviſe, but not if it be deviſed *in praeſenti*. Then here, if this is a void deviſe, the ſecond deviſe ſhall be void alſo; for it connot be a contingent remainder, becauſe there is no particular eſtate to ſupport it; and as an executory deviſe it

Nor will he take an eſtate tail by implication, tho' the eſtate is limited over only in caſe of failure of iſſue male in him. S. C. 3 Danv. Abr. ubi ſupra R. acc. Dougl. 470. Forr. 262. 4 Bro. P. C. 96.

Nor will his eſtate ſupport the deviſe. cit. Fearn 228. R. acc. 1 Lev. 135.

A deviſe per verba de præſenti to ſuch iſſue maleas he ſhould have by any future wife (*his firſt being then living* (*b*) and his iſſue male by her being entitled to eſtates tail under the firſt conveyance is bad. Cit. and dub. Fearn. 323. R. acc. Blackſt. 188 and vide Dougl. 489 and n. 1. Fearne 337 427. vide poſt. 523. ſee alſo ante 3. and the caſes there cited.

And ſo is a limitation over in caſe of failure of ſuch iſſue male. R. acc. Blackſt. 188. Fearne 339.

(*a*) In Skinn. ubi ſupra this deviſe is ſtated to have been in ſtrict ſettlement, if ſo, vide as to the 2d. point Dyer 174. Frenchman's caſe. And 1 And. 8.

(*b*) Vide 4 Mod. Skinn. 1. Eq. Abr. and 3 Danv. Abr. ubi ſupra.

the

will be void, becauſe it is to take effect upon the death of *B.* without iſſue. *Adjournatur. Ex relatione m'ri Notæ.*

Avery *verſ.* White.

The condition of a bond for payment of money, tho' the words of avoidance are omitted, is a good defeaſance R. acc. 2 Saun. 38. D. acc. Com. 231. Dougl 369. ſee alſo poſt. 335.

DEBT upon a bond conditioned to pay money; and upon *oyer* it appears, that the uſual concluſion of a condition, *viz.* that then this obligation ſhall be void, *&c.* was omitted. And therefore Mr. *Northey* for the plaintiff argued, that the bond was ſingle. *Sed non allocatur.* For, *per curiam*, the condition being to pay money, is a good defeaſance of the bond; and if the obligor pay the money, the obligation ſhall be void. But no judgment was given, becauſe the parties agreed. Mr. *Nott.*

Melwood *verſ.* Leech.

Treſpaſs without *contra pacem* bad after judgment by default But now ſee 16 and 17 Car. 2. c. 8 ſ. 1, & 4 Ann. c. 16. ſ. 1.

TRESPASS. The words *contra pacem* were omitted in the declaration, and therefore after execution of a writ of inquiry judgment was arreſted upon motion. But *Holt* chief juſtice ſeemed to incline that it would have been good after verdict. Mr. *Nott.*

Gibbons *verſ.* Pepper.

S. C. 4 Mod. 404. Salk. 637. cit. 3 Wilſ. 411.

Every juſtification muſt confeſs a cauſe of action Therefore a plea to an action of aſſault and battery that the defendant was on horſeback, and his horſe on a ſudden fright ran away with him, that he called to the plaintiff to get out of the way, and upon his neglect the horſe ran over him againſt the defendant's will, is bad. Vide 1 Vent. 295. 2 Lev. 172. 3 Keb. 670. See alſo Sty. 72. 3 Lev. 37.

TRESPASS, aſſault and battery. The defendant pleads, that he rode upon a horſe in the king's highway, and that his horſe being affrighted ran away with him, perſons ſtanding in the way, among whom the plaintiff ſtood; ſo that he could not ſtop the horſe; that there were ſeveral perſons ſtanding in the way, among whom the plaintiff ſtood; and that he called to them to take care, but that notwithſtanding, the plaintiff did not go out of the way, but continued there; ſo that the defendant's horſe ran over the plaintiff againſt the will of the defendant; *quae eſt eadem tranſgreſſio, &c.* The plaintiff demurred. And ſerjeant *Darnall* for the defendant argued, that if the defendant in his juſtification ſhews that the accident was inevitable, and that the negligence of the defendant did not cauſe it, judgment ſhall be given for him. To prove which he cited *Hob.* 344. *Weaver* verſ. *Ward. Mo.* 864. *pl.* 1192. 2 *Roll. Abr.* 548. 1 *Brownl. prec.* 188.

Northey for the plaintiff ſaid, that in all theſe caſes the defendant confeſſed a battery, which he afterwards juſtified; but in this caſe he juſtified a battery, which is no battery. Of which opinion was the whole court; for if I ride upon a horſe, and *J. S.* whips the horſe, ſo that he runs away with me and runs over any other perſon, he who whipped the horſe

horſe is guilty of the battery, and not me. But if I by ſpurring was the cauſe of ſuch accident, then I am guilty. In the ſame manner, if *A.* takes the hand of *B.* and with it ſtrikes *C.* *A.* is the treſpaſſer, and not *B.* And, *per curiam*, the defendant might have given this juſtification in evidence, upon the general iſſue pleaded. And therefore judgment was given for the plaintiff. Hob. 134.

Meriton *verſ.* Briggs.

ESCAPE. The defendant pleads recaption upon freſh purſuit. The plaintiff replies, *de injuria ſua propria abſque hoc quod* he retook, &c. upon freſh purſuit, *et adhuc detinet.* The defendant demurs, and ſhews for cauſe, that the plaintiff had traverſed matter not alledged in the plea, *viz. quod adhuc detinet*, which ought not to be; for if the defendant hath ſuffered *J. S.* to eſcape a month after the recaption, yet the plaintiff ſhall be barred by the recaption for the old eſcape, and ſhall have a new action for the new eſcape; *quod Holt* chief juſtice *negavit*, for both are but one eſcape. Judgment for the plaintiff. Mr. *Nott.*

If the defendant pleads a recaption upon freſh purſuit to an action of eſcape, the plaintiff may take a traverſe that he did not retake, and does not ſtill detain him. Q. *tamen* and *vide* Str. 422. poſt. 64.

Rex *verſ.* Croſby *alias* Philips.

CROSBY was indicted of high treaſon, and at the trial at bar he excepted againſt the evidence of Mr. *Aaron Smith*, becauſe he had been ſet in the pillory upon a judgment given againſt him in this court, upon an information 34 *Car.* 2. the record of which he produced. Mr. ſolicitor general *Trevor* and Mr. *Cowper* on behalf of *Aaron Smith* argued, that the infamy was always a conſequence of the guilt, and not of the puniſhment; and therefore, by them, if an innocent man hath an infamous judgment given againſt him, for a crime that does not deſerve ſuch judgment, this will not render the party infamous. Then for application they ſaid, that the crime of which Mr. *Aaron Smith* was accuſed, did not deſerve ſuch judgment; and therefore ſhall not take away his teſtimony. And Sir *Samuel Eyre* juſtice ſeemed to be of that opinion. But *Holt* chief juſtice gave no opinion as to this point, ſaying that he could not impeach the record; but he was of opinion that the general act of pardon, 2 *Will. & Mar.* gave Mr. *Smith* a new credit, but did not work by way of reſtoration, to reſtore him to his old credit. As if a perſon be attainted of felony, he is now incapable of making a purchaſe to hold, or to give evidence; but if the king pardons him, he is now become a new creature, and may do both; (*a*) but he is not reſtored, to inherit to thoſe perſons, to whom he was inheritable before. And the difference

A pardon makes an infamous perſon a competent witneſs. S. C. 5 Mod. 15. 12 Mod. 72. Salk. 689. Skinn. 578. Holt 753. Gilb. Evid. 28. R. acc. Godb. 288. Raym. 369. 1 Vent. 349. D. acc. Bull. Ni. Pr. 202. See alſo Hob. 81. Raym. 379. 'Tis the infamy of the crime, not of the puniſhment which takes away a man's teſtimony. S. C. Salk. Skinn. Sed Hol. C. J. contra 5 Mod. 12 Mod. and Holt ubi ſupra R. acc. 3 Lev. 426. 2 Will. 18. D. acc. Co. Litt. 6. 6. b. 13th Ed. n. 1. Compariſon of hands no evidence in treaſon. S. C. 12 Mod. and Skinn. ubi ſupra *(unleſs the papers are found in the priſoner's cuſtody, in which caſe it is.* R. acc. Burr. 644.)

(*a*) R. acc. Co. Litt. 391. b. 392. a.

Pardon may cure a criminal, not a civil disability.

ference is, between a civil disability, which the pardon cannot cure, *Co. Lit.* 234. *a.* Sir *Ar. Ingram*'s case, and a criminal disability, which the pardon may take away. And for these reasons the testimony of Mr. *Aaron Smith* was admitted. But the principal point of treason charged upon Mr. *Crosby*, being the writing of certain treasonable papers, which the king's counsel endeavoured to prove by comparison of hands, having no other evidence; the prisoner, Mr. *Crosby*, produced the copy of the act of parliament for the reversal of the attainder of *Algernoon Sidney* esq. in which it was declared, that the comparison of hands is not legal evidence. Upon which the jury found the prisoner not guilty.

Williams *verſ* Grey.

S. C. 4 Mod. 403. 1 Salk. 12. Salk. 149. Holt 307. 12 Mod. 71. Comb. 322 cit. Str. 214.

An executor as such may have an action of tort for an injury done to the personal estate of his testator in the testator's life time, R. acc. Str. 212. Cro. Eliz. 207. see also 5 Co. 27. a. Cro. Car. 216. and 1 Vent. 30. 1 Sid. 88 407. & post. 971.

WILLIAMS executor of *J. S.* brought an action upon his case against *Grey* sheriff of the county of *Wilts*; and declared that his testator had recovered judgment in debt for———against *Mellin*, upon which he sued a *fieri facias* directed to the defendant, then sheriff, to levy 147*l.* 10*s.* of the goods of *Mellin*; that the defendant, by virtue of the *fieri facias*, took in execution goods of *Mellin* to the value of 101*l.* 10*s.* but *falso*, *fraudulenter*, *et deceptive*, returned, that he had levied goods but to the value of 47*l.* part of which he had sold, to the value of 29*l.* 15*s.* and 4*d.* and that for the residue he had not found purchasers, *&c.* And for this false return, the plaintiff, as executor, brings this action. Upon not guilty pleaded, verdict was given for the plaintiff. And now Mr. *Northey* moved in arrest of judgment, that the action did not lie; because this false return is a mere personal wrong, and of consequence died with the testator. And it is not within the statute of 4 *Ed.* 3. *cap.* 7, *de bonis asportatis*. And he cited 1 *Roll. Abr.* 912. *Tit. Executors pl.* 2. which book says, that it was left a *quære* in the case between *Lemason* and *Dixon*, (for the court was equally divided) if case lies for an executor for an escape upon *mesne* process made in the life of the testator. And if upon a *fieri facias* the sheriff levies the debt, and does not return his writ, nor pay the money to the party, and the person who sues the execution dies, whether his executor may have an action against the sheriff. *Rolle* says, that in a case between *Spurstow* and *Prince*, this be moved after verdict in arrest of judgment, the plaintiff prayed judgment against himself, to the end that he might commence a new action for his own expedition. But *Holt* chief justice, and Sir *Samuel Eyre* justice, (Sir *Giles Eyre* justice, and Sir *Willian Gregory*, being absent by reason of sickness) after the case had been argued two or three times, were of opinion, that the action well lay, for the case of

Latch. 167. Noy 87. Poph. 189. Jones 173.

1 Roll. Abr. 913. pl. 3.

of *Lemaſon* and *Dixon* was upon *meſne* proceſs, but if it had been after execution, the judges there, by the reaſons which they gave, ſeem to incline that the action would lie. To the ſame purpoſe is *F. N. B.* 121. *a.* This ſeems then to be ſtronger than when the body is taken in execution; for the body is but in nature of a pledge for the debt, but upon levying of the goods, a right was veſted in the teſtator. And the ſtatute *de bonis aſportatis* has been always favourably extended for the benefit of executors. For which reaſons they gave judgment for the plaintiff.

An executor as ſuch may have debt againſt the ſheriff for the eſcape of a priſoner in execution made in the life of his teſtator. Vide ante 36. adm. poſt. 973. Mich. 5 Will. & Mar. C. B. Orby verſ. Hales 1693 Intr.

Trin. 4 Will. & Mar. C. B. Rot. 769.

Waltham *verſ.* Sparkes

S. C. Skinn. 556. Comb. 320.

WILLIAM Waltham executor of *Rachael Waltham*, executrix of *William Waltham*, brings debt upon bond againſt the defendant. The defendant demands *oyer* of the bond, and of the condition, which was, that if the defendant, his heirs, executors, and adminiſtrators, ſhall ſave harmleſs, as well the overſeers of the poor of *Shafford* in *Bedfordſhire* and their ſucceſſors, as all the inhabitants of the ſaid pariſh, from all expences, charges, &c. upon the account of *John Gorden*, his wife and children, that then, &c. The defendant pleads *non damnificat*, &c. The plaintiff replies, that *John Gorden* had iſſue *Joſeph Gorden*, who ſettled at *Shafford*, and there married, and had children there born; that *Joſeph Gorden* being ſick, became impotent and incapable of maintaining himſelf, ſo that the 19th of *Auguſt* 5 *Will. & Mar.* two juſtices of peace, upon complaint made to them by the overſeers of the poor, made an order and warrant, that the inhabitants of the ſaid pariſh ſhould allow 2*s.* for one week then paſſed, for the maintenance of *Joſeph Gorden*, his wife and children; which order and warrant were delivered to *Nicholas Seams* overſeer of the poor: that the 2*s.* were paid by the inhabitants: and he avers that 8*d.* part of the 2*s.* was for the maintenance of *Joſeph Gorden*, &c. To this the defendant rejoins, and traverſes, that the 8*d.* were for the maintenance of *Joſeph Gorden*, &c. The plaintiff demurs. Serjeant *Heath* and ſerjeant *Wright* for the plaintiff argue, that the traverſe, which the defendant hath taken, is immaterial. For if a man will traverſe, he ought to traverſe that which will reduce the point in debate to a concluſion, and then the traverſe is good. *Vaugh. 8.* But the defendant has not done ſo here, for he has traverſed that 8*d.* was for the maintenance of *Joſeph Gorden*, where every part, that was for the maintenance of his wife or children, was in effect for the uſe and maintenance of him. For by the common law, as well as by the law of nature, the huſband is obliged to provide for his

In debt on a bond of indemnity againſt the maintenance of J. S. his wife and children, it is a good breach that two juſtices made an order to pay 2*s.* for the maintenance of T. S. one of the children of J. S. his wife and children.

An additional averment that part of the 2*s.* was for the maintenance of T S. is ſurpluſage. And a traverſe of ſuch averment immaterial.

No traverſe is good which does not reduce the point in debate to a concluſion vide Burr. 1591. Dougl. 445.

The huſband is obliged to provide for his wife and the parents for their chil-

dren, vide 43. Eliz. c. 2. ſ. 7.—7 Jac. 1. c. 4. ſ. 8.—5 G. 1. c. 8. ſ. 1. 17 G. 2. c. 5. ſ. 1.

wife

wife and the parents for their children, and therefore every part of the 2*s.* is a breach of the condition. 2. The traverſe is too narrow, for he has not traverſed any part of the 8*d.* For if 2*d.* was for the uſe or maintenance of *Joſeph Gorden*, that was a breach of the condition. Mr. *Northey* and Sir *Bartholomew Shower* for the defendant argued, That the word children in the condition of the bond, ſhall not be extended further than to *Joſeph Gorden*, who was the child of *John Gorden*, and not to the children of *Joſeph Gorden*; which will be a full anſwer to the firſt objection of the ſerjeants. 2. They took a diſtinction between a general iſſue and a collateral iſſue, and cited to maintain the traverſe, *Co. Litt.* 281. *b. Cro. Eliz.* 84. *Dyer.* 115. *b.* upon the authority of which they concluded, that in this preſent caſe the traverſe was not too narrow. 3. They took exception to the replication, that the juſtices of peace out of ſeſſions could not make an order for an expreſs ſum for the maintenance of a poor man, but they agreed that they might ſign a rate made by the pariſhioners. But to this the court anſwered, that all the juſtices of peace in *England* did ſo, and therefore, though they have not authority to do it in ſtrictneſs of law, yet *communis error facit jus.* And the court reſolved, that the averment, that the 8*d* was for the maintenance and uſe of *Joſeph Gorden* was ill, and only ſurpluſage, for the 2*s.* was for the uſe of *Joſeph Gorden*, for that which is for the uſe of the wife and the children, is for the uſe of the huſband and father, becauſe the huſband and father is obliged to provide for them; and ſo it was a manifeſt breach of the condition of the bond. Then the plaintiff has led the defendant out of the way, and he has followed him with an immaterial traverſe. But they agreed that the traverſe was good enough, as to the not traverſing of the 8*d.* and every part thereof. And they agreed to the diſtinction made by Sir *Bartholomew Shower* and Mr. *Northey*. But then rejecting this averment out of the caſe, and the traverſe alſo, it is apparent, that this money came to the uſe of *Joſeph Gorden*, which was a breach of the condition of the bond. And therefore upon the merits of the cauſe the court ſaid, that they gave judgment for the plaintiff. *Note*, That where it is ſaid in the breach, that the 2*s.* were for a week then paſt; although this was objected to be too uncertain, yet it was held good enough, becauſe this bond cannot be ſued again.

Two juſtices may out of ſeſſions make an order for an expreſs ſum for the maintenance of a pauper.

Eaſter Term

7 Will. 3. C. B.

Sir George Treby *Chief Juſtice.*

Sir Edward Nevil
Sir John Powell
Sir Thomas Rokeby
} *Juſtices.*

Brittel *verſ.* Bade.

S. C. Salk. 185.

EJECTMENT for lands, *&c.* The defendant pleads, that the lands are held of the dean and chapter of *Worceſter, ut de manerio de D.* which is ancient demeſne, *&c.* The plaintiff replies, *quod bene et verum eſt*, that the lands aforeſaid *tenentur de decano et capitulo Wigorniae ut de manerio de D.* which is ancient demeſne, but he farther ſaith, that the lands are copyhold lands parcel of the ſaid manor, *&c.* The defendant rejoins, *quod ex quo praedictus* the plaintiff *cognovit*, that the lands are ancient demeſne, it is not material, whether they are copyhold lands or freehold, *&c.* The plaintiff demurs. And ſerjeant *Girdler* for the plaintiff argued, that the rejoinder is ill, for copyhold lands are of a nature ſo baſe, that the party cannot have a writ of right cloſe for them. *F. N. B.* 11. *m.* And if they ſhall be tried in the court of the lord, he in effect will be both judge and party. And for this reaſon they ſhall be tried by ejectment at common law. And he cited a caſe *Mich.* 6 *Will. & Mar. C. B. Rot.* 553. where in ejectment the defendant pleaded, that the lands, for which the ejectment was brought, were ancient demeſne; the plaintiff replied, that they were copyhold, *&c.* and upon demurrer it was adjudged for the plaintiff. And of this opinion was the whole court. But then ſerjeant *Trinder* for the defendant took exception to the replication, that it was repugnant

Ancient demeſne is no plea in ejectment for copyhold lands. R. acc. Salk. 56. Cro. Jac. 559. 3 Lev. 405. D. acc. F. N. B. 11. m. See alſo Burr. 1046. R. cont. 5 Co. 105.

Copyholds cannot be ſaid to be held of the manor.

Writ of right cloſe lies not for copyhold lands. 21 Aſſiſ. 13.

repugnant to itſelf; for by ſaying *tenentur*, &c. *ut de manerio*, the plaintiff confeſſes, that the lands were freehold; for copyhold lands cannot be holden of the manor, but (*a*) are parcel of the manor itſelf, which conſiſts of demeans and ſervices; and then when the plaintiff ſays, that they are copyhold lands, this is repugnant to what he had ſaid before; and therefore it is void. And of this opinion were *Treby* chief juſtice, *Nevill* and *Rokeby* juſtices. But *Powell* juſtice *contra*. For one ſays in common ſpeech, that copyhold lands are held of the manor. And *Treby* chief juſtice ſaid, that the juriſdiction of the court of the lord of the manor extends to lands held of the manor, and not to lands parcel of the manor. And therefore by the opinion of three juſtices the writ was abated.

(e) poſt. 1229. 1231.

Int. Hil. 6 Will. 3. C. B. Rot. 307.

Yaxley *verſ.* Rainer.

In an action for a copyhold fine for a licence to aliene, there is no occaſion to ſhew that the place where the fine was appointed to be paid is within the manor. Where a tender ought to be pleaded with a *tout temps priſt* it cannot be pleaded after an imparlance. R. acc. poſt. 254. Lutw. 238. vide Comb. 50. Barnes 4to. Ed. 353. 357.

DEBT brought by the plaintiff, lord of the manor of *Yaxley bull's hall*, againſt the defendant a copyholder of the ſame manor, for a fine for licence to aliene copyhold lands; and he declares, that there is, and time whereof, &c. was, a cuſtom within the manor of *Yaxley's bull's hall*, that all the copyholders within the ſame manor have uſed time whereof, &c. to pay to the lord of the ſaid manor upon every alienation of the ſaid copyhold lands, a fine for licence to aliene. That the plaintiff was lord of the ſaid manor, and that the defendant was a copyholder of the ſame manor. And that the plaintiff gave licence to the defendant to aliene, for which the plaintiff aſſeſſed ſo much for a fine, and gave day to the defendant to pay it at *Yaxley hall*; that the defendant aliened, and did not pay the fine to the plaintiff; by which an action accrued to the plaintiff, &c. The defendant imparles; and then as to part he pleads a tender. And to this the plaintiff replies, that the defendant ſhall not be admitted to plead it after an imparlance, &c. The defendant rejoins, *nul tiel record* of the imparlance, and this was found againſt the defendant. As to the other part the defendant pleads *nil debet*, and verdict for the plaintiff. And ſerjeant *Rotherham* moved in arreſt of judgment, that the declaration was ill, becauſe it did not appear, that the place where the money for the fine was appointed to be paid, was within the manor of *Yaxley bull's hall*; but rather it appeared, that it was appointed to be paid out of the manor, for it was appointed to be paid at *Yaxley hall*, which is not ſaid to be within the manor. And it ſhall not be intended to be the ſame with *Yaxley bull's hall*. And the lord cannot appoint a place for payment out of the manor, for then the tenant might be forced to go all over

over *England* in queſt of the lord, to the tenant's great prejudice. And he compared it to the caſe in *Latch* 122. *Grey* verſ. *Uliſſes*. But *Levinz* ſerjeant for the plaintiff agreed the caſe in *Latch*, and the reaſon of it was, becauſe rent ought to be paid upon the land. But in the principal caſe the fine is collateral. And beſides, the court will not intend (eſpecially after a verdict) that the place was out of the manor: ſince this intendment would deprive a man of a right, that accrued by a kind of contract. And that the lord may aſſeſs a fine out of the manor, all agreed. Then why may not he make it payable out of the manor alſo? And it was adjudged accordingly by the whole court, and judgment was given for the plaintiff. But if it had been for a forfeiture, the court ſaid that it might have been otherwiſe.

The lord may aſſeſs a fine out of the manor

Trinity Term

7 Will. 3. B. R. 1695.

Sir John Holt *Chief Juſtice.*

Sir William Gregory
Sir Giles Eyre *died* 3 June *in this term.*
Sir Samuel Eyre
} *Juſtices.*

Selway *verſ.* Holloway.

Leaving goods in an inn-yard from whence a carrier ſets out, Is no delivery to the carrier. Vide Blackſt. 908.

AN agreement was made between *Merry* and *Selway*, now plaintiff, for a certain parcel of hops for ſo much money, and that *Merry* upon his delivery of them to *Holloway*, the now defendant (who was a common carrier) ſhould have his money. *Merry* brought his action for this money, and recovered, upon evidence that the hops were left at the inn where *Holloway* lodged, without proving any delivery to *Holloway* or his ſervant; but only a woman (who had ſerved *Holloway* before, but had quitted his ſervice for five years) ſaid to the carman, if he laid them down *Holloway* would find them. And upon the trial it was proved, that there were many carriers who lodged at the ſame inn, but none of them went out the ſame day. *Holt* chief Juſtice not approving this verdict, the cauſe being tried before him, a new trial was granted, and *Merry* had another verdict given for him. Upon which *Selway* brought this action againſt *Holloway* the carrier; and ſome of the jurymen, who had been jurymen in the other cauſe between *Merry* and *Selway*, being upon the jury in this cauſe, gave a verdict for *Holloway*, which in effect was contrary to their former verdict; for if they were not delivered to *Holloway*, as they have now found that they were not, then they ought not to have given a verdict for *Merry* againſt *Selway*. Upon which *Selway* moved for a new trial in this cauſe between him and *Holloway*. But the court ſaid, that they could not help the two former verdicts, but they

they were all of opinion, that the hops could not be ſaid to be delivered to *Holloway*; and therefore a new trial was denied.

Prinn. *verſ.* Edwards.

S. C. 3 Salk. 145.

DEBT upon a judgment. The defendant pleads, that a writ of error is brought returnable in the exchequer chamber upon the ſame judgment, which is yet depending, and prays, *quod eat inde ſine die quouſque*, &c. The plaintiff demurs. And adjudged for him, becauſe the defendant ought to have concluded *quod breve caſſetur*. But *eat inde ſine die quouſque*, &c. is a good concluſion, where excommunication is pleaded in abatement; becauſe there re-ſummons lies, but it does not lie in this principal caſe. But *per curiam* theſe actions are vexations, and therefore not to be countenanced; and for this reaſon common bail has been often allowed in theſe actions. And *Holt* chief juſtice ſaid, that a writ of error in effect ſuperſeded the judgment, to prove which he cited a caſe between *Reed* and *Pierpoint*, which in effect was thus: (*b*) *J. S* has judgment given againſt him for 20*l.* and acknowledged a ſtatute for 20*l.* and died, have made *J. N.* executor, and leaving aſſets only to the value of 20*l.* *J. N.* brought a writ of error upon the judgment, and pending the writ he paid the ſtatute; and it was adjudged, that he might juſtify it againſt the judgment, becauſe it was ſuperſeded by the writ of error. Judgment was given in the principal caſe, that the defendant ſhould anſwer over. The ſame judgment was given *Mich.* 7 *W.* 3. *B. R.* between *Rowley* and *Rapſon* (*c*) for the ſame reaſons. And then it was reſolved, that a writ of error pending is a good plea in a *ſcire facias* upon a judgment. The ſame judgment was given *Mich.* 8 *Will.* 3. *B. R.* between *Chaſeworth* and *Merriman*. Mr. *Day*. *Hill.* 6 *Will.* 3. In the exchequer chamber all the juſtices and barons (except baron *Turton*) were of opinion, that in debt upon judgment, error brought upon the judgment is a good plea in delay *quouſque*, &c. but they did not give judgment. Between *King* and *Tuck*.

A writ of error depending is a good plea in abatement to an action of debt upon a judgment (*a*) R. acc. Skin. 590. Holt 198. Carth. 1. Lill. Ent. 11. 2 Rich. Pr. B. R. 27. ſemb. acc. 7 Mod. 140. R. cont. 4 Mod. 247. 7 Mod. 62. ſemb. cont. 1 Mod. 121. R. acc. to a *ſci fa.* poſt. 1295. If ſuch plea concludes with a prayer of *quod eat inde ſine die quouſque*, it is bad. R. acc. Skinn. 590. Holt 198. Carth 2. If an executor brings debt on a judgment againſt his teſtator, he may pending the writ pay a ſtatute. R. Yelv. 29, cit. 4 Mod. 248. 7 Mod. 140. (*b*)

(*a*) Note, The modern practice is to move to ſtay proceedings until the writ of error is determined; and vide Burr. 2454.

(*b*) This caſe is not truly ſtated here or in any of the reports of it which are Yelv. 29. Cro. Eliz. 734. 822. and 2 Brownl. 39, 81. ſee the record in Coke's Entries 152.

(*c*) Skinn. 590. Holt 198.

Rex *verſ.* Bithell.

S. C. Salk. 348. Holt 145. 12 Mod. 74. and with the arguments of counſel 5 Mod. 19.

BITHELL being committed to the keeper of *Newgate*, to be kept in ſafe cuſtody, until he ſhould pay a fine, which was ſet upon him by the court at the *Old Bailey*, upon a conviction of having exchanged broad money

A court of oyer and terminer cannot commit an abſent man without proceſs.

Nor can they commit to any other than their immediate officer.
But tho' a commitment be irregular in both these particulars, the court will not discharge the party, if cause appears for his detention, on an habeas corpus R. acc. March. 52. vide Vaugh. 135.

ney for clipped, against the new act of parliament, procured a *habeas corpus*, to bring him to the king's bench, in order to be turned over to the *Marshalsea*, pretending that there were several actions depending against him. To which *habeas corpus* the keeper of *Newgate* returned, that *Bithell* was committed to him, safely to be kept in custody, *virtute cujusdam ordinis curiae* of the sessions at the *Old Bailey*, *tenor cujus sequitur in haec verba*, *viz.* that *William Bithell* is known to have exchanged broad money for clipped, *ideo consideratum est per curiam quod predictus Willelmus Bithell solvat domino regi mille libras bonae et legalis monetae Angliae pro fine, et remaneat in gaola de Newgate quousque, &c.*

Sir *Bartholomew Shower*, Mr. *Northey*, *&c.* took exception to this return.

1 That it appears by this return, that there was no commitment, for it is said, that *Bithell* was commited *virtute cuiusdam ordinis*, in which order no commitment appears.

2. It does not appear, that *Bithell* was present in court, and then the court could not commit him without process of *capias*.

3. It does not appear, that *Bithell* was in prison before; and no implication by the word *remaneat* shall aid it.

4. That every commitment ought to be to the immediate officer of the court, and therefore in this case it ought to have been to the sheriff of *Middlesex*, who was the immediate officer of the court, and not to the gaoler of *Newgate*, who is but a subordinate officer of the sheriff, and no officer of the court.

Against these objections the king's counsel argued, that although the return was not so good as it might have been, yet sufficient cause appeared upon the return, to remand him. And for this reason (as they told me, for I was not present in court when judgment was given) the prisoner was remanded to *Newgate*, notwithstanding that the persons, who were pretended to be bail for him in the actions depending against him in this court, declared that they rendered him in discharge of themselves, the court only regarding it as a trick. But the court was of opinion, that the return was not good, for when a man is taken in execution, he ought to be committed to the sheriff, who is the immediate officer of the court, and the party ought to be present in court, when he is committed, otherwise the want of a writ is not supplied. And by *Holt* chief justice, if a man against whom judgment is given in the king's bench, be walking in *Westminster-hall*, the king's bench may send a tipstaff, to bring him into court, and the court may commit him in execution. But otherwise, if he were at *Charing-cross*.

Rex

Rex & Regina *verſ.* Kempe.

S. C. Salk. 465. 12 Mod. 77. Comb. 334. Holt 419. with the arguments of counſel. 4 Mod. 275. Carth. 350. Skinn. 446, 580.

A *Scire facias* iſſued out of the petty bag in chancery, to repeal letters patent bearing date the 29th of *December* in the 27th year of the reign of king *Charles* the ſecond, by which that king granted to the defendant the office of ſearcher in *Plymouth*. The caſe was ſhortly thus: king *Charles* the ſecond granted this office to *John Martin durante bene placito*. Afterwards by other letters patent, reciting the grant to *Martin*, he granted this office to *Fryer* for life, to commence after the death, ſurrender, or forfeiture of *Martin*. *Fryer* afterwards ſurrendered his letters patent to the king; who afterwards, in conſideration of the ſurrender of the letters patent of *Fryer*, granted by letters patent this office to *Henry Kempe* for life, to commence after the death, ſurrender, forfeiture, or other determination, of the eſtate of *Martin*, and afterwards to *William Kempe* for life, (who is the now defendant) to commence after the death, ſurrender, forfeiture, or other determination of the eſtates of *Martin* and *Henry Kempe*. *Henry Kempe* dies, and then king *Charles* the ſecond dies; and now this *ſcire facias* is ſued againſt the defendant, to repeal theſe letters patent.

The king may grant a miniſterial office in reverſion. S. C. 3 Danv. Abr. 161. pl. 12. Adm. 4 Co. 4. a. 2 Roll Abr. 154. l. 7. Blo. Tit. patents. pl. 30. 52. 54, 37. Semb. acc. Dyer 80. b. 259. a. & vide Dyer 270. b. (1)

To commence upon the death ſurrender or forfeiture of his officer at will. Semb. acc. Dyer. 94. a &c. See Dyer 197. b. pl. 47.

This caſe was argued ſeveral times by *Gould* king's ſerjeant and ſerjeant *Pemberton* for the king, and by Sir *Thomas Powis*, Mr. *Northey*, *&c.* for the defendant, And now Sir *Samuel Eyre*, and *Holt* chief juſtice (there being but two judges in court) gave their opinions in ſolemn arguments for the defendant. Sir *Samuel Eyre* juſtice for the defendant ſaid, that the principal *quære* was, whether the letters patent of *Fryer* were good? For admitting that they were good, the defendant ought to have judgment: for the conſideration of the letters patent of *Kempe* was the ſurrender of thoſe of *Fryer*; and if thoſe of *Fryer* were good, then the conſideration of thoſe of *Kempe* was good, and by conſequence the grant. But if the letters patent of *Fryer* were ill, then there was no conſideration in the patent of *Kempe*, and the king was deceived in his grant, and therefore it was void in law. But he was of opinion, that the letters patent of *Fryer* were good; againſt the validity of which it was objected, 1, That an eſtate for life, as this of *Fryer* was, could not depend upon an eſtate at will; to which objection he anſwered, that this grant of office did not reſemble that of lands, for an office is no longer in being than it is in grant by the king; for the king has no reverſion of an office, nor can he grant it by that name, as 8 *Hen.* 7. 12. 6 *Hen.* 7. 14. 2 *Brownl.* 242. *Cro. Car.* 203. 8 *Co.* 50. *b.* 8 *Hen.* 7. 1 & 3. But the king may grant it in

If the avowed conſideration of the king's grant is void, the grant is void. R. acc. 9 Co. 93. b. &c. See Hob. 203.

4 Mod. Cases 1029.

The king has no reverſion of an office, nor can he grant it by that name.

(1) As to ſuch a grant of a judicial office, See 4 Co. 4. a. 2 Roll. Abr. 154. l. 8. Co. Lit. 13th. Ed. 3. b. and n. 5. and the caſes there cited.

poſſeſſion, or to take effect *in futuro*. 8 *Hen.* 7. 12. 1 *Hen.* 7. 29. 6. 8 *Co.* 55. *b. Co. Lit.* 3. *b. Cro. Car.* 203. 3 *Leon.* 31. Nor is a particular eſtate neceſſary, to ſupport this grant of the office *in futuro*.

2, It was objected, that the king was deceived in his grant to *Fryer*, which was to commence after the death, ſurrender or forfeiture of *Martin*; for the eſtate of *Martin*, being only an eſtate at will, it could not be ſurrendered or forfeited; for thoſe acts, which in caſes of other particular eſtates will amount to a ſurrender or forfeiture, in caſe of an eſtate at will amount to a determination of the will; and therefore there cannot be a ſurrender or forfeiture of an eſtate at will (to which laſt aſſertion Mr. Juſtice *Eyre* agreed). And in fact the eſtate of *Martin* did not determine by his death, ſurrender or forfeiture, but by the death of king *Charles* the ſecond; and therefore this grant to *Fryer* could not take effect, becauſe *Martin*'s eſtate did not determine by his death, ſurrender or forfeiture.

To anſwer which objections he ſaid, that it ought to be conſidered, 1. When the king ſhall be ſaid to be deceived, to avoid a grant. 2. In what manner the grant of the king ſhall take effect, and what conſtruction it ſhall have.

A falſe or partial ſuggeſtion by the king's grantee, to the king's prejudice, will make the king's grant void. D. acc. Hob. 229. & See poſt. 298. See alſo Cro. Eliz. 632. Yelv. 48. 1 Co. 44. a. 51. a. b. 3 Leon 5.

As to the firſt, where the matter expreſſed to be ſuggeſted on the part of the grantee is falſe, and to the prejudice of the king, there if the king be deceived, that will avoid the grant.

But a miſtake in the law on the part of the king will not. R. acc. 6. Co. 56. a. b.

But where the words are the words of the king, and it appears that he has only miſtaken the law; there he ſhall not be ſaid to be deceived, to the avoidance of the grant. As if there is an eſtate *in eſſe* not recited, or when the grant is recited to be of leſs value than it actually is, by the ſuggeſtion of the party, there the king is deceived, and the grant ſhall be void. For in the firſt caſe the intent of the king was, to grant an eſtate to take effect in poſſeſſion, which intent cannot take effect becauſe there was an eſtate before *in eſſe* not recited. In the ſecond caſe if the grant were good, the king ſhould grant more than he had deſigned to do. But if the king is not deceived in his conſideration, nor otherwiſe to his prejudice, but his intent was to paſs the lands, only he is deceived in the law, nevertheleſs his grant ſhall be good. To warrant which diverſity, he cited *Dyer.* 352. *a.* 197. *b. Cro. Jac.* 34. 2 *Brownl.* 242. 11 *Co.* 4. *b.* 1 *Mod.* 196. *Lane.* 75. 31 *Hen.* 6. 23. 6 *Co.* 55. *a.*

2. In

2. *In* what manner theſe letters patent of the king ſhall be conſtrued, when he is miſtaken in his own words and affirmation. And he ſaid, that it is a rule in law, that where the king is not deceived by the ſuggeſtion of the party, and it appears by the letters patent that the intent of the king was that the patentee ſhould take, ſuch conſtruction ſhall be made, that the grant ſhall not be void. 6 *Co.* 6. *a.* 10 *Co.* 67. *b.* 9 *Edw.* 4. 11. 8 *Co.* 56. *a.*

Where the king tho' miſtaken in his own words, is not deceived by the party, ſuch conſtruction ſhall be put upon the grant as ſhall give it effect. D. acc. 9 Co. 50 a. 1 Mod. 196. poſt. 302.

Now to apply this to the preſent caſe. In theſe letters patent to *Fryer* the king is not deceived, for the precedent letters patent are truly recited, and the ſuggeſtion of the party is true, and the intent of the king was, that *Fryer* ſhould take by theſe patents; and therefore ſuch conſtruction ought to be made, as the grant may take effect.

And as to the commencement of this grant to *Fryer*, it ſeemed to him that the king's intent was, that *Martin* ſhould hold it for his life: that is to ſay, that he would not determine his will during the life of *Martin*, but that after *Martin*'s death the new letters patent ſhould take effect. But ſince *Martin*'s grant determined by the king's death, this grant of *Fryer*'s ſhall commence after the death of *Martin*. And for theſe reaſons he was of opinion, that the defendant ought to have judgment.

Holt chief juſtice for the defendant ſaid, that the queſtion was, whether *Fryer*'s letters patent were good? For if they are not, thoſe of *Kempe* will not be good neither. But he was of opinion, that thoſe of *Fryer* were good.

1. It was objected, that they were void, becauſe they were not to commence upon the determination of the eſtate of *Martin*, but upon his death, ſurrender, or forfeiture. His death might happen, but not his ſurrender of forfeiture, becauſe it was but an eſtate at will.

To which he anſwered, that an eſtate at will among common perſons cannot be ſurrendered; becauſe, being at the will of both parties, either of the parties may determine his will. But in the caſe of the king, it is not at the will of both parties, but of the king only, and the party cannot determine his will but by ſurrender. For if it be an office of truſt, forbearance of execution is fineable; and ſurrender in ſuch caſes is conſtantly practiſed, as in the caſe of *Hale* chief juſtice and *Scroggs* chief juſtice.

The king's tenant at will may ſurrender his eſtate.

Then if this office granted at will was surrenderable, (as by him it was) the expreſſion of the king in his letters patent was proper enough.

2. It was objected, that it was not forfeitable.

The king's tenant at will may forfeit his eſtate.

To which he anſwered, that the king's tenant at will may be ſaid to forfeit. For perhaps the king upon ſuggeſtion of crimes committed by the party, before he determine his will, ſhall be informed by inquiſition of record, and then upon the very return of the inquiſition the office is forfeited. But if it were an eſtate for life, then there ought to be a *ſcire facias* to repeal the letters patent.

Admitting then the law to be ſo, this grant to *Fryer* was good, and might have commenced after the death, ſurrender, or forfeiture of *Martin*.

But it was farther objected againſt this grant to *Fryer*, that ſuppoſe the king had determined his will during *Martin*'s life, yet the grant to *Fryer* could not have taken effect, becauſe the eſtate of *Martin* did not determine by the death, ſurrender, or forfeiture of *Martin*; and then if the grant to *Fryer* were good, there would be a freehold to commence *in futuro*, which is againſt the rules of law.

To which he anſwered, that this grant would nevertheleſs have taken effect, but not till the time limited by the letters patent, which then muſt have been *Martin*'s death, and in the mean time the king might have granted it to whomſoever he pleaſed; and when *Martin* died, *Fryer*'s grant would have commenced.

An office or rent *de novo*, tho' freehold, may be granted to commence *in futuro*. Vide 2 Wilſ. 166. 2 Bl. Com. 165, 314. upon a contingency, or with fractions.

And as to the objection that a freehold cannot be granted to commence *in futuro*, he anſwered, that it muſt be underſtood of a freehold *in eſſe*, as 5 *Co.* 94. *b.* *Berwick*'s caſe; but a rent *de novo* may be granted to commence *in futuro*, or may be granted in fee with fractions, 1 *Co.* 87. *a.* *Corbet*'s caſe, or to commence upon any contingency; becauſe it is a creature of the grantor, who may mould it in what form he pleaſes. And the grant of this new office reſembles the grant of a rent *de novo*; for ſince there is no eſtate *in eſſe*, but it is new created by the king, he may mould it as he pleaſes. And although there is ſuch an office as this of a ſearcher, yet the eſtate is new, and ſubject to any limitations. And no reaſons can be given, why a grant *in futuro* of ſuch a new office ſhould not be good, as well where there is

is such precedent estate, as where there is none at all. For suppose, there being before a grantee for life, the king grants to another, to commence after the death of the grantee for life: this first grant for life is of no avail to make good the last grant, for the last grant is not a remainder, for then it ought to have been created at the creation of the particular estate: nor is it a reversion, for neither the king nor any other has any reversion of the office, and a grant by such name is void; but the king may grant an office in reversion; not in respect of the particular estate, but it is only a future interest to commence *in futuro*. *Young* vers. *Stawell*, *Cro. Car.* 203. and *Young* versus *Fowler*, *Cro. Car.* 400.

But if the king has the inheritance of an office, such a grant as this had been void. And it seemed to him, that the king's intent was, not to determine his will during *Martin*'s life, but that after his death the grant to *Fryer* should commence; and not to give opportunity to any solicitation, to determine the estate of *Martin* before his death. Lastly, *Fryer*'s letters patent being good, the surrender of them was a good consideration in the grant to *Kempe*, so that the letters patent granted to *Kempe* were good. And therefore judgment was given for the defendant.

Rook *vers.* Clealand.

Intr. Trin. 6 Will. & Mar. C. B. Rot. 508.

S. C. Lutw. 503.

A Man, seised of a reversion expectant upon an estate for life, bound himself and his heirs in a bond, and died, living the tenant for life; this reversion shall be *assets* in the hands of the heir. Adjudged this term *in C. B.*

Reversion on an estate for life, is affects by descent, *quando acciderint*, R. acc. Blackst. 1230. adm. Bro. C. C. 256. post. 784. Carth. 129. see also 6 Co. 42. a. 58. b. Bro. C. C. 246. 260. Carth. 126. 3 Lev. 286. 1 Show. 244.

Walter *vers.* Rumbal.

Pleadings and verdict, 4 Mod. 385. vol. 3. 75.

WALTER brought an act of *trover* against the defendant *Rumbal* for 6 hogs, 5 pigs, &c. Upon not guilty pleaded, the jury find a special verdict; that *John Smith* the 16th of *October* 8 *Car.* 2. was seised in fee of a messuage and a certain parcel of land containing 200 acres of land, part of which lay in the hundred of *Kinalsey* in *Wiltshire*, and part in the hundred of *Andover extra* in the county of *Southampton*; and being so seised, he demised it by indenture to *John Walter* for 21 years, reserving 43*l.* 10*s.* rent annually, to be paid at two equal portions at *Lady-day* and *Michaelmas*; that the lessee entered and was thereof possessed by virtue of the lease aforesaid; and that rent being in arrear, the defendant as bailiff to *John Smith* distrained the cattle,

Personal notice of a distress is sufficient to warrant a sale under the 2 W. & M. s. 1. c. 5. s. 2. S. C. 4 Mod. 390. Salk. 247. Comb. 336. 12 Mod. 76. Notice to the owner is sufficient as against him. S. C. 4 Mod. Salk. Comb. and 12 Mod. ubi supra

Where lands are contiguous and leased by one demise rendring an intire rent, tho' part of them may lie in one county and part in another, and the landlord distrains cattle on the lands in both counties, he not only may, but ought to drive the whole distress to the same pound. S. C. 4 Mod. Salk. Comb. & 12 Mod. ubi supra. vide 1 & 2 P. M. c. 12. f. 1. & 2 Inst. 106.

cattle, for which the action is now brought, being *levant* and *couchant* upon this land, *viz.* part upon the parcel of the land which was in *Kinalsey*, and part upon the other parcel which was in *Andover extra*. They find that the plaintiff was owner of this cattle, and that the defendant after the distress taken gave notice to the plaintiff according to the statute of 2 *Will. & Mar. sess.* 1 *cap.* 5. and that the plaintiff *Walter* did not replevy them within five days. And that after the five days the defendant sent for the constable of *Kinalsey* and the constable of *Andover extra*. That by two appraisers, sworn by the constable of *Kinalsey*, and in the presence of the constable of *Andover extra*, the cattle were appraised. And that afterwards the defendant sold them, and left the overplus with the constable for the use of the plaintiff, *&c.* And serjeant *Gould* and Mr. *Pratt* for the plaintiff objected.

Upon the sale of such distress the appraisers need only be sworn by the constable of the hundred in which the distress is impounded. S C. 4 Mod. Comb. & 12 Mod. ubi supra.

1. That the notice is ill, for the act says, that it should be at the chief mansion-house or other notorious place upon the premisses; but in this case it was given to the plaintiff himself. *Sed non allocatur*; for *per curiam* the intent of the act was only, that the party should have notice, which is performed by this means, better than if it had been left at the house or other most notorious place.

Where a special verdict finds that lands lying in adjoining counties are demised by one lease under an intire rent they shall be presumed to lie contiguous.

2. They objected for the plaintiff, that the jury have found, that notice was given to the owner of the goods, and not to the tenant of the land. And although the act is in the disjunctive, yet it ought to have a reasonable construction; and it is more reasonable, that the notice should be given to the tenant of the land, because he might shew that the rent is satisfied, which does not lie in the knowledge of the owner of the cattle. *Sed non allocatur*; for the act has expressly provided, that notice may be given to the owner of the goods. But if the tenant had sued a replevin, then the notice must have been given to him; but notice to the owner sufficiently affects the owner, and the plaintiff is found owner of the cattle, therefore notice to him is sufficient.

On a special verdict in trover by the owner of a distress finding the distress and sale, the jury need not shew that the tenant did not replevy. Nor that the distress was sold for the best price.

3. They objected, that the jury had not found, that the constable of *Andover* administered the oath to the appraisers, but that he was only present. Now the constable of *Kinalsey* had no jurisdiction over that which arose within the hundred of *Andover*, and therefore the goods distrained within the hundred of *Andover* were sold without having been appraised by sworn appraisers, for the oath administered by the constable of *Kinalsey* as to those goods in *Andover* was void, which is contrary to the direction of the statute. And although the constable of *Andover* was present, that does not

aid

aid it no more than where the mayor of a corporation, being a juſtice of peace, made an order and ſigned it, and afterwards this order was ſigned by another juſtice of peace, and it was ruled naught, upon 14 *Car.* 2. *cap.* 12 becauſe the laſt juſtice was not actually preſent at the ſigning of it as the ſtatute provides. So here becauſe the conſtable of *Andover* did not adminiſter the oath though he was preſent, the appraiſement of theſe goods in *Andover* was ill. But to this it was anſwered by the court, that the oath adminiſtred by the conſtable of *Kinalſey* was ſufficient, for the lands, although they lie in divers counties, yet they ſhall be intended contiguous, for they were demiſed by one demiſe rendering one intire rent; then the diſtreſs being lawfully taken for one intire cauſe, as it was here, the chaſing of them is a continuance of the taking, and the difference of the counties will make no diverſity of the diſtreſſes; but the diſtrainer, as the caſe was, had liberty to chaſe them all into *Wiltſhire*; then the officer where the diſtreſs is chaſed, is within the act, becauſe the diſtreſs is there lawfully in the cuſtody of the law; and therefore the oath, adminiſtered by the conſtable of *Kinalſey*, good for the whole. But it was objected to this, that the words of the act are (the *officer* where ſuch diſtreſs ſhall be taken) and now the goods, which were taken in *Andover* cannot be ſaid to be taken in *Kinalſey*; to which the court anſwered, that the chaſing of the diſtreſs over is a continuance of the taking of the diſtreſs, and the party, ſince it was for one intire cauſe, cannot ſever the diſtreſs, but ought to chaſe them altogether, and impound them in one pound, by 1 & 2 *Ph. & Mar. cap.* 12.

Order by two juſtices according to 14 *Car.* 2. *cap.* 12. muſt be ſigned by each in the preſence of the other.

Chaſing a diſtreſs over is a continuance of the taking. R. acc. 2 Wilſ 354. 3 Wilſ. 295. D. acc. Latch. 60.

4. It was objected, that the jury have not found, that the tenant had not brought a replevin within the five days. *Sed non allocatur*; for the jury have found, that the owner did not replevy within the five days, which, as to the plaintiff who is the owner, is ſufficient.

5. It was objected, that they do not find, that the goods were ſold for the beſt price. To which the court anſwered, that *that* ſhall be intended, ſince the appraiſers were ſworn. For which reaſons judgment was given for the defendant. But *Holt* chief juſtice ſaid in this caſe, that if lands in *Middleſex* and *Hampſhire* be demiſed by one demiſe, reſerving one intire rent, the diſtreſs taken in *Middleſex* cannot be chaſed into *Hampſhire*, becauſe the counties are not adjoining.

Diſtreſs taken in two counties, which are not adjoining, cannot be chaſed out of the one county into the othe

Maſters

Maſters *verſ.* Lewis.

S. C. 3 Salk. 429. Holt 429. Comb. 347. Skinn. 516. 5 Mod. 75, 92 and with the arguments of counſel. Carth. 344.

The creditor of an inteſtate cannot under the cuſtom of *London*, attach any of his debts by levying a plaint againſt the ordinary. R. acc. *T. Jones*, 165.

CHARLES Maſters was indebted to *Goſtwright*, and had alſo a debt owing to him by *Lewis* the defendant. *Maſters* dies inteſtate, and *Goſtwright* enters a *caveat* in the ſpiritual court, and then enters a plaint in the court of the ſheriffs of *London* againſt the archbiſhop of *Canterbury* as ordinary, to attach this debt in the hands of *Lewis*, and upon default has judgment and execution. Then the archbiſhop grants adminiſtration to *Alice Maſters*, who brings this *indebitatus aſſumpſit* againſt *Lewis*, who pleads (1) this foreign attachment in bar. The plaintiff demurs, and Sir *Bartholomew Shower* and Mr. *Dee* for the defendant argued, that the foreign attachment in this caſe was good, and the defendant's debt well attached, and therefore he ought not to be liable over to the plaintiff. 1. They ſaid that this foreign attachment had *had* the approbation of all courts for more than an hundred and fifty years: and there was no inconvenience, for if the defendant, againſt whom the attachment is ſued, comes within the year and day, he may ſue a *ſcire facias* againſt the plaintiff, to diſprove the debt. 2. They ſaid that it had been allowed in a caſe of the very ſame nature, *Calthrop*, *Rep.* 66. And though it may be objected, that this may work a *devaſtavit* in the adminiſtratrix, for by this means a debt upon a ſimple contract may be ſatisfied before a debt upon ſpecialty; they anſwered, that the adminiſtratrix might well plead in an action brought againſt her, *plene adminiſtravit*; for ſhe is not chargeable for more than that which comes to her hands. And by 5 *Co.* 82. *b. Snelling*'s caſe, the adminiſtrator is bound by the cuſtom of *London*, to pay a debt by ſimple contract as well as a debt upon ſpecialty. And although in this caſe it may be objected, that the ordinary was not liable to any action of debt, they anſwered, that by 13 *Ed.* 1. *cap.* 19. the ordinary is liable, ſo long as he hath *aſſets*, 2 *Inſt.* 397. But they ſaid, that admitting, that this judgment in the attachment was erroneous, nevertheleſs ſo long as it continues in force, it ſhall bind the parties. For which reaſons they prayed judgment for the defendant.

But *Northey* & *contra* for the plaintiff. Of which opinion was *Holt* chief juſtice, Sir *Giles Eyre* and Sir *Samuel Eyre* juſtices. For, 1. Foreign attachment (by them) cannot charge any perſon but a debtor, and the ordinary is no debtor, before goods come to his hands. 5 *Co.* 82. *b.* 9 *Co.* 39. *b. Henſloe*'s caſe, *F. N. B.* 120. *D.* 2. Garniſhment cannot be, but where the garniſhee is

Foreign attachment charges only a debtor. Ordinary no debtor, before goods come to his hands. Garniſhment cannot be, but where the garniſhee is liable to the action of the defendant. Semb. acc. Dougl. 363. Vide Tamen. Dougl. 16. Garniſhee may plead whatever the defendant might have pleaded. D. acc. poſt. 347.

(1) Note, a foreign attachment may now be given in evidence. Poſt. 180. Bl. 834. 3 Will. 297.

liable

liable to the action of the defendant; for the garniſhee may plead all things that the defendant might have pleaded. But in this caſe the ordinary, who was the pretended defendant, could not have had an action againſt *Lewis* for this money. Therefore if this foreign attachment ſhall be allowed good, it will be in effect to adjudge a power in the attachment to give an action, to a perſon who cannot have one by law, which the attachment cannot do. But where there is an executor or adminiſtrator, a foreign attachment may well be allowed, becauſe they may be ſued, or may ſue. And as to the objection, that the judgment although erroneous ſhall bind the parties until it be reverſed, the court anſwered, that *non valet exceptio ejus rei cujus petitur diſſolutio.* And the adminiſtratrix, in this caſe could not reverſe this judgment, becauſe ſhe is not party to the record. And by *Holt* chief juſtice, *Snelling*'s caſe, 5 *Co.* 82. *b.* where it is ſaid, that the adminiſtrator is bound by the cuſtom to pay a debt upon ſimple contract, *&c.* is not found law. And afterwards *Mich.* 7 *Will.* 3. *in B. R.* 1695. (Sir *Giles Eyre* being dead, and Sir *Thomas Rokeby* made juſtice in his place) the whole court of king's bench gave judgment for the plaintiff.

Ordinary cannot have debt againſt an inteſtate's debtor. D. acc. 9 Co. 39. a. Co. Litt. 292. 6.

Executors and adminiſtrators are within the cuſtom of foreign attachments. R. acc. 1 Rol. 105. Calthr. 66. ſed. vide Bl. 834. 3 Wilſ. 297.

Memorandum, *Sir* Edward Ward *knight, attorney general, was this term made ſerjeant at law, and lord chief baron of the Exchequer, in the place of Sir* Robert Atkins (*but this was* nolens volens,) *And Sir* Thomas Trevor *ſolicitor general the eighth of* June *ſucceeded in the office of attorney general. And Sir* John Hawles *knight, of* Lincoln's Inn, *ſucceeded in the office of ſolicitor general. And Sir* Salathiel Lovell *knight, recorder of* London, *was made king's ſerjeant.*

Mich. Term.

7 Will. 3 B. R. 1695.

Sir John Holt *Chief Juſtice.*

Sir William Gregory
Sir Thomas Rokeby
removed this term out of the Common Pleas in the room of Sir Giles Eyre
Sir Samuel Eyre
} *Juſtices.*

Sir John Dalſton *verſ.* Janſon.

S. C. Salk. 10. 12 Mod. 73. with the arguments of counſel and more at large Comb. 333. 5 Mod. 90. Pleadings. 5 Mod. 89. Salk. 703. vol. 3. 79.

Trover cannot be joined with caſe upon the cuſtom of the realm. R. acc. 3 Salk. 204. R. cont. 1 Vent. 223. 2 Wilſ. 319. D. cont. 1 Term Rep. 277. ſee alſo 1 Vent. 365. 3 Lev. 99. 1 Term Rep. 274. 3 Wilſ. 348. and Bl. 848. in which caſe De Grey, C. J. and it ſhould ſeem properly, refers to the nature of the action, as the criterion for determining what actions may and what cannot be joined.

ACTION upon the caſe grounded upon the cuſtom of the realm againſt a common carrier, and *trover*, were joined in one declaration. Upon not guilty pleaded, verdict for the plaintiff. And it was moved in arreſt of judgment, that theſe actions cannot be joined; for although the caſe upon the cuſtom ſeems to be founded upon a *tort*, yet it ſounds in contract; and then an action founded upon contract cannot be joined with an action founded upon a *tort*, as *trover*. And 1 *Sid.* 244. *Matthew verſ. Hopkins*, for this reaſon in a like caſe judgment was arreſted. And of the like opinion was the whole court at preſent, and therefore judgment in this caſe was arreſted.

Penſe

Penſe *verſ.* Prouſe.

S. C. Carth. 360. Comb. 344.

If a ſuit is inſtituted in the ſpiritual court for a rate, part of which is bad, the court will grant a prohibition for the whole. Semb. acc. 1 Mod. 261

MR. *Pratt* moved for a prohibition to the conſiſtory court of the biſhop of *Exeter*, where his client was libelled againſt for a rate aſſeſſed by the churchwardens by cuſtom for repair of the church, as well the chancel as the nave of the church. And reſolved 1. That the pariſhioners, and not the churchwardens, ought to aſſeſs the rate. 2. That the parſon ought to repair the chancel and not the pariſhioners, but that the pariſhioners ought to repair the nave of the church. And by *Holt* chief juſtice, by the canon law the parſon ought to repair the whole; but by the cuſtom of *England* the parſon ſhall repair the chancel, and the pariſhioners the nave of the church. And by the cuſtom of *London* the pariſhioners ſhall repair the chancel alſo. But *Rokeby* juſtice was of opinion, that the pariſhioners ought to contribute to the charge of the ornaments of the chancel, but *Holt* doubted of that. Then Sir *Bartholomew Shower* moved, that a prohibition ſhould be granted, only *quoad* the ſuit for the rate for the chancel. But reſolved, that the prohibition ſhall be for the whole, beauſe it is but one rate, and entire; but if a man libel for two diſtinct things, the one of which is of eccleſiaſtical conuſance, and the other not, a prohibition ſhall be granted, *quoad* that which is of temporal conuſance, and they of the court *Chriſtian* ſhall proceed for the other. Therefore in the principal caſe a prohibition was granted.

The pariſh ought to repair the nave of the church. D. acc. 1 Mod 236. & ſee 2 Inſt. 489. The parſon the chancel. D. acc. 1 Mod. 261. 5 Mod. 391.

Q. Whether pariſhioners are bound to contribute to the charge of the ornaments of the chancel.

Where a man libels in the ſpiritual court for an intire thing of a part of which the court has no cognizance, there ſhall be a prohibition for the whole, but where he libels for two diſtinct things, of one of which only the court has no cognizance, a prohibition quoad.

Herbert *verſ.* Walters.

S. C. 12 Mod. 85. Holt 191. 1 Salk. 205. Skinn. 591.

On avowry for a poor rate if the plaintiff is nonſuit at the trial, and the jury omits inquiring of the damages, the court will award a writ of inquiry. S. C. Comb. 344. 5 Mod. 118. R. acc. 5 Mod. 76, 77. Bl. 921. ſee alſo Comb. 11 Str. 1021. B. R. H. 138. Str. 972. Bl. 763. 1 Lev. 255. 1 Sid. 380. 10 Co. 118. b. 4 Leon. 245.

REPLEVIN. The defendants as overſeers of the poor of the pariſh avow for a rate, ſet upon the plaintiff by force of 43 *Eliz. cap.* 2. The plaintiff replies *de injuria ſua propria abſque tali cauſa*, and upon this they were at iſſue. And at the trial, after appearance, the plaintiff was nonſuit. And Sir *Francis Winnington* moved for a writ of inquiry of damages, and after debate at ſeveral days, reſolved, that a writ of inquiry ſhall be granted. For if the jury try the iſſue, and do not find damages in caſe where damages are recoverable, this ſhall not be ſupplied by a writ of inquiry, becauſe the damages are part of the verdict, and if the jury had found exceſſive damages, the party might have had an attaint. But in this caſe, although the jury by the ſtatute (notwithſtanding they did not try the iſſue) might have been charged to find damages; yet if they had found them, it had been but an inqueſt of office, and by conſequence the party could not have had an attaint if they had been exceſſive.

No writ of inquiry to ſupply a defect in a verdict, where an attaint lies upon the finding. D. acc. B. R H. 120 10 Co. 119. a. 4 Leon. 245. 2 Wilſ. 368. Sho. P. C. 201. and ſee Raym. 124. 1 Sid. 246. 1 Keb. 882.

Upon demurrer to the evidence the jury may aſſeſs damages, or a writ of inquiry may be awarded. See Dougl. 212.

And the reaſon of this does not differ from the caſe where there is a demurrer to the evidence at the trial, the jury may aſſeſs conditional damages, and if they do not, a writ of inquiry may be awarded. *Cro. Car.* 102. *Darroſe verſ. Newbott.* Beſides that, 1 *Roll. Rep.* 272. *Brampton's* caſe, and 2 *Roll. Rep.* 112. are expreſs authorities in point. And this is not like the caſe of *Ward verſ. Culpeper, Mich.* 20 *Car.* 2. *B. R.* 1 *Sid.* 380. 1 *Lev.* 255. where in replevin the defendant avowed for a rent-charge, and iſſue being joined, the jury found the value of the cattle and damages, but did not find what rent was arrear according to the ſtatute 17 *Car.* 2. *cap.* 7. and reſolved, upon a motion for a writ of inquiry, that it cannot be granted, becauſe the ſtatute ſays that the ſame jury ſhall inquire of the value of the cattle and of the rent arrear; but the 43 *Eliz.* laſt paragraph, gives the party his election, either to have the jury find the damages, or to have a writ of inquiry. And *Holt* chief juſtice ſaid that he remembered a caſe 17 *Car.* 2. *B. R. Burton* verſ. *Robinſon, Raym.* 124. 1 *Sid.* 246. 1 *Keb.* 882. Detinue for a charter, verdict for the plaintiff upon iſſue joined, and the jury found damages, but did not find the value of the deed; and upon motion for a writ of inquiry the court doubted, whether it ſhould be granted: but afterwards he was informed, that a writ of inquiry was granted, contrary to *Cheyney's* caſe 10 *Co.* 118. *b.* and (by him) contrary to law.

In detinue if the jury omit to find the value of the deed, this cannot be ſupplied by writ of inquiry.

Young *verſ.* Rudd.

S. C. Carth. 347. Salk. 627.

In aſſumpſit the defendant may plead a gift and acceptance in ſatisfaction of *the promiſes*. Upon ſuch a plea the plaintiff may proteſt againſt the gift and traverſe the acceptance. S. C. 5 Mod. 86. Comb. 346. 12 Mod. 85. R. acc. Str. 23. & ſee poſt. 104.

ASSUMPSIT and *quantum meruit* by an apothecary for medicines and attendance upon the defendant when he was ſick, *&c.* The defendant pleads, that he gave to the plaintiff a beaver hat in ſatisfaction of thoſe promiſes, and that the plaintiff accepted it in ſatisfaction. The plaintiff, *proteſtando* that the defendant did not give the beaver hat to him in ſatisfaction, *&c.* traverſes the taking by him in ſatisfaction. The defendant demurs. And Mr. *Hall* took exception to the plea, that it is pleaded in ſatisfaction of the promiſes, whereas it ought to be in ſatisfaction of the money due upon the promiſes, and compared it to the caſe of *Neal verſ. Sheffield, Yelv.* 192. *Cro. Jac.* 254. 1 *Brownl.* 109. where acceptance of a load of lime was pleaded in bar of a bond, which was upon condition, and adjudged no plea, becauſe it (*a*) ought to have been pleaded in ſatisfaction of the ſum of money contained in the condition. But, by the court, the caſes differ, for in the caſe cited, a releaſe of the condition had not been a bar to debt upon the bond; but here a releaſe of the promiſes had been a good bar in this action, and therefore the defendant has pleaded well enough. Then Mr. *Northey* took exception, that the traverſe in the replication was ill, for the traverſe ought to be to the moſt material part, which is here the gift; for if the

(*a*) D. acc. 2 Will. 86. ſed vide poſt. 519, 520.

defendant

defendant gave in ſatisfaction, and the plaintiff received it; whether the plaintiff received in ſatisfaction, is not material; for it muſt be, if he will receive it, that he receive it to that intent, for which the defendant gave it. As if *A.* owes *B* 20*l.* upon a bond, and 20*l.* upon a ſimple contract, and *A.* pays *B.* 20*l.* in ſatisfaction of the money due upon the bond, and *B.* ſays that he will accept it in ſatisfaction of the money due upon ſimple contract, nevertheleſs if he accept it, it ſhall be adjudged, that he accepted it for the money due upon the bond. *Cro. Eliz.* 68. *Sty.* 239. Therefore in this caſe the traverſe ought to have been to the gift. But Mr. *Hall* for the plaintiff argued, that of neceſſity this new agreement muſt be by the mutual aſſent of the parties, and then the acceptance is as material as the gift. Of which opinion was *Holt* chief juſtice: for if the defendant had pleaded the gift, without an averment that the plaintiff accepted it, the plea had been ill. And *Holt* cited *Hob.* 178. *Erle* verſ. *Tuck*, where the acceptance was traverſed; and therefore (by him) both the gift and the acceptance was traverſable; and therefore he was of opinion, that judgment ſhould be given for the plaintiff. *Roke by* juſtice was of opinion for the plaintiff, but for another reaſon, becauſe ſince the plaintiff had taken by proteſtation the gift, and had traverſed the acceptance, it doth not appear that there was any receipt. But if there had been any receipt confeſſed, he ſeemed to incline, that the acceptance had not been traverſable for Mr. *Northey's* reaſons. The ſame caſe between *Yelverton* and *Saliſbury*. and the ſame judgment this term.

A man who owes ſeveral diſtinct debts to the ſame perſon, may when he makes a payment direct to which debt it ſhall be applied. D. acc. 2 Vern. 607. 5 Co. 117. b. and ſee Str. 24. 1194. 2 Cha. Caſ. 83. 1 Vern. 24. 34. 468. 2 Vern. 606. 2 Brown. 107. and Com. Dig. Tit. Chancery. 4 F. 2d. Ed. Vol. 2. 327.

Plea of a gift in ſatisfaction without an averment of acceptance accordingly bad. See Cro. El. 193.

Rex *verſ.* Leaſon and Edwards.

THE defendants were taken by a meſſenger, and kept in cuſtody ſeveral days in *Middleſex*; and the beginning of this term they entered their prayer according to the (*a*) *habeas corpus* act. After being brought before Sir *William Trumball* ſecretary of ſtate, he committed them to the *Marſhalſea* for high treaſon in conſpiring the death of the king, which fact was ſuppoſed to be committed in *Surrey*. And now being brought to the king's bench by *habeas corpus*, Sir *Francis Winnington* and Sir *Bartholomew Shower* moved that they ſhould be bailed (*b*). But denied by the court, for the intent of the *habeas corpus* act was, that the prayer ſhould be entered, where the party ought to be tried; which in this caſe muſt be at the aſſizes in *Surrey*, for the king's bench cannot originally hold plea of felony ariſing out of *Middleſex*, and therefore the king's bench will remand the priſoners to the *Marſhalſea*. *Ex relatione m'ri Ives. Hill.* 8.

The prayer to intitle a man to the benefit of the *habeas corpus* act muſt be entered in the court where he ought to be tried. D. acc. 3 Vin. 533.

(*a*) Vide Comb. 111. 3 Vin. 516. The King's Bench does not hold plea originally of a felony ariſing out of Middleſex.

(*b*) By the 31 Car. 2. c. 2. ſ. 7. If any perſon committed for high treaſon or felony ſhall make a petition in open court the firſt week of the term or firſt day of the ſeſſions of oyer and terminer, or general gaol delivery, to be brought to his trial, and ſhall not be indicted the next term or ſeſſions after his commitment: the court of B. R. or ſeſſions are required on motion to them in open court the laſt day of the term or ſeſſions by or on behalf of the priſoner, to diſcharge him upon bail, unleſs it ſhall appear that the king's witneſſes could not be produced ſuch term or ſeſſions.

The Lord *Montgomery*, being indicted in *London* for high treaſon for conſpiring the death of the king, entered his prayer in the king's bench; but adjudged that it ought to be entered at the *Old Bailey*.

Leward & ux' *verſ.* Baſely

S. C. Salk. 407.

A wife may juſtify an aſſault in defence of her huſband.

TRESPASS, aſſault and battery, for a battery committed upon the wife. The defendant pleads, *de ſon aſſault demeſne* of the wife. The plaintiffs reply, that the defendant went out to fight the huſband, and that ſhe being deſirous to (*a*) aſſiſt her huſband, and to keep him from being wounded, *inſultum fecit* upon the defendant. The defendant demurs. And Mr. *Carthew* argued, that this *inſultum fecit* was ill. And for that he cited a caſe between *Jones* and *Treſillian*, *intr. Trin.* 21 *Car.* 2. *B. R. Rot.* 841. 1 *Mod.* 36. 1 *Sid.* 441. 1 *Lev.* 282. 2 *Keb.* 597. Treſpaſs, aſſault and battery; the defendant pleaded *de ſon aſſault demeſne*; the plaintiff replied, that he was poſſeſſed of a cloſe called *Cupner's* cloſe, and that the defendant broke the gate and chaſed his horſes in the cloſe, and the plaintiff for defending his poſſeſſion *molliter inſultum fecit* upon the defendant: and upon demurrer adjudged a bad replication, for he ſhould have ſaid, *molliter manus impoſuit:* but he could not juſtify an aſſault in defence of his poſſeſſion. And this caſe the court agreed to be good law, but different from the preſent caſe; for this is a juſtifiable aſſault; for the wife may lawfully make an aſſault, to keep her huſband from harm, and ſhe has pleaded it ſo. In the ſame manner a ſervant may juſtify an aſſault in defence of his maſter, but not *e contra*, becauſe the maſter might have an action *per quod ſervitium amiſit*. So in this caſe, if the defendant lifted his hand to ſtrike the huſband, the wife might well juſtify an aſſault to prevent the blow. And if the fact had been otherwiſe, the defendant ought to have rejoined, *de ſon tort demeſne*, and then it had been againſt the plaintiff. But a man cannot juſtify an aſſault in defence of his horſe, or his poſſeſſion, for there he ought to ſay, *molliter manus impoſuit*. Judgment for the plaintiff, *niſi*, &c.

A man cannot juſtify an aſſault in defence of his property. D. acc. Owen. 151. Lutw. 1483. D. cont. Bro. Treſpaſs. 128.

Servant may juſtify an aſſault in defence of his maſter. D. acc. 2 Roll. Abr. 546. 1 Bl. Com. 429. Bro. Treſpaſs. 189. 217. ſemb. acc. 1 Hawk. c. 60. ſ. 23. Sed non e contra. vide Owen. 151 D. cont. 2 Roll. Abr. 546. 1 Bl. Com. 429. Bro. Treſpaſs. 128. ſemb. cont. 1 Hawk. c. 60. ſ. 24. ſee alſo 1 Bl. Com. 450. 454.

(*a*) Such interpoſition muſt be ſtated on the replication, and proved on the trial to have been merely preventative: a vindictive interpoſition is unwarrantable. Str. 933.

Smith *verſ.* Frampton.

S. C. Salk. 644. 5 Mod. 87.

New trial ſhall not be granted in hard actions, where the verdict is for the defendant, tho' contrary to evidence. D. acc. Salk. 653. ſee Cowp. 37 Burr. 2257. 2 Wilſon. 306. 3 Wilſ. 159. 1 Wilſ. 17. 298. Str. 101. 899. 1238. Salk. 640.

SMITH brought an action upon his caſe againſt the defendant, for negligently keeping his fire, by which the houſe of the plaintiff was burnt. And after verdict for the defendant, Mr. *Montague* moved for a new trial, upon a ſuggeſtion that the verdict was againſt evidence. And he argued, that though it was a ſevere action, yet all actions

were grounded upon reaſon, and that new trials had been granted againſt the hundred. *Trin.* 1691. *B. R.* between *Horton*, and the hundred of *Edmonton*. A like caſe *Trin.* 5 *Will. & Mar. C. B.* So it is agreed 1 *Sid.* 49. 1 *Keb.* 127. between *Read* and *Dawſon*, that a new trial may be granted to the defendant in an information in perjury where the king is not party, without conſent of his council, and where he is party, with the conſent of his council. But ſerjeant *Darnall* and Sir *Bartholomew Shower e contra*: that the court does not grant new trials where the verdict is for the defendant in penal actions, as perjury, forcible entry, &c. And in *Hil.* 4 & 5 *Will. & Mar.* 1 *Sho.* 336. in information againſt *Davies* for a riot, the judge before whom he was tried certified, that it was a verdict againſt evidence; nevertheleſs in motion for a new trial it was denied. So in Sir *John Jackſon*'s caſe, 1 *Lev.* 124. in information for ſubordination of perjury, ſerjeant *Maynard* produced ſeveral affidavits, that the moſt material witneſſes were withdrawn by a trick of Sir *John Jackſon*; and yet upon motion for a new trial it was denied; which caſe *Holt* chief juſtice ſaid he remembered well. And the court after having conſidered this caſe ſeveral days reſolved, that this being a caſe of hardſhip, and the jurors being judges of the fact, no new trial ſhould be granted; though *Holt* chief juſtice, before whom it was tried, was diſſatisfied with the verdict. And Mr. *Northey* ſaid, that Mr. *Siderfin* is miſtaken in the caſe of *Read* and *Dawſon*, for 3 *Will. & Mar. B. R.* between the king and queen and *Stone*, in information for perjury, a new trial was granted to the defendant without the conſent of the king's council.

No new trial after acquittal on a criminal proſecution, though the proſecutor's witneſſes are kept back by a trick. ſemb. cont. Salk. 646. Str. 1238.

Powers *verſ.* Cook.

S. C. Salk, 298. 5 Mod. 145. 12 Mod. 83. Carth. 363.

DEBT upon bond againſt the defendant, as executrix to *J. S.* The defendant pleads, that *J. S.* died inteſtate, and that adminiſtration was granted to her of the goods, &c. of *J. S.* and therefore *petit judicium ſi ipſa ad billam praedictam reſpondere debet.* The plaintiff demurs. And Mr. *Dee* for the plaintiff argued, that the plea is ill. For if the defendant adminiſtered the goods of *J. S.* before adminiſtration granted to her, ſhe is chargeable as executrix *de ſon tort.* And therefore ſhe ought to have traverſed that ſhe meddled before as executrix, as *Yelv.* 115. 1 *Brownl.* 97. *Lothbury & ux' v. Humfry.* The plaintiff brings debt as adminiſtratrix to *R.* The defendant pleads, that *R.* made his will, and made him his executor; and upon demurrer adjudged an ill plea, becauſe he ſhould have traverſed that *R.* died inteſtate. So *Cro. Eliz.* 565. *Bradbury v. Reynell.* 810. *Bethell v. Stanhope.* Sir *Bartholomew Shower contra.* That the books of *Cro. Eliz.* 565 & 810 are founded upon this reaſon, that the party was conuſant of the intermedling; but 3 *Leon.* 197. and *Cro. Eliz.* 102.

A perſon ſued as executor who pleads that he is adminiſtrator need not traverſe intermeddling before adminiſtration granted. S. C. 5 Mod. 136. Holt 307. 3 Danv. Abr. 414. p. 23. Such plea ought to conclude with a prayer *quod billa caſſetur*, vide ante, 47.

Stubs

Stubs v. Rightwiſe, and *Paſ.* 18 *Car.* 2. *C. B. rot.* 736. are expreſs, that the plaintiff ought to reply that ſpecial matter. Of which opinion was the whole court. And *Holt* chief juſtice ſaid, that if the defendant had taken ſuch traverſe, it had made her plea vitious; for it is enough for her to ſhew that the plaintiff's writ ought to abate; which ſhe has done, in ſhewing that ſhe is chargeable, only by another name. Then as to the traverſe, that ſhe did not adminiſter as executrix before the letters of adminiſtration were granted, it would be to traverſe what is not alledged in the plaintiff's declaration, which would be againſt a rule of law that a man ſhall never traverſe that which the plaintiff has not alledged in his declaration. Then Mr. *Dee* took exception to the concluſion of the plea, that it was not in abatement. Sir *Bartholomew Shower e contra* cited *Placit gen. & ſpec. tit. Abatement* 20, 21. and argued, that if it had been only *petit judicium ſi ad billam praedictam ſic ut praefertur formatam reſpondere debet*, it had been good enough. But the court denied thoſe caſes, and ſaid, that in this preſent caſe it is a proper concluſion to the juriſdiction, which is ſometimes alſo *ſi curia cognoſcere velit*; but it cannot be good in abatement: and therefore judgment, that the defendant anſwer over. But a concluſion in abatement ought to pray judgment, *quod billa caſſetur*. The ſame judgment was given for the ſame reaſon in this laſt point this term, between *Nichols* and *Shepherd*.

No traverſe of matter not alledged. R. acc. poſt. 122. D. acc. Lutw. 937. 1560. poſt. 238. 355. Doct. plac. 358. ſemb. cont. ante 39.

Concluſion of a plea to the juriſdiction of the court is. *If the defendant ought to anſwer* or *if the court will take cognizance of the plea.*

Stedman *verſ.* Bates.

S. C. Salk. 390. 5 Mod. 141. Comb. 347. Carth. 346. 12 Mod. 86.

REPLEVIN for the taking of bricks, *&c.* The defendant makes conuſance as bailiff to the counteſs of *Saliſbury*: and ſhews, that *John Bennet* was ſeiſed of the place where, *&c.* in fee; and being ſeiſed, demiſed to *John Griffith* for 180 years, rendering rent. That *John Bennet* died, by which the reverſion deſcended to the counteſs of *Saliſbury* and her ſiſter Mrs. *Bennet*, daughters and heirs of the ſaid *John Bennet*. And as bailiff to the counteſs he makes conuſance for rent-arrear, *&c.* The plaintiff demurs. And *Hall* for the defendant ſays, that although the daughters were one heir to the father, yet they have ſeveral inheritances; and therefore it is not abſolutely neceſſary for them to join in avowry. And he cited a caſe in point, *Trin.* 4 *&* 5 *Will. & Mar. C. B. rot.* 707. *Oſmer verſ. Sheafe*. But by *Rokeby* juſtice, (*a*) this point was never moved in that caſe. And *Littleton* himſelf ſays, that coparceners ought to join in avowry. And therefore judgment for the plaintiff.

Coparceners muſt join in avowry. Vide poſt. 726. 197. 2 Bl. Com. 188. Co. Lit. 164. a. 169. b. 196. a. b. 180. b. poſt. 422.

(*a*) See acc. Lutw. 1211.

Memorandum, *Sir* John Powell, puiſne *baron of the Exchequer, was removed into the Common Pleas in the room of Sir* Thomas Rokeby, *removed into the King's Bench this term; and Sir* Littleton Powis, puiſne *judge of* Cheſter, *was made baron of the Exchequer.*

Drage

Drage *verſ.* Netter. C. B.

CASE upon a bill of exchange. The defendant pleaded a releaſe after the bill drawn, and before the acceptance by the defendant, the bill being drawn by *J. S.* upon the defendant. And adjudged no plea, for this releaſe was before the defendant was chargeable. *Ex relatione m'ri Place.*

A releaſe can only operate on exiſting rights. R. acc. 5 Co. 70. b. Goldſb. 166. Moore 469. 10. Mod. 87. D. acc. poſt. 518. and vide 664 to 667; ſee alſo poſt. 320.

Rex *verſ.* Kendal *and* Row. B. R.

S. C. Salk. 347. with the arguments of counſel 5 Mod. 78.

UPON a *habeas corpus* directed to the keeper of *Newgate* to bring the bodies of the defendants to the king's bench, he returned, that the defendants were committed to his cuſtody by warrant of Mr. ſecretary *Trumball* for high treaſon, in aiding and aſſiſting Sir *James Montgomery* to eſcape, who was committed to the cuſtody of a meſſenger for ſuſpicion of high treaſon, *&c.*

A ſecretary of ſtate may commit for high treaſon. S. C. 12 Mod. 82. Comb. 343. Skinn. 596. Holt 144. R. acc. Carth. 291. Agr. Str. 2. 3 Vin. 515. 534. 2 Wilſ. 151. D. acc. 1. Bac. Abr. 378. vide 2 Wilſ. 275. But Q. whether to a meſſenger, except until examination, or to convey to priſon. S. C. 12 Mod. Holt and Skinn. ubi ſupra.

To which return Mr. ſerjeant *Levinz*, Sir *Bartholomew Shower*, *&c.* took exceptions, 1. That a ſecretary of ſtate cannot commit. 1. Becauſe no perſon can commit, who cannot adminiſter an oath, which a ſecretary cannot do. 2. There are no precedents of ſuch commitments. 3. In the parliament in 1678, it was looked upon as an illegal practiſe of Sir *Lionel Jenkins*, and a great oppreſſion of the ſubject. 4. 1 *Anderſ.* 207, 8. that perſons committed by one of the privy council ought not to be diſcharged, is an extrajudicial opinion, and therefore not to be regarded. 2. It is ſo general, that perſons committed for the leaſt offence by any of the privy council ſhall not be diſchargeable, which ſeems to be a breach of the fundamentals of the common law, which ſupport the liberty of the ſubject. *Sed non allocatur.* For by *Holt* chief juſtice, this point was looked upon to be ſo clear law, that it was never drawn in queſtion in his memory, but once by Sir *Francis Winnington* at the bar. And 1 *Anderſ.* 297 is good authority, for it was reſolved at the meeting of the judges for aſſerting the liberty of the ſubject. And 1 *Leon.* 71. takes a diverſity; that if a man be committed by (*a*) one of the privy council, the cauſe of the commitment ought to be ſpecified; but if by the whole council, it is not neceſſary; which was then looked upon as law, though it is now altered by the (*b*) *habeas corpus* act. And at common law, before there were any juſtices of peace, there were commitments; for the juſtices of gaol delivery ought to impanel a grand jury, to inquire of all offences

If a gaoler returns to a habeas corpus a commitment for reſcuing a traitor committed to a meſſenger, the court will intend the commitment to the meſſenger was to convey to priſon only. S. C. 12 Mod. & Skinn. ubi ſupra. A commitment for reſcuing a traitor ought to ſpecify the treaſon for which the traitor was committed. S. C. Comb. Skinn. and Holt ubi ſupra cit. 1 Bac. Abr. 381. and that he was guilty of the treaſon. S. C. 12 Mod. ubi ſupra. vide 1 Hale P. C. c. 22. 1ſt Ed. p. 235. 238. Q. whether the reſcuer of a traitor may not be indicted tho' the principal dies before attainde Q. whether the reſcue of a traitor is treaſon or felony.

(*a*) Vide 2 Wilſ. 290. (*b*) 31 Car. 2. c. 2.

committed by thoſe in gaol; therefore there muſt have been a commitment precedent. And by *Rokeby* juſtice commitment by ſecretaries of ſtate have been more than a hundred years ago. 2 *Leon.* 175. *Helyard's* caſe. And at common law conſervators of the peace could not execute their office without a power to commit. And ſecretaries of ſtate are of the ſame nature as conſervators of the peace were. And no ſtatute gives power to juſtices of peace to commit, but it is incident to their office.

Conſervators of the peace may commit.

Secretaries of ſtate are of the ſame nature with conſervators of the peace.

Sed vide 11 St. Tr. 317. 2 Wilſ. 290. Commitment is incident to the office of a juſtice of peace.

Then the defendant's counſel took exception, that it appeared upon the return that Sir *James Montgomery* was committed to a meſſenger, which is an illegal commitment, for (*a*) by the common law every perſon ought to be committed to the county gaol, *Brit.* 92. *Cuſtom. de Normandy* 75. *b. Hil.* 25 *Edw.* 4. *pl.* 4. Beſides that, to commit a man to a meſſenger, is to fine him before conviction, for he muſt pay the meſſenger's fees. And it is only an invention to evade the *habeas corpus* act. And if the commitment of Sir *James Montgomery* was not lawful, then it was no crime in the defendants to help him to eſcape. *Sed non allocatur.* For though generally commitments ought to be to the common gaols, yet it is a queſtion, if commitment to another place than the common gaol will make the commitment void. Juſtices of peace ought not to commit to the *New Priſon* for felonies, *&c.* However, though a meſſenger is not a gaoler, yet *per curiam* a man may be committed to a meſſenger for a time, till examination. But as this return was, the court ſaid, they would intend, that this meſſenger was only appointed to convey Sir *James Montgomery* to priſon; and therefore Sir *James Montgomery* was well committed in his cuſtody. And by *Holt* chief juſtice it was ruled at *Norwich* aſſiſes, by *Hale* chief juſtice, that if a juſtice of peace directs a warrant to any particular private man, he may execute it and take the party, and may well juſtify the execution in an action of falſe impriſonment. And *Holt* chief juſtice ſaid, that the *Tower* was looked upon by the law, and was, a priſon within the *habeas corpus* act. *Gibbon's* caſe.

(*a*) 5 H. 4. c. 10. ſed nunc vide 6 G. 1. c. 19. ſ. 2.

2 Inſt. 42, 43.

Juſtices of peace ought not to commit to New Priſon for felonies. Poſt. 699.

A private man may execute a juſtice of peace's warrant.

Tower of London is a priſon.

Then the defendants' counſel argued, that the defendants could never be attainted in this caſe, becauſe Sir *James Montgomery* the principal was dead before he was attainted. To which the attorney general Sir *Thomas Trevor* anſwered, that this was treaſon, and therefore all were principals, and conſequently the defendants triable, whether Sir *James Montgomery* was attainted or not. See 1 *Hale P. C. c.* 22. 1ſt. Edit. p. 237. 238.

2. The defendants' counſel ſaid, that this was not treaſon but felony. Mr. attorney *contra* cited 1 *Hale P. C.* c. 22. 1ſt.

1ſt. Ed. p. 234, 236, 237. But to theſe two laſt exceptions the court gave no poſitive opinion. *Ideo quaere.*

Laſtly, The defendants' counſel took exception to the return, that the treaſon for which Sir *James Montgomery* was committed, was not ſpecified in the warrant of commitment. For perhaps Sir *James Montgomery*'s treaſon might be ſuch, at that the acceſſary to it ſhould not be guilty of high treaſon. And if a man receive a counterfeiter of the great ſeal, knowing that he is a counterfeiter, *&c.* it is not treaſon. 12 *Co.* 81. Receiving of a coiner, knowing that he is ſuch, is but miſpriſion of treaſon. But *Holt* chief juſtice ſaid that there was no authority, that a man who breaks priſon, and lets out a coiner, is not a traitor. But he and all the court were of opinion, that ſuppoſing the crime to be high treaſon, two things ſhould have been ſpecified in the warrant of commitment. 1. For what treaſon Sir *James Montgomery* was committed, for he who breaks the priſon is guilty of the ſpecific treaſon. 2. It ought to have been averred, that Sir *James Montgomery* committed the fact, becauſe the breaking of the priſon is affected with the ſame offence. And therefore for this defect the priſoners were bailed.

Q. whether reſcuing a coiner is treaſon.

Hilary Term

7 Will. 3. B. R.

Wentworth *verſ.* comitem Stafford.

S. C. more at large. 5 Mod. 147.

5 Law Rep. 237.

Q. whether the court can amend a judgment after the term in which it was entered by filling up a blank which had been left for the quantum of the coſts. Vide poſt. 182. Str. 1110. Burr. 1984. 1989. 2730.

SIR *William Wentworth* recovered judgment for 3000*l.* againſt the earl of *Stafford* in 1676, and the entry of it was, that the plaintiff ſhould recover 3000*l. necnon* [*blank*] *pro damnis, &c.* A motion was made for liberty to amend, and to inſert a ſum certain for the coſts and damages, however ſmall, to perfect the judgment. But after argument at the bar ſeveral times (by *Holt* chief juſtice) it cannot be granted, becauſe it would be to give a new judgment, and beſides, (*a*) the motion comes too late. But *Rokeby* juſtice thought that it might be amended, becauſe for a juſt debt. *Adjournatur.*

(*a*) Note the judgment according to 5 Mod. 147. was of nineteen years ſtanding.

Hains *verſ.* Jeffell.

S. C. Comb. 356. 5 Mod. 168. Com. 2.

Marriage with a relation, tho' illegitimate, within the Levitical degrees, is illegal.

A Day was appointed to hear counſel, why a prohibition ſhould not be granted to the ſpiritual court of *Worceſter*, to ſtay a ſuit againſt *Hains* for marrying with the baſtard daughter of his ſiſter. And Sir *Bartholomew Shower* for the prohibition argued, that it was not prohibited by any law, for there was neither affinity nor conſanguinity, for a baſtard is *nullius filius*. *Co. Lit.* 123. *a.* 157. *a.* (*a*) It is no conſideration to raiſe a uſe. 41 *Ed.* 3. 19. *Old Bendl.* 102. *Dobbins e contra*, that the original is, *ad proximam ſanguinis non accedat*; that the *Jews* made no difference, as to marriage, between baſtards and others. *Seld. de jure Hebr. li.* 5. *cap.* 10. *fol.* 591. *Puffend. li.* 6. *c.* 1. *par.* 32. *Zepper, li.* 4. *c.* 19 *p.* 502. It ſeems to the court that no prohibition ſhould be granted, for though baſtards are deprived of privileges by particular laws, the ſame reaſon prohibits them from marrying, as others. And it has been always held accordingly, eſpecially where it is the child of a woman relation. And by Sir *Bartholomew Shower*'s rule *Hains* might marry

1 Law Ins 3. 445.

(*a*) D. acc. Co. Litt. 123. a. & 13th. Ed. n. 8. 2 Roll. Abr. 785.

marry his own baſtard, which doubtleſs could not be allowed. *Adjournatur.*

Memorandum, *Sir* William Williams *and Sir* William Whitlock *were turned out from being King's counſel.*

Bovey *verſ.* Caſtleman.

INdebitatus aſſumpſit. The plaintiff declares that there was an agreement between the defendant and him, that if the duke of *Savoy* made an incurſion into *Dauphine* within ſuch a time, that then the plaintiff ſhould give the defendant 100*l.* And if the duke did not make the incurſion into *Dauphine* within the time limited, that then the defendant ſhould give to the plaintiff 100*l.* which agreement was reduced into writing and ſigned by both the parties: and the plaintiff avers, that the duke of *Savoy* did not make any incurſion into *Dauphine* within the time limited; by which the defendant became indebted to the plaintiff in 100*l.* and being indebted aſſumed to pay, *&c.* Upon *non aſſumpſit* pleaded, verdict for the plaintiff. And now Mr. *Northey* moved in arreſt of judgment, that there was not any conſideration to raiſe a debt, for no debt can ariſe between the plaintiff and defendant upon the incurſion of the duke. For it is but a wager, for which *indebitatus aſſumpſit* will not lie, becauſe there wants a real conſideration. But for mutual promiſes *aſſumpſit* may lie, but not *indebitatus aſſumpſit.* For *indebitatus aſſumpſit* will lie only in caſes where debt will lie but in this caſe debt cannot lie. *Quod fuit conceſſum per totam curiam.* And therefore judgment was given, *quod querens nil capiat per billam.*

Indebitatus aſſumpſit lies not for a wager. See acc. 12 Mod. 70. Semb. acc. 5 Mod. 13. 131. D. acc. Salk. 23. 12. Mod. 81. See alſo 12 Mod. 69. 81. poſt. 1034. 6 Mod. 128. Comb. 302 3 Lev. 118. But aſſumpſit will lie on the mutual promiſes acc. Burr. 2602. Cowp. 17. 37. adm. Cowp. 729. 1 Term Rep. 56. poſt. 1035. 6 Mod. 129. a. ſee Doug. 4, 5, 6.

Fletcher *verſ.* Ingram.

Intr. Mich. 7 Will. 3. B. R. Rot. 107.

S. C. 5 Mod. 127. Comb. 359. Skinn. 635. Pleadings 5 Mod. 124. Lill. Ent. 369. Vol. 3. 81.

REplevin. The defendant ſaith, that the place where, *&c.* is in *Chenſon*, and that *Chenſon* is parcel of the manor of *Chenſon*, of which manor *J. S.* is ſeiſed in fee; and preſcribes to have a court-leet of all the inhabitants within the ſaid manor; that there is, and time whereof, *&c.* hath been, a cuſtom within the ſaid manor, that the homage of the leet has uſed to elect a conſtable, at the leet held within the month of St. *Michael*, out of the inhabitants of the manor, to be conſtable of *Chenſon* for one year; that the perſon ſo elected hath uſed to take an oath to execute the ſaid office; or in caſe of failure, that the ſteward of the court uſed

A cuſtom for the homage of a leet to elect a conſtable for a year generally without ſpecifying what year, is good. And if the cuſtom preſcribes that the party elected ſhall take an oath to execute the office it is

good, tho' it does not appoint before whom the oath is to be taken.—If the cuſtom impoſes a fine for a refuſal to take ſuch oath, ſuch fine cannot be diſtrained for of common right.—S. C. Holt 187. 12 Mod. 87. Semb. cont. 8 Rep. 38. p. 41. a.—In avowry for ſuch fine the avowant muſt ſhew ſpecially that the plaintiff had notice of his election. S. C. Holt 187. 12 Mod. 87. 1 Salk. 175. D. acc. 2 Hawk. c. 10. ſ. 46. ſee alſo 5 Mod. 96. Al. 78.

to impoſe a reaſonable fine. That the plaintiff being an inhabitant within the manor was elected by the homage according to the cuſtom, to be conſtable for one year then next following, *unde notitiam habuit:* and becauſe the plaintiff refuſed to take the oath, the ſteward impoſed 40*s.* fine upon him; and becauſe the fine was not paid, the defendant makes conuſance of the taking of the cattle as a diſtreſs in the place where, &c. as bailiff to *J. S.* The plaintiff demurs. And ſerjeant *Wright* for the plaintiff took exception. 1. That the cuſtom was void for the uncertainty, for it is not ſhewn, for what year the perſon elected ought to ſerve, for the cuſtom is, to ſerve one year generally. 2. Admit that the cuſtom is good, then it is not purſued; for the plaintiff was elected to ſerve the year next enſuing. *Sed non allocatur*; for by the court, it ſhall be intended, that the cuſtom is, to ſerve the year next enſuing. And Sir *Bartholomew Shower* cited a caſe between *Titus* and *Perkins* ſince the revolution, 1 *Lev.* 255. *Skinn.* 247. *Comb.* 43. *Carth.* 12. 3 *Mod.* 132. in which *Holt* chief juſtice held, that a cuſtom, that a copyholder ſhall pay the profit of one year generally for a fine for admittance, was good, without alledging what year.

The ſecond exception was that the cuſtom is void, becauſe it is, that the party elected ſhould take an oath, to execute the office, &c. But in the cuſtom no perſon is named, who ought to adminiſter the oath; and it is not in the power of the party to take the oath, without the concurrence of ſome perſon to adminiſter it. And in 8 *Co.* 38. *b. Grieſly's* caſe, it is pleaded, that the perſon ought to take the oath before the ſteward in court. *Sed non allocatur.* For by the court, of common right the homage in courts leet ſhall elect the conſtable, and this is the conſtant practice in *Middleſex.* Then the ſteward by conſequence of law may ſet a fine upon the party elected, if he refuſe to ſerve, though no cuſtom is alledged for the fine. But this ſuppoſes the party preſent in court. When he is not preſent in court, the ſteward cannot ſet a fine: but his refuſal ought to be preſented by the homage at the next court, and then he ſhall be amerced. In the ſame manner if the perſon is preſent in court, the ſteward *ex officio* may adminiſter the oath; but if the court is adjourned before the oath taken, the ſteward ought to iſſue a precept, to command the party, to take the oath before the juſtices of peace. For though juſtices of peace had their beginning within time of memory, yet they have the ſame authority, as the conſervators of the peace had at common law, who in ſuch caſe might have adminiſtred the oath.

Of common right the homage at the leet elects the conſtable. D. acc 1 Bl. Com. 356. Str. 1213. Fitzg. 192. T. Jones 212. (*a*) Where the perſon elected refuſes to ſerve, if he be preſent in court, the ſteward may of common right fine him. R. acc. 8 Co. 38. b. D. acc. 2 Hawk. c. 10. ſ. 46. If he be abſent, he ſhall be preſented and amerced. D. acc. 2 Hawk. c. 10. ſ. 46. The ſteward may adminiſter an oath to the perſon elected, if he be preſent. If he is not, and the court is adjourned, the iſſue a precept, to command him to ſwear before the juſtices of the peace. (*b*)

(*a*) But in default of the leet, juſtices of the peace may; ſee 2 Hawk. c. 10. ſ. 50. 1 Bac. Abr. 439. and 13 and 14 Car. 2. c. 12. ſ. 15. ſee alſo Str. 1213. Fitzg. 192. 1 Barnard. B. R. 51.

(*b*) He may be ſworn before a ſingle juſtice. R. Str. 1143. D. acc. T. Jones. 212.

The

The third exception was, that the defendant ſhould have alledged a cuſtom for the taking of the diſtreſs. Of which opinion was the whole court.

The fourth exception was, that the general averment, that the plaintiff *inde notitiam habuit*, is not ſufficient, but the plaintiff ought to have had ſpecial notice, and this ought to have appeared in the pleading. Of which opinion was the whole court alſo. And for theſe two laſt reaſons judgment was given for the plaintiff. See *Winch. Ent.* 987.

Walter *verſ.* Stokoe.

S. C. 5 Mod. 16. 69, Carth. 367. Comb. 354, but no judgment, *Holt* 54.

All the perſons againſt whom a judgment is given muſt if living, join in a writ of error thereon. (a) R. acc. Carth. 7. Str. 233, 606. poſt. 1043, 1532. Adm. Burr. 1792. D. acc. Yelv. 209. See alſo poſt. 244.

JUdgment in treſpaſs was given againſt five. Four bring error, and adjudged that the writ was not good. For all perſons againſt whom a joint judgment is given, ought to join in a writ of error: but it appears here upon the face of the writ, that there was another perſon, againſt whom the judgment was given, who has not joined in the writ of error, and it is not alledged that he is dead, and therefore the writ is bad. 2. It was adjudged, that although the curſitor had right inſtructions, yet this writ of error is not amendable by common law, nor by any of the ſtatutes. For (*b*) all amendments are granted for the ſupport of judgments, but the principal deſign of a writ of error is to reverſe them. 3. It was adjudged, that if the writ of error had been amendable, yet the plaintiff in error ſhould not be obliged to amend his writ at the defendant's motion (for in this caſe Mr. *Northey* for the defendant in error moved that the plaintiff ſhould amend his writ) for a man cannot oblige another to ſue a writ, in other manner than he himſelf intends. And *Holt* chief juſtice ſaid, that the defendant in error is ſcarce party in court; for (*c*) if he dies after *in nullo eſt erratum* pleaded, the court ſhall proceed; but if the plaintiff dies, it is otherwiſe. See 1 *Ventr.* 34. And for theſe reaſons the writ of error was quaſhed. See 1 *Rol. Abr.* 747. *pl.* 4.

No writ of error is amendable. Sed nunc vide 5 G. 1. c. 13. ſ. 1. Str. 892. Cowp. 425. Bl. 1067. Tho' the inſtructions to the curſitor were right. At leaſt not at the inſtance of the defendant in error. Vide 5 G. 1. c. 13. ſ. 1.

(*a*) Or if any of them refuſe, he or they ſhould be ſummoned and ſerved. Vide Carth. S. Yelv. 4.
(*b*) D. acc. 1. Leon. 134.
(*c*) R. acc. poſt. 1295.

Dominus Gerrard *verſ.* Dominam Gerrard. † *Error* C. B.

S. C. Salk. 253. Skinn. 592. Holt 260. Comb. 352. 5 Mod. 64. Pleadings. Lev. Ent. 76. & vol. 3. 229.

A woman ſhall have dower of the capital meſſuage of a titular barony. S. C. 12 Mod. 84. in C. B. 3 Lev. 401. cit. Co. Litt. 31. b. 13 Ed. n. b.

DOWER. As to part the tenant confeſſes the action, and judgment is given in *C. B.* for the demandant, and *miſericordia* entered againſt the tenant. And as to the reſidue, the tenant pleads, that Sir *Thomas Gerrard* was ſeized of the meſſuage now in demand called *Bromley*, in his demeſne as of fee. And being ſo ſeized, king *James* the firſt, by his letters patent under the great ſeal of *England*, created the ſaid Sir *Thomas Gerrard* baron of *Bromley*; and ſo the meſſuage in demand became *caput baroniae*; and he prays judgment, if the demandant ought to be endowed thereof. The demandant demurred: and judgment was given for her in *C. B.* and another *miſericordia* entered againſt the tenant; who now brings error, and aſſigns for error. 1. That the demandant ought not to have dower of this meſſuage, being *caput baroniae*. 2. That there ought not to be two *miſericordia*'s againſt the tenant. And Sir *Bartholomew Shower* and Mr. *Acherley* argued, as to the firſt point, that it would tend to the diſhonour of the dignity, to have the capital meſſuage divided and diſmembred; but it would be more for the honour of the realm, that it be kept intire. And for authority cited *Co. Lit.* 31. *b. Fitzh. Dower*, 180. *Bract. li.* 2. 93. *b. Paſ.* 4 *Hen.* 3. *rot.* 7. But ſerjeant *Wright* and Mr. *Northey contra*; of which opinion was the whole court. For theſe authorities muſt be intended of feodal baronies, of which there are none at this day, except *Arundel*. And this privilege was allowed to them, becauſe they ought upon neceſſity to defend the realm, to which they were bound by tenure: For the king at the creation of the barony, gave to the baron lands and rents, to hold of him by the defence of the realm. But then this cannot be a feodal barony, for it was in the ſeiſin of the *Gerrards* before, and therefore was not given to the *Gerrards* by the king, at the creation of the barony, to hold of him. And *Rokeby* juſtice ſaid, that this was the reaſon of the judgment in the common pleas. As to the ſecond point, the counſel for the plaintiff in error ſaid, that it is a rule in law, *quod nemo bis punitur pro uno delicto*; but if two amerciaments be allowed here, this rule will be broken. And for authority they relied on 5 *Co.* 58. *b. Sweet*'s caſe, which has not been yet denied. 2 *Book of judgments* 102. Serjeant *Wright* and Mr. *Northey contra*, that there were two offences, and therefore there ought to be two amercements; for the tenant has delayed the demandant two ſeveral times, and then there being two ſeveral judgments, he muſt be

Where there are two final judgments againſt a defendant on one writ, he ſhall be twice amerced. S. C. Salk. 54. Semb. cont. 8 Co. 61. a.

Feodal baronies, what.

be twice amerced. 2 *Leon.* 185. *pl.* 231. 1 *Roll. Abr.* 218. *pl.* 2. *Barry's* caſe. *Fitzh. Judgment* 32. *Raſt. Entr.* 19. *Co. Entr.* 169. *b.* And *Specot's* caſe is not againſt it, becauſe the ſecond judgment there was erroneous, for there was no delay there in the defendant. And *Brook, Amercement* 16, 17, 56, inſinuates, that where there is a final judgment given, there muſt be a *miſericordia.* And then when there is a new delay, and a new judgment, there muſt be another *miſericordia.* And *per curiam,* the queſtion will only be, whether a man can be twice amerced upon one writ? And adjudged that he may in this caſe. For when the tenant confeſſes part, judgment muſt be entered againſt him, which is a final judgment; then (*a*) there muſt be an amercement, or it will be error; then at preſent it is a queſtion, whether the laſt judgment ſhall be for or againſt the demandant? But in the mean while the demandant is delayed; therefore when judgment is afterwards given for the demandant, there muſt be a new amercement; but where one judgment depends upon the other, and is but an interlocutory judgment, the law is otherwiſe. And judgment, for theſe reaſons, was affirmed by the whole court.

(*a*) Sed nunc vide 16 & 17 Car. 2. c. 8. ſ. 1 & 4 Ann. c. 16. ſ. 2.

There ſhall not be ſeveral amerciaments on an interlocutory and a final judgment.

Chamberlain *verſ.* Hewitſon.

THE plaintiff *Chamberlain* moved for a prohibition to the ſpiritual court, upon a ſuggeſtion, that the defendant *Hewitſon* preferred articles in the ſpiritual court againſt her for incontinency with the huſband of *Hewitſon,* and obtained ſentence againſt her. Upon which Mrs. *Chamberlain* appealed to the court of delegates, who confirmed the former ſentence, and made a decree, that the plaintiff ſhould do penance, and pay coſts to Mrs. *Hewitſon.* Afterwards the general pardon iſſued, by which the penance was pardoned. And now the defendant *Hewitſon* libelled in the ſpiritual court for the coſts; where the plaintiff Mrs. *Chamberlain* pleaded the releaſe of the huſband of Mrs. *Hewitſon,* (*a*) which the ſpiritual court diſallowed; and therefore ſhe prayed to have a prohibition granted. And ſerjeant *Wright* for the defendant argued againſt the prohibition, that *ubi cognitio principalis, ibi debet eſſe cognitio acceſſorii.* To prove which rule, and apply it to the preſent caſe, he cited *Yelv.* 172. *Starkey* verſ. *Barton & Gore. March* 73. *pl.* 112. *Cro. Jac.* 269. 12 *Co.* 65. *Robert's* caſe. A feoffment was tried in the ſpiritual court in a caſe between *Tutter* and *Whiſkins.* 2. He argued, that it were in vain for any wife to commence a ſuit againſt the adultereſs, if the releaſe ſhould be allowed to bar her of her coſts, which are merely the charges of the ſuit, by which ſhe has brought the criminal to condign puniſhment; therefore theſe coſts ought not to be re-

The ſpiritual courts may determine matters of temporal cognizance which come collaterally before them. R. acc. 2 Lev. 64. D. acc. ſed R. cont. 3 Lev. 72. ſemb. acc. 3 Bl. Com. 112. Salk. 547. In ſuch determination however they muſt obſerve the rules of the common law. R. acc. Cro. Eliz. 666. Salk. 547. 3 Mod. 283. D. acc. poſt. 222. 3 Bl. Com. 112. 12 Co. 66 2 Lev. 64. 3 Lev. 72. ſemb. acc. Cro. Eliz. 466.

If a feme covert ſues another woman for incontinency with her huſband, and obtains a decree

with coſts, the huſband may releaſe them. S. C. 1 Salk. 115. 5 Mod. 69. Holt 99. 12 Mod. 89. vid. 2 Roll. Abr. 402. pl. 3.

(*a*) Note: in Salk. 115. 5 Mod. 69. & Holt 99, the plaintiff is ſtated to have moved for a prohibition immediately upon pleading the releaſe.

leaſeable

leaſeable by the huſband, no more than the caſe of *Motam*, 1 *Roll. Rep.* 426. 2 *Rol. Abr.* 298. *pl.* 1. 300. *pl.* 10. Againſt which it was argued for the plaintiff by Sir *Bartholomew Shower*, that the prohibition ought to be granted; and of that opinion was the whole court. And reſolved, 1. That the juriſdiction of the eccleſiaſtical court ſhall extend to the determination of the validity of letters patent, feoffments, releaſes, *&c.* which come in queſtion there, in matter properly within the eccleſiaſtical conuſance, provided that in the determination of ſuch collateral matters, they do not deviate from the rules of the common law; for if they do ſo, a prohibition ſhall be granted. 2. It was reſolved, that if a *feme covert* ſue another in the ſpiritual court for incontinency with her huſband, and recover coſts, if the huſband releaſe them, the wife is barred. For ſince the huſband is liable to the charges of the ſuit expended by the wife, he ſhall have the coſts in recompence; beſides that, the wife cannot have a chattel intereſt excluſive of the huſband. But if the huſband dies, the wife ſhall have them, becauſe they were a *choſe in action*, and they ſhall not go to the executors of the huſband. But if the huſband and wife are divorced *a menſa et thoro*, and the wife has alimony allowed her, and ſhe ſues for defamation or other injury, and recovers coſts, the huſband releaſes them, yet the wife ſhall recover them; becauſe they come inſtead of that which ſhe has expended out of her alimony, which was a ſeparate maintenance, and not in the power of the huſband. And this is the reaſon of *Motam*'s caſe. 2 *Rol. Abr.* 300. *pl.* 10. But if the wife has a legacy left her, the huſband may releaſe it. 2 *Rol. Abr.* 301. *pl.* 11. In the principal caſe a prohibition was granted.

If coſts are given to the wife in the ſpiritual court, and the huſband dies, the coſts ſhall go to the wife, and not to the repreſentative of the huſband.—If the huſband and wife are divorced a menſa et thoro, and the wife has alimony, and obtains a decree in the ſpiritual court with coſts for defamation, &c. the huſband cannot releaſe the coſts. But after ſuch divorce and alimony, the huſband may releaſe a legacy left the wife.

D. acc. p. Cur. Cro. Eliz. 908.

Eaſter

Eaſter Term

8 Will. 3 C. B.

Sir George Treby *Chief Juſtice.*
Sir Edward Nevill
Sir John Powell
Sir John Powell *of* Glouceſter } *Juſtices.*

Lawton *verſ.* Ward. †

Pleadings. Lutw. 111. vol. 3. 85.

ACTION upon the caſe for ſpoiling his way with carts and carriages. The plaintiff declares, that he was ſeiſed of a cloſe called *L.* and of another cloſe called *B.* contiguouſly adjoining, and that he and all thoſe, *&c.* time whereof, *&c.* had a cart way from the high road between *F.* and *W.* to *L. tanquam ad tenement. ſpectantem,* and that the defendant *cum carucis et carriagiis ſuis* had made the way ſo founderous, *&c. ad damnum, &c.* The defendant pleads, that *W. W.* was ſeiſed in fee of a cloſe called *C.* and that he and all thoſe, *&c.* time whereof, *&c.* had a way in the ſame way to his cloſe of *C.* and the defendant drove the carts, *&c.* as ſervant to *W.* to the cloſe called *C. &c.* The plaintiff replies, and confeſſes the preſcription of the defendant, *&c.* but ſays, that he drove the carts to *C.* and alſo farther to *D. &c.* The defendant rejoins, that foraſmuch as the plaintiff has confeſſed, that the way did not belong only to him, but alſo to *W.* his maſter, he might uſe it as he pleaſed, *&c.* The plaintiff demurs. And adjudged for him by the whole court. And reſolved, 1. That the defendant has not purſued his preſcription; for the preſcription is to go to *C.* then when he goes to *C.* and farther to *D.* he has not authority to do it. And *Powell juſtice, junior* ſaid, that the diffefence is, (*a*) where he goes farther to a mill or a bridge, there it may be good; but when he goes to his own cloſe it is not good, for by the ſame reaſon, if the defendant purchaſes a thouſand cloſes, he may go to them all,

Under a right of way over a cloſe to a particular place, a man cannot juſtify going beyond that place. S. C. Lutw. 114. See 1 Roll. Abr. 391. pl. 1, 2. Therefore if a defendant juſtifies paſſing along a private way under a right of way to a cloſe called *A.* the plaintiff may reply that he went beyond *A. S. C.* Lutw. 114. In an action for ſpoiling plaintiff's way with defendant's carriages, the defendant may juſtify going along the way with the carriages of a third perſon, having a right to go along the way S. C. Lutw. 114.

A man may preſcribe for a way in himſelf and all thoſe whoſe eſtate he has, without ſhewing that the way is appurtenant to his eſtate. And if he ſtates that he was ſeiſed of two cloſes, and that he and all thoſe &c. had a right of way, "*tanquam ad tenementa ſpectantem,*" the court will reject the words "*tanquam ad tenementa ſpectantem,*" as ſurpluſage.

(*a*) Q. Whether this diſtinction is well founded: the true point to be conſidered upon ſuch a caſe ſhould ſeem to be, *quo animo* the party went to the cloſe; whether really and *bonâ fide* to do buſineſs there, or merely in his way to ſome more diſtant place.

which

which would be very prejudicial to the plaintiff. And for authorities they relied upon 1 *Roll's Abr.* 391. *pl.* 3. 1 *Mod.* 190. 2. Reſolved, that the replication is no departure from the declaration, but fortifies it; and the plaintiff (*a*) in an action upon the caſe (notwithſtanding that it is ſuppoſed, that he ſets forth his whole caſe in his declaration) may aid himſelf by a replication, as well as in any other actions. For the plaintiff cannot divine, that the defendant will preſcribe for the ſame way. And *Powell junior* juſtice compared it to the caſe, where the plaintiff brings treſpaſs for a horſe, the defendant claims it as a ſtray, (*b*) the plaintiff may well reply, that the defendant rode or wrought the horſe; and this fortifies the declaration, for by this the defendant abuſed his right, and is thereby become a treſpaſſer *ab initio.* *Yelv.* 96. *Bagſhaw* verſ. *Gaward.* *Cro. Jac.* 147. 3. Reſolved, that the plea is good enough, notwithſtanding that the plaintiff charges the defendant with ſpoiling the way with *carucis, &c. ſuis*, and the defendant juſtifies as ſervant with the *carucis, &c.* of his maſter, becauſe the defendant had a property in them by the poſſeſſion. 4. Reſolved, that the preſcription, as the plaintiff has laid it, is good; for though he ſays, that he was ſeiſed of two cloſes contiguouſly adjoining, and then lays the preſcription for the way to one of them, *tanquam ad tenement. ſpectantem*, and has not ſhewn, that he was ſeiſed of any tenement before; the court ſaid, that they would reject *tanquam ad tenement. ſpectantem* as ſurpluſage. And in *Raſtall* it is often omitted. *Raſt. Ent.* 618.

(*a*) In caſe as well as in other actions the plaintiff may aid himſelf by a replication, acc. Yelv. 13.

(*b*) To a plea juſtifying the taking of an horſe as an eſtray, the plaintiff may reply that the defendant worked the horſe. R. acc. 1 Term Rep. 12. See alſo 3 Wiſ. 20. Salk. 221. 2 Wilſ. 318.

Tukely *verſ.* Hawkins.

The ſteward of a manor may take the ſurrender of a copyhold out of the manor. R. acc. Salk. 184. D. acc. 1 Roll. Abr. 500. l. 42. 4 Co. 30. b. Co. Litt. 58. a. 13 Ed. n. 4. And ſee 1 Leon. 227. And a cuſtom to the contrary is void. But he cannot admit out of the manor. Semb. acc. 4 Co. 26. b.—Vide 4 Co. 27. a. Co. Litt. 58. a. Cro. Car 267.

IN ejectment upon motion for a new trial, reſolved, that a ſteward of a manor may take a ſurrender of a copyhold, out of the manor; but cannot admit out of the manor; and that a cuſtom, that the ſteward ſhall not take ſurrenders out of the manor, is a void cuſtom.

Kempſter *verſ.* Deacon.

In treſpaſs *quare clauſum fregit* if it appears on the record that a view has been taken by conſent of the parties, tho' the damages are under 40s. & the judge makes no certificate, the plaintiff ſhall have full coſts.—A view cannot be granted unleſs the title comes in queſtion. S. C. Salk. 665.

TRESPASS for a cloſe broken, &c. Upon not guilty pleaded, the *niſi prius* roll was carried to the aſſiſes to be tried, and there by conſent of the parties the jury had the view, and the trial was put off to the next aſſiſes, and then the iſſue was tried, and a verdict for the plaintiff and 13*s.* damages. And the queſtion was *in C. B.* whether the plaintiff ſhould have more coſts than damages, for the judge had made no certificate that the title came in queſtion. And

reſolved

reſolved *per curiam*, the plaintiff ſhall have full coſts, for it appears upon the record, that the view was granted, but the view cannot be granted, unleſs where the title comes in queſtion. And therefore the granting of the view amounts to a certificate, that the title came in queſtion. And by all the prothonotaries, it is always the practice, to give full coſts where the view is granted.

Dalſton *verſ.* Reeve.

1 Ld Ra 13. 45-2

In covenant for non-payment of a rent for tithes, eviction is a good plea.

COvenant upon indenture, for non-payment of rent. The plaintiff declares, that he was ſeiſed of tithes, and by indenture demiſed them to the defendant, rendering rent, and the defendant covenanted to pay it, and he aſſigned his breach in non-payment of ſo much. And the defendant pleaded eviction. The plaintiff demurred. And judgment was given for the defendant; becauſe it is a rent, and the eviction is a ſuſpenſion of it, and therefore a good plea. *Ex relatione m'ri Mather.*

Chance *verſ.* Adams.

15 Law Inſ. mc. 59.

Miſrecital of the title of a public act, tho' the party confines himſelf by the words *contra formam ſtatuti* not fatal. S. C. cit. 19. Vin. 510. pl. 17. Vide 6 Mod. 62. Salk. 609. 3 Salk. 331. pl. 10.

7 Law / 66

DEBT for 200*l.* The plaintiff declares, that whereas by an act for granting ſeveral rates upon tonnage of ſhips and veſſels it is enacted, that if any guager guage any vat, *&c.* of beer, ale, *&c.* and do not leave a true note in writing of the laſt guages taken, with the brewer, *&c.* containing the true quantity and quality of the liquors guaged, he ſhall forfeit 5*l.* for every offence; then the plaintiff ſhews, that the defendant was a guager, and that the 7 *Nov.* 5 *Will. & Mar.* he guaged divers veſſels of the plaintiff of exciſeable liquors, *&c.* and did not leave a note in writing, *&c.* and that *diverſis temporibus* after the 7th of *Nov.* and before the bringing of the action, he guaged ſeveral veſſels of the plaintiff and five other perſons, of exciſeable liquors, and did not leave a note in writing, *&c. contra formam ſtatuti, unde actio accrevit* to the plaintiff to demand 200*l.* the forfeitures amounting to ſo much at five pounds a time. The defendant demurred. And it was objected on the part of the defendant, that the plaintiff has miſtaken the act, for the act is for tonnage *of* ſhips, but the plaintiff has declared upon the act, which was to grant ſeveral rates for tonnage *and* ſhips, but there is no ſuch act; then the plaintiff reſtraining himſelf by a *contra formam ſtatuti*, when there is no ſuch act, the declaration is ill. *Hutt.* 56. *Parker*'s caſe. *Sed non allocatur.* For the title of the act is no part of the act, and therefore it is but ſurpluſage, and miſrecital ſhall not vitiate. *Hardr.* 324. in the caſe of the *Attorney general*

In debt upon a penal ſtatute the plaintiff muſt particularize each offence. D. acc. poſt. 479.

In debt againſt a guager for not leaving notes of his guages, the plaintiff muſt ſpecify the kinds of liquors guaged.

Where the whole penalty in a popular action is given to the informer he is not bound to bring ſuch action within a year after the cauſe of action accrued. (*a*) 4 & 5 W. & M. c. 20. ſ. 49.

verſ.

verſ. *Hutchinſon & Pocock*, by *Hale* chief baron. And *Powell ſenior* juſtice ſaid, that it was ſo adjudged in the houſe of peers between *Darwyn* and the earl of *Monmouth*. And by *Treby* chief juſtice the title of the act is but a new uſage, and begun about 11 *Hen.* 7. but the miſrecital of the purview or enacting part always vitiates.

The ſecond exception was, that the plaintiff ought to have ſaid, *poſtea*, *viz.* ſuch a day the defendant guaged, *&c.* and ought not to have ſaid ſo generally, *diverſis temporibus*, *&c.* And of this opinion was the whole court. For the proof is incumbent upon the defendant, that he has left a note, *&c.* But it is impoſſible for him to provide witneſſes to anſwer the plaintiff's charge, if he does not know at what days the plaintiff will charge him. See 2 *Roll. Abr.* 81. *Aſhton's* caſe, *pl.* 15.

The third exception was, that he has ſaid divers exciſeable liquors, which is too general, for he ſhould have ſpecified what liquors, to the end that the court might have judged, whether they were exciſeable or not; of which opinion the whole court was, and therefore judgment was given for the defendant.

Another exception was taken, that it appears upon the plaintiff's declaration, that he has miſtaken his time; for it appears, that a year was expired after the fact committed, before the bringing of this action; and therefore it is barred by 31 *Eliz. cap.* 5. But as to that *Nevill* and *Powell ſenior*, juſtices, relied upon a caſe between *Culliford* and *Blandford* adjudged ſince the revolution; where an action *qui tam*, *&c.* by bill was brought *in B. R.* for having made a falſe return of a burgeſs to ſerve in parliament; the falſe return was laid to be in *March* 1689, and the bill was filed *term Paſchæ* 1690, ſo that it appeared upon the record, that more than a year was elapſed; and upon error brought in the exchequer chamber it was reſolved by the majority of the judges then preſent there, that where the informer ought to have the whole penalty, the ſtatute of 31 *Eliz.* does not extend to it, becauſe it is not within the words of the act, and penal acts are not extendible by equity. But *Treby* chief juſtice, and *Powell junior* juſtice, were of opinion contrary to that judgment; for if the informer ſhould be bound, when the queen was joined with him, much more ſhould he be bound when he ſued by himſelf.

See the report of this caſe in B. R. Carth. 232. Comb. 194. Sho. 353. 12 Mod. 27. 4 Mod. 129. Where the caſe however went off upon another point.

Note, *Treby chief juſtice*, *Rokeby juſtice* of *C. B.* and *Powell*, bar. held, that for the ſaid reaſon the judgment in the caſe of *Culliford* and *Blanford* ought to be reverſed; but *Nevill* and *Powell* juſtices of *C. B.* and *Leckmere* and *Nevill* barons held the contrary.

Burghill

Burghill *verſ.* Archiep. Ebor. Epiſcop. Carliol. Gibbons & univerſitat. Cantabr.

Burghill brought a *quare impedit* againſt the defendants. The writ was returnable *tres Mich.* 5 *Will. & Mar.* at which day the defendant *Gibbons* caſt an eſſoin, which was not adjourned. Then the archbiſhop of *York* caſt an eſſoin, which was not adjourned. Upon which the defendants entred a *non proſ.* againſt the plaintiff, which upon motion in *Hilary* term laſt was ſet aſide, becauſe the eſſoin of the archbiſhop of *York*, for the non-adjournment of which the plaintiff was nonſuit, was ill caſt, the eſſoin of *Gibbons* not being adjourned, ſo that the archbiſhop had no day in court to caſt an eſſoin; upon the ſetting aſide of which *non proſ.* the record was made right, and the proceeding was in this manner, *viz.* the writ was returnable *tres Mich.* 5 *Will. & Mar.* at which time *Gibbons* was eſſoined, which was adjourned to *craſt. Martin*, then the archbiſhop caſt an eſſoin, which was adjourned to *octab. Hilar.* and at *octab. Hilar.* the other two defendants were not eſſoined but made default; then the plaintiff ſues a *pone* againſt them, to ſhew cauſe why they made default, returnable *octabis purificationis*, at which day iſſued an *alias pone*, which was continued until the firſt return of laſt *Hilary term*; at which day the biſhop of *Carliſle* caſt an eſſoin, which was adjourned to *quinden. paſchae*; at which day the univerſity caſt an eſſoin, to which the plaintiff entred a challenge upon the eſſoin roll, and the defendant demurred to the challenge, and the eſſoin was quaſhed by the court, becauſe an eſſoin is an excuſe of the appearance of the party, now a corporation cannot appear, and therefore cannot caſt an eſſoin, nor (*a*) enter into recognizance. *Bendl.* 121. 21 *Edw.* 4. 79. And now ſerjeant *Gould* moved that the archbiſhop of *York* might have an eſſoin, his former eſſoin which he caſt being adjudged ill upon the ſetting aſide of the *non proſ.* and ſo he had not had any eſſoin. And *per curiam* he ſhall have an eſſoin, for the courſe of the court is, that an eſſoin may be caſt at any time before a *ne recipiatur* is entred; and the reaſon of the irregularity of the firſt eſſoin of the archbiſhop (which was ſet aſide for that cauſe) proceeded from the plaintiff's own fault, *viz.* the non-adjournment of the eſſoin of *Gibbons*, upon which he might have been nonſuit; but where there are ſeveral defendants, and one of them caſts an eſſoin, which is challenged, and upon demurrer the challenge is allowed; the others have no day in court to caſt an eſſoin, becauſe *idem dies datus eſt* to them all, but all the defendants may join in eſſoin if they

If the plaintiff does not adjourn an eſſoin he may be nonproſſed. Vide 2 Term Rep. 16. But he cannot be nonproſſed on an ill caſt eſſoin. R. acc. Str. 1194. A defendant cannot caſt an eſſoin, unleſs he has a day in court.

If one of ſeveral defendants caſts an eſſoin, the others, unleſs it is adjourned, have no day in court.—But tho' one of the other defendants does in ſuch caſe caſt an eſſoin, which is ſet aſide, yet if an adjournment is afterwards entered to the firſt, he ſhall have a freſh one.

Corporation cannot caſt an eſſoin R. acc. Cook's caſ. Pr. C. B. 8. D. acc. 2 Term Rep. 16. Eſſoin may be caſt at any time before a *ne recipiatur* entred.

Where one of ſeveral defendants caſts an eſſoin which is challenged, if the challenge is allowed, the others have no day in court.

All the defendants may join in eſſoin or ſever. vide 2 Vent. 57. 2 Inſt. 126. 250.

(*a*) Vide Mo. 68. pl. 182.

pleaſe

The allowing an essoin where it does not lie is not error, contra of denying it where it does lie. D. acc. Hob. 47. Vide post. 594. 1018. Str. 973. An essoin cannot be cast, after the defendant has appointed an attorney upon record. R. acc. 2 Wilf. 164. Carth. 45. Judgment final given upon quashing an essoin, Hil. 1 Ed. 3. fol. 2. pl. 2. vide Carth. 45.

pleaſe, or any two of them may have ſeveral eſſoins. And by *Powell junior* juſtice it is not error, to allow an eſſoin where it does not lie, but it is error to deny an eſſoin where it does lie; and (by him) it is not error to allow two eſſoins. But *Powell ſenior* juſtice ſeemed to doubt of this latter point, becauſe it is within the act of fourching by eſſoins. And *Powell junior* juſtice cited the caſe of one *Slay*, where an eſſoin was caſt for the defendant at *niſi prius*, which the plaintiff challenged, becauſe an attorney was entered upon record, and the challenge was allowed, and judgment peremptory was given, and upon error brought it was affirmed *in B. R.* becauſe it was in nature of a departure in deſpite of the court; which caſe, as well all the court, as the ſerjeants at the bar remembered.

Makareth *verſ.* Pollard,

Juſtification under a judgment in an inferior court by *taliter proceſſum* good. R. acc. 3 Lev. 403. 2 Mod. 102. 195. 1 Wilf. 316. 2 Wilf. 5. Adm. Cowp. 18.

TReſpaſs for the taking of a horſe. The defendant juſtifies under a judgment recovered againſt the plaintiff in the hundred court, by a *taliter proceſſum*, and does not ſet out the proceedings at large; and adjudged good, notwithſtanding that the old books are to the contrary, upon the authority of a caſe between *Doe* and *Parmiter*, *Hil.* 24 & 25 *Car.* 2. 2 *Lev.* 81 adjudged in point *in B. R.* in the time of lord *Hale*, upon great debate. The ſame point adjudged between *Walker* and *Freby* and *Holmes*, *Trin.* 8 *Will.* 3. *C. B. Intr. Hil.* 7 *Will.* 3. *C. B. Rot.* 342. *Lutw.* 1410.

Knight and his wife *againſt* The Mayor, maſters, and burgeſſes of Wells.

S. C. Lutw. 519. Entry Lutw. 508. vol. 3. 166.

A corporation cannot have two names by grant. Semb. acc. 1 Roll. Abr. 512. l. 54. ſed vide poſt. 1239. If a corporation enters into a bond by their wrongname, the bond is void.

DEBT upon a bond made to the plaintiff's wife *dum ſola* by the corporation of *Wells*, by the name of *The mayor, aldermen, and burgeſſes*. Upon *non eſt factum* pleaded, the jury find a ſpecial verdict, that queen *Elizabeth*, in the thirty-firſt year of her reign created them a corporation, by the name of *the mayor, Maſters, and burgeſſes of* Wells, and that king *Charles* II. in the thirty-fifth of his reign, by his letters patent, granted to them, that they ſhould be known by the name of *the mayor, aldermen, and burgeſſes*, &c. and by this laſt name they entered into the bond; and if this be the bond of the mayor, maſters, and burgeſſes, of *Wells*, then, &c. And adjudged for the defendants, becauſe by the taking of the ſecond letters patent the firſt name is intirely extinguiſhed; but it was agreed; that a corporation might have

have two names, the one by preſcription and the other by grant, or both by preſcription, but not two by grant. *Hardr.* 504. The attorney general againſt the town of *Farnham*.

Pedro *verſ.* Barrett.

A Brought caſe againſt *B.* for falſly and maliciouſly procuring him to be indicted, for conſpiring to lay a baſtard child to *B.* of which indictment upon trial *A.* was acquitted. After verdict for the plaintiff upon not guilty pleaded, adjudged that the action well lay, for (*a*) the conſpiracy was a thing puniſhable at common law by fine and impriſonment, *&c.*

Caſe lies for procuring the plaintiff to be indicted for conſpiring to lay a baſtard child to the defendant.

(*a*) When this caſe was determined it was the general opinion of the courts that no action would lie for a malicious indictment, if the plaintiff could not have been puniſhed on that indictment. Vide poſt. 380, 381. but that opinion is now exploded. Vide Gilb. Caſ. L. and Eq. 185. to 230.

Trinity Term

8 Will. 3. C. B. 1696.

Sir George Treby *Chief Juſtice.*

Sir Edward Nevil
Sir John Powell
Sir John Powell *of* Glouceſter } *Juſtices.*

Intr. Hil. 7 Will. 3. C. B. Rot. 1657.

Sir John Brownlow *againſt* Sir John Hewley.

S. C. Lutw. 368. Pleadings. Lutw. 364. Vol. 3. 88.

The aſſignee of a rent reſerved upon the aſſignment of a term may bring debt againſt the aſſignee of the aſſignee of the term. Q.

And he need not ſhew the commencement of the term.

In debt for rent if the defendant pleads a tender on the land at the day, he muſt make a profert of the money. Acc. Raym. 418.

DEBT for 550*l.* for rent. The plaintiff declares, that Sir *Thomas Trevor* and Sir *John Walter* were poſſeſſed of a farm for a term of 99 years, commencing the firſt of *April* 14 *Jac* 1. and that they being ſo poſſeſſed, aſſigned all their intereſt in the term to *J. L.* rendering 100*l. per annum* rent; and that *J. L.* entered and was poſſeſſed, and paid the rent; that afterwards Sir *John Walter* and Sir *Thomas Trevor* granted the rent to *Richard Brownlow* for the whole term, to which grant *J. L.* attorned; that *Richard Brownlow* made Sir *John Brownlow* his executor, and died; and that Sir *John Brownlow* made the now plaintiff his executor and died; both of whom proved the reſpective wills: and the plaintiff brings debt againſt the defendant Sir *John Hewley*, as aſſignee of *J. L.* of the land, for 550*l.* for rent, for five years and a half, &c. The defendant pleads tender of 50*l.* every day of the half year at which the rent was payable, and that no perſon was there to receive it, and that it was never after demanded upon the land. The plaintiff demurs. And reſolved, 1. That this is a rent ariſing by real contract, and is reſervable without deed, and that debt well lies for the aſſignee of it. And the court relied principally upon the caſe of *Winton* verſ. *Pinkney*, 1 *Ventr.* 242, 272. 3 *Keb.* 131, 137. 2 *Lev.* 80. *Raym.* 222. *Robins* verſ. *Cox and Warwick.*

Warwick. Raym. 11. *Goodman* verſ. *Packer. T. Jones* 1. *(a)* And (by them) the opinion of *Hale, Al.* 57, 8. hath been held for law all theſe laſt years. 2. It was reſolved, that the defendant ſhould have pleaded with a *profert in curia*: and therefore judgment was given for the plaintiff.

(a) See alſo 2 Mod. 174.

Allways *verſ.* Broom.

S. C. Lutw. 1262. Pleadings Lutw. 1259.

PARCO *fracto* and *reſcous (a)* may be joined. Adjudged *Trin.* 8 *Will.* 3. *C. B. Thel. Dig.* 107. *lib.* 10. *cap.* 15. *ſ.* 17.

(a) Note they were joined in the ſame count.

Ward *verſ.* Griffith.

Debt lies againſt bail on their recognizance. On ſurrender, bail will not be diſcharged, unleſs they enter a committitur in the office. (a) Such committitur cannot be entered after the death of the principal, tho' he was actually ſurrendered and in cuſtody while alive. Oyer may be had of a recognizance. Sed vide Ford v. Burnham. Barnes 4to. Ed. 340. Dougl. 215. 459. 1 Term. Rep. 149. But it is not grantable of courſe after the term the declaration was delivered. Vide 5 Co. 74. b. 76. b. 1 Term Rep. 150. Tho' the court will ex gratia ſometimes grant it afterwards. (b) If no Ca. ſa. is filed againſt the principal in his life time, the court will make a rule to prevent the filing of it after his death.

SIR *Edward Ward* in 1683 brought an action againſt Sir *William Warren*, in which *Griffith* was bail, and obtained judgment. Sir *William Warren* rendered himſelf to the *Fleet*, and *reddidit ſe* in diſcharge of his bail was entered in the warden of the *Fleet's* book, but no *committitur* was entered in the office. Sir *William Warren* continued priſoner in the *Fleet* till *Michaelmas* term laſt, and then died there. Sir *Edward Ward* died, and *W.* his executor, now plaintiff, brought debt upon the recognizance againſt the bail; and in *Eaſter* term now paſt ſerjeants *Pemberton, Levinz* and *Wright*, moved for an imparlance. 1. Becauſe debt does not lie upon the recognizance. *Raym.* 14. *Godlington* verſ. *Lee.* 2. Becauſe the plaintiff has ſlept ſo long as thirteen years. 3. They prayed that the court would give them leave to enter a *committitur* in the office. But this ſecond was denied, becauſe it is now too late after the death of the party, And as to the firſt, *Treby* chief juſtice and *Powell junior* juſtice were clear, that debt lies, and that the defendant ſhall have liberty to plead all pleas, that he might have pleaded upon a *ſcire facias*. And for this they relied upon the caſe of *Sparrow* and *Sowgate, W. Jones* 29. *Winch.* 61. *Hutton.* 47. 1 *Rolls Abr.* 600. *p.* 7. 8. *l.* 3. 11. But they ſaid, that ſuch actions were diſcountenanced, *(b)* and therefore if no *capias ad ſatisfaciendum* is filed againſt the principal, they would make a rule of court that it ſhould not be filed after, which would ſtop the action; and *Powell* juſtice *junior* ſaid, that the king's bench did ſo in the caſe of *Miles* and *Bateman*, as *Powell* remembered. But becauſe the plaintiff had ſtaid without ſuit ſo long, they granted an imparlance until this term, being *Trinity* term. And now *Pemberton* moved, that becauſe the plaintiff had declared generally upon a recognizance, ſo that the condition does not appear, and the defendant cannot plead no *capias ad ſatisfaciendum* againſt the principal, *&c.* that the

(a) Note the modern practice is to enter a reddidit ſe in the Filacer's book at a judge's chambers, and give the plaintiff notice. Imp. Pr. C. B. and this fully diſcharges the bail. Salk. 272.

court will grant him *oyer* of the recognizance. And *per curiam*, if a bond is brought into court *oyer* is grantable only the firſt term, for afterwards it is adjudged in the poſſeſſion of the party. The ſame law of a recognizance, which is a pocket record. But of other records, which are always in court, *oyer* is grantable at any time. And therefore in this caſe the declaration being delivered two terms before, and the time elapſed to have *oyer* of courſe, the court granted *oyer*, becauſe otherwiſe the defendant would be ouſted of his plea, the recognizances by bail in *C. B.* being ſpecially entered, the plaintiff has declared here as upon a general recognizance, and omitted all the ſpecial matter. But by *Powell junior* juſtice, if the defendant had here pleaded *nul tiel record*, the iſſue had been with him; for a record which compriſes that upon which the plaintiff declares and more, is not the ſame record with that upon which the plaintiff declares.

In debt upon a recognizance in C. B. if the plaintiff does not ſet out the condition, the defendant may plead nul tiel record.

Hatter *verſ.* Aſh.

S. C. 3 Lev. 438.

A freehold cannot be conveyed to commence in futuro. R. acc. 5 Co. 94. b. 1 Wilſ. 176. D. acc. 2 Bl. Com. 165. 314. 1 Roll. Abr. 828. Agr. 2 Wilſ. 166.

UPON a ſpecial verdict in ejectment the caſe was thus. A prebendary made a leaſe of lands by indenture the fourteenth day of *April* 1675, *habendum a datu indenturae* for three lives, and livery was made the fourteenth. And it was objected againſt this leaſe, that a *habendum a datu* is all one with a *habendum a die datus*, which is excluſive of the day of the date; and then the leaſe will begin the fifteenth. *Co. Lit.* 46. *b.* expreſs in point. From whence it follows, that the livery was void, for livery *in præſenti* could not be made to a freehold to commence *in futuro*. The counſel of the other ſide agreed that a freehold could not commence *in futuro*, and therefore if the day of the date be excluded, the objection is fatal. But (by them) the day of the date in this caſe is not excluded, for [*datus*] ſignifies no more than [given] in *Engliſh*. And therefore old epiſtles inſtead of the inſcription dated ſuch a day, ſay, given ſuch a day. Then if an indenture of leaſe was made to commence from the giving of it, it ſhall commence without doubt from the day in which it was given, and there could not be any difference between the ſame word, or rather the ſame ſenſe, in *Latin* and *Engliſh*. Beſides, that it is adjudged, that if a leaſe is made to begin from the making of the deed, it ſhall begin the ſame day that it becomes a deed, which is the ſame day that it is delivered. 5 *Rep.* 1. *Clayton*'s caſe. *Co. Lit.* 46. *b.* And the ſame reaſon holds place in caſe where it is limited to begin from the date, that it ſhall begin the day of the delivery; for *datum prima facie* ſignifies *deliberatum*. And as to the objection, that *Co. Lit.* 46. is to the contrary, that book is founded

A freehold leaſe to commence from the date includes the day of the date. S. C. Salk. 413. Vide poſt. 480. 1242. 281. See alſo Powell on Powers 435. to 541. & Cowp. 714. where the caſes upon this point are collected and conſidered.

founded upon 5 *Co.* 1. *b. Clayton's* caſe, where this point is not reſolved by the court, but inferred by the reporter of the caſe from *Popham* in *Dyer*, 218. which book does not warrant any ſuch opinion. And although 3 *Bulſtr.* 203. *Bacon* verſ. *Waller*; *Mo.* 40. *pl.* 128. agrees with 5 *Co.* 1. yet *Cro. Jac.* 135. *Oſborne* verſ. *Rider*, 258. *Llewellyn* verſ. *Williams*, are contrary. 2. The counſel, to maintain the leaſe argued, that this difference might be maintained by law, that where it is in point of intereſt, that is conveyed from one to another, as in a leaſe for years, there *a datu* includes the day; but where it is in matters of account, where no matter of intereſt is deſigned to be paſſed, as if the one be accountable to the other by deed, there a *datu* is excluſive of the day of the date, as well as a *die datus*. 1 *Bulſtr.* 177. And of this opinion was *Powell ſenior* juſtice. But the other juſtices gave no opinion as to this diverſity. 3. It was urged, that in caſe of a leaſe for years *habendum a datu* the day might well enough be excluded, becauſe it will be no prejudice to the parties; but in the caſe of a leaſe for life, as in the caſe at bar, it was reaſonable, *ut res magis valeat*, to conſtrue the day incluſive, eſpecially ſince there is no reſolution extant, where any eſtate has been deſtroyed by ſuch date and livery made the ſame day. But to this the juſtices gave no opinion. After ſeveral arguments at the bar *Treby* chief juſtice was of opinion, that the leaſe was ill upon the authority of *Co. Lit.* and the other books. But *Nevill* juſtice, and the two *Powells*, juſtices, were of opinion, that the leaſe was good, for the reaſons given by the counſel in their firſt point. And judgment was given accordingly this term. *Ex relatione m'ri Salkeld.*

The words "from the date" when uſed to paſs an intereſt include the day, aliter when uſed by way of computation only in matters of account. Acc. Powell on Powers 504 to 510.

S. C. cit. 1 P. Wms. 11, 12.

BY *Powell junior* juſtice. If the ſpiritual court refuſe the evidence of the ſon to prove a will in which the father is a legatee, no prohibition is grantable. And he cited this caſe as lately adjudged before commiſſioners delegates. There were three witneſſes to prove a nuncupative will, two of them were without exception, and the third was ſon to the legatee; the ſtatute of frauds requires three competent witneſſes; the queſtion therefore was, if theſe three were ſufficient, the ſon not being an evidence by the ſpiritual law? and adjudged that they were; becauſe two only were required by the ſpiritual law, and the third was a good witneſs within the intent of the act of frauds.

The ſon of a legatee is not by the ſpiritual law a competent witneſs to prove a will. R. acc. poſt. 91. 1 P. Wms. 10. vide Bl. 96. 98. 14 Ann. c. 16. 1. 14 But he is at common law. Vide 25 G. 2 c. 6.

Trin.

Trin. Term

8 Will. 3. B. R. 1696.

Sir John Holt *Chief Juſtice.*

Sir Thomas Rokeby
Sir John Turton *removed this term into the King's Bench out of the Exchequer in the room of Sir* William Gregory *who died laſt vacation*
Sir Samuel Eyre

} *Juſtices.*

Memorandum, The laſt vacation Mr. ſerjeant *Blencowe* was made baron of the Exchequer in the room of Sir *John Turton* removed into the King's Bench.

Petit *verſ.* Smith.

S. C. 5 Mod. 247. Com. 3. Comb. 378. 1 P. Wms. 7. 2 Eq. Abr. 434. Note to pl. 13.

The ſpiritual court cannot compel an executor to diſtribute the ſurplus of his teſtator's eſtate, (*a*) D. acc. poſt. 363. 1 P. Wms. 546, 547. Adm. and a reaſon given for it. 1 P. Wms. 549.

PRohibition was granted to the delegates, to ſtay a ſuit there, *&c.* becauſe they compelled an executor to make diſtribution of the *ſurplus*, he having fifty pounds deviſed to him by the will as a legacy; becauſe, there being a will and an executor, the ſpiritual court cannot compel diſtribution, but only where the party dies inteſtate. *Ex relatione m'ri Place.*

(*a*) But the court of Chancery will, and ſo it afterwards did in this very caſe. Vide 1 P. Wms. 9. 2 Eq. Abr. 5. pl. 2.

Huſſey

Huſſey *verſ.* Jacob.

8. C. Salk. 344. Carth. 356. 12 Mod. 96. with the arguments of counſel; Mod. 175. Com. 4. Pleadings 5 Mod. 170, Vol. 3. 93.

Huſſey brought *aſſumpſit* againſt the defendant *Jacob* upon his acceptance of a bill of exchange drawn upon him by the lord *Chandos* according to the cuſtom of merchants. The defendant *Jacob* pleaded, that the lord *Chandos* played at hazard with the plaintiff *Huſſey* and loſt to him at one and the ſame time 150*l.* and that for payment and ſecurity of the ſaid ſum of 150*l.* loſt to the plaintiff, he drew this bill of exchange upon the defendant payable to the plaintiff, which the defendant accepted; and then he pleads the ſtatute of gaming of 16 *Car.* 2. *cap* 7. by which this bill of exchange, being given for ſecurity of the ſaid ſum gained at play, became void, *&c.* The plaintiff demurs. And Sir *Bartholomew Shower* for the plaintiff argued. 1. That this was not within the ſtatute; for though he well agreed, that an action could not be maintained againſt the lord *Chandos* himſelf for this money by reaſon of this ſtatute; but here a third perſon has made himſelf chargeable by his own collateral engagement, *viz.* by the acceptance of the bill, which ſeems to be out of the intent of the act; for the *aſſumpſit* of the acceptor is altogether different from that of the drawer; for although the conſideration of the drawer was the money won at play, yet the conſideration of the acceptance was the honour of the drawer, or his effects in the hands of the acceptor. And the defendant has not pleaded, that the acceptance was *pro ſolutione et ſecuritate* of it. Beſides that it would be of very ill conſequence, to ſuffer the defendant to avoid his own bill and acceptance by this means; for a bill of exchange once accepted by a reſponſible man, is of ſuch credit among traders, that it paſſes as current as ready money, and is negociated from one to another through all *Europe*, and exchanged upon valuable conſideration, till it come back to *London*. But if the firſt acceptor ſhall be admitted to avoid it by the ſtatute of gaming, this will diminiſh the credit of bills of exchange, and will be a great check to merchandizing. But to this it was anſwered, and reſolved by the court, that if a collateral engagement of a third perſon ſhall not be within the intent of the act, the act will be very eaſily evaded, and in effect rendered uſeleſs. And therefore all the court was of opinion, that if a man has loſt money at gaming, *viz.* more than 100*l.* at one time, and he procures *J. S.* to be bound for the payment of it, or as the principal caſe is, gives a bill of exchange for the payment of it which is accepted, both theſe ſecurities are void by the ſaid act. But if he who wins, being indebted to a ſtranger, procures him who loſes, to bind himſelf to the ſtranger for the payment of the money due by him who wins to the

Special matter of fact intermixed with matter of law, tho' it might be given in evidence on the general iſſue, may be pleaded ſpecially. R. acc. Hob. 127. 4 Cro. 13. 14. agr. 2 Vent. 295. Semb. acc. Cro. El. 871. poſt. 125. See alſo poſt. 217. 393. 566. 787. In an action by the payee of a bill of exchange againſt the acceptor, the defendant may plead that the bill was given for money loſt at play. S. C. Holt 328. Vide Str. 1155. Dougl. 614, 713. In ſuch plea the defendant has no occaſion to aver that the parties played on tick.

A collateral ſecurity by a third perſon for money loſt at play is void. Semb. acc. 1 Wilſ. 220.

But a ſecurity given by the loſer to a bona fide creditor of the winner is good. R. acc. Moor 752. Cro. Jac. 32. Yelv. 47. 1 Brownl. 85. ſed v. 2 Str. 1155. Dougl. 614 713

ſtranger

A ſecurity for money loſt at play is good againſt all the parties in the hands of an aſſignee for a valuable conſideration. R. cont. Str. 1155. Dougl. 713.

ſtranger, in conſideration of a diſcharge of the money which he hath loſt at gaming, this bond which he makes to the ſtranger is not within the act, becauſe it is made for a juſt debt. So in this principal caſe, if the bill of exchange had been afterwards aſſigned for a valuable conſideration, the honeſty of this aſſignment had purged the original canker, and rendered it good enough. As where a fraudulent conveyance is aſſigned upon valuable conſideration, the fraud is purged. (But Sir *Bartholomew Shower* ſaid, that it was ſtrange, that the party by his aſſignment could make that good, which was void *ab initio.*) But in this caſe at bar, the money loſt at play is the foundation of the whole, which is ill, and therefore the bill and the acceptance, which are the ſuperſtructure, are ill alſo. Note, This is called an acceptance for the honour of the drawer, when a ſtranger upon whom the bill was not drawn, in reſpect to the drawer, and having no effects of his in his hands, accepts it.

Acceptance of a bill of exchange for honour of the drawer, what?

2. It was objected for the plaintiff, that the defendant has not brought himſelf within the ſtatute; for he has not alledged that the Lord *Chandos* and the plaintiff played upon tick or credit according to the words of the act, which is a penal law, and ought to be purſued ſtrictly; for ſuch gaming was not prohibited by the common law. *Sed non allocatur*; for *per curiam* the giving of the bill of exchange makes it evident, that they did not play for ready money, but for credit.

3. It was objected, that the cuſtom, which was the ground of the action, is not anſwered by the plea. *Sed non allocatur.* For *per curiam* it is confeſſed and avoided. It is admitted to be good generally, but not with this ingredient. And by *Holt* chief juſtice, though theſe declarations ſeem to be grounded upon cuſtom, yet this cuſtom is properly the common law. For the acceptance of the bill amounts to a promiſe in law to pay it, and this promiſe is grounded upon the conſideration of trade.

Actions upon bills of exchange are aſſumpſits at common law. Vide poſt. 175.

4. It was objected, that the defendant ſhould have pleaded the general iſſue, and given this matter in evidence; for the ſtatute ſays, that ſuch contract ſhall be void; then nothing is due to the plaintiff, and conſequently the defendant ſhould have pleaded the general iſſue; for in effect this plea does but amount to it. *Sed non allocatur*; for *per curiam*, where the defendant had ſpecial matter conſiſting not only of bare matter of fact, but intermixed with matter of law, which will avoid the charge or action of the plaintiff: he is not obliged to plead the general iſſue, but may plead it ſpecially. For otherwiſe he ſhould be obliged to commit a point of law to a jury who is ignorant of it, which would be abſurd.

Therefore

Therefore in debt upon a bond made by a *feme coverte* while ſhe was *coverte de baron*, the defendant may plead the ſpecial matter, or *non eſt factum* and give it in evidence. So in this caſe the defendant might have pleaded the general iſſue, and have given this matter in evidence, or he might do as he has done, *viz.* plead it ſpecially. And therefore judgment was given by the whole court for the defendant.

Aſſumpſit againſt a woman, ſhe pleads that ſhe is, and at the time of the aſſumpſit made, was a feme coverte. The plaintiff demurred ſpecially, and ſhewed for cauſe, that this amounted to the general iſſue. But adjudged for the defendant, for this matter of fact is intermixed with matter of law, which will excuſe the defendant. Mich. 8 Will. 3. B. R. 1696. James verſ. Fowkes. 12 Mod. 101.

Note, In this caſe, the caſe of one *Reſindale* lately adjudged was cited, where the caſe in effect was thus. *A.* covenanted with *B.* that the horſe of *A.* ſhould run with the horſe of *B.* four heats for 30*l.* each heat; and in covenant brought for the 120*l.* having won every heat, the defendant pleaded the ſtatute of gaming; and upon demurrer it was objected, that this was not within the ſtatute; becauſe the running of each heat for 30*l.* was a diſtinct and ſingle wager; and then, being but for 30*l.* the ſtatute did not extend to it, the ſum prohibited by the ſtatute being 100*l.* or more. But it was adjudged that it was void for the whole; for it was but one intire and ſingle contract, though the horſes were to run four times; and then the ſum won amounting to 120*l.* it was expreſly prohibited by the act. *Ex relatione m'ri Salkeld.* Intr. Trin. 25 Car. 2. Rot. 1233. in B. R.

To win more than 100l. under an agreement to run four heats for 30l. each is within the ſtatute of gaming S. C. 3 Salk. 165. with ſome difference. 1 Vent. 253. 2 Lev. 94. 3 Keb. 254. 259. See alſo Bl. 1226.

Wilkinſon *verſ.* Kitchin.

S. C. cit. Str. 916.

THE plaintiff being committed to priſon, two indictments for clipping, *&c.* being found againſt him by the grand jury, ſent for the defendant, being a *Newgate* ſolicitor, and gave him 70*l.* at ſeveral days, to procure his diſcharge, and for his pains. And not being proſecuted upon theſe indictments, he brought *indebitatus aſſumpſit* againſt the defendant for the whole 70*l.* And upon the trial at *Guildhall*, *Trin.* 8 *Will.* 3. before *Holt* chief juſtice of *B. R.* the queſtion was, whether money given to a man to be expended in an ill uſe might be recovered by the giver who was *particeps criminis*. And Sir *Bartholomew Shower* cited a caſe, where a bribe was given to a cuſtom-houſe officer for exempting goods from the payment of cuſtoms, which being diſcovered, and the goods ſeized, (*a*) the party recovered his money in *indebitatus aſſumpſit*. And afterwards it being proved in this caſe, that the defendant confeſſed, that he had diſpoſed of this money in bribes, the jury by direction gave a verdict for the plaintiff. *Ex relatione m'ri Nott.*

If a man gives his agent money to expend illegally, tho' it is expended accordingly, he may bring an action againſt his agent for money had and received. R. cont. Doug. 671. Semb. cont. Salk. 22. Dougl. 673. and vide Skinn. 412. Cowp. 792.

(*a*) Q. If ſo, ſee this caſe put, cont. Salk. 22. and ſo conſidered Dougl. 673. and ſee Skinn. 412.

Jones

Jones *verſ.* Bodeener.

S. C. Salk. 173. Holt 149. Carth. 370. Comb. 379. 5 Mod. 225. Com. 8.

If the defendant pleads a juſtification which is ill in ſubſtance, tho' upon an iſſue inde a verdict is found for the plaintiff, the judgment ſhall not be entered upon the verdict, but upon the confeſſion. R. acc. Cro. Eliz. 214. D. acc. poſt. 924. & vide Str. 873. Com. 548. and a writ of inquiry ſhall be awarded for the damages.

TRESPASS for the plaintiff's cloſe broken, and cattle taken in *Blackacre*. The defendant pleads, that the plaintiff was outlawed in debt at the ſuit of *J. S.* upon which a *capias utlagatum* iſſued againſt the plaintiff, and a *levari facias teſte Hil. 6 Will. & Mar.* iſſued out of the exchequer directed to the ſheriff of *N.* commanding him to levy the iſſues and profits of the plaintiff's lands to the uſe of the king, that this writ was delivered to the ſheriff at *A.* upon which the ſheriff made his warrant, directed to the defendant his bailiff, *virtute cujus* the defendant entred into *B.* being the plaintiff's land, and took there the cattle. Upon which the plaintiff replied, that the defendant took the plaintiff's cattle at *O. abſque hoc* that he took them at *B.* And iſſue being joined upon this, the verdict was for the plaintiff. And it was moved by Mr. *Northey*, that no judgment can be given upon this verdict. For if there is no matter of bar in a plea, and iſſue is joined thereupon, it is void, and not aided by the ſtatutes of jeofails. But if a plea contain matter of bar, and iſſue is joined upon a thing not material, this is aided by 32 *Hen.* 8. *cap.* 30. *ſ.* 1. *Cro. Eliz.* 227. *Lovelace* verſ. *Grimſden.* 259. *Gurny* verſ. Sir *Edw. Clere.* Now here the matter of the plea is merely frivolous, for there cannot be any writ *teſte Hil. 6 Will. & Mar.* becauſe the queen died before *Hil. ſexto* came. But *Shower* for the plaintiff argued, that there was here a proper plea, but ill pleaded; and there is a manifeſt difference between a thing which is a good bar but ill pleaded, and a thing which is no bar but merely frivolous. Now here there is a colourable bar, *viz.* conſiſting of a writ which would have been good in reſpect of the matter, if it had not miſtaken, and that is aided by the ſtatutes of jeofails. *Cro. Eliz.* 455. *Chamberlain* verſ. *Nichols.* 778. *Dighton* verſ. *Bartholomew. Hob.* 326. *Reynolds* verſ. *Buckle. Raym.* 458. Sir *George Fletcher*'s caſe. *Cro. Car.* 18. *Knight* verſ. *Harvy. Mo.* 696. *pl.* 969. *Wilcock* verſ. *Hewſon. Cro. Jac.* 678. *Johns* verſ. *Ridler.* But by *Holt* chief juſtice, and the whole court, judgment muſt be given for the plaintiff, upon the confeſſion, and not upon the verdict; and a new writ of enquiry muſt be awarded for the damages. For the iſſue being perfectly immaterial (for it cannot be a taking at *O.* by virtue of an impoſſible writ) the jury could not give damages. Therefore the verdict was ſet aſide, and judgment was entred for the plaintiff upon the confeſſion of the defendant, who hath admitted the treſpaſs.

Beſton

Beſton *verſ.* Hayward.

Mich. 8 Will. 3. B. R.

TReſpaſs for breaking his cloſe, and digging therein at *B.* The defendant juſtifies by a way, &c. The plaintiff replies, that the treſpaſs whereof he complains was not committed in the way which the defendant claims, but in another part of the cloſe, *et hoc paratus eſt verificare, unde ex quo prædictus defendens ad tranſgreſſionem prædictam in clauſo prædicto, de novo aſſign. factam ſuperius non reſpondet idem querens petit judicium et damna, &c.* The defendant demurred. And *Northey* for the defendant took exception to this new aſſignment, becauſe it does not ſay *alia quam in barra*, as the old precedents are 2 *Co.* 6. &c. But by *Holt* chief juſtice, the treſpaſs here being for breaking of the cloſe, and the new aſſignment being in the ſame cloſe, the plaintiff has pleaded better than if he had ſaid *alia quam in barra*. And therefore judgment was given for the plaintiff.

To a juſtification in treſpaſs under a right of way, a replication that the treſpaſs was committed *extra viam* in another part of the cloſe, is a good new aſſignment.

Smith *verſ.* Thwaite.

S. C. 1 P. Wms. 10.

A. Makes his will and *B.* executor, and deviſes divers legacies, and afterwards all the reſidue of his goods (if there ſhall be any remaining) to *C.* and *D.*—*E.* and *F.* ſon and daughter of *C.* and *D.* were witneſſes to prove this will, and *G.* the third witneſs was without exception. And it was adjudged by the commiſſioners delegates (of whom the two *Powells* juſtices, and Sir *Samuel Eyre* juſtice were three) that *E.* and *F.* cannot be admitted to be witneſſes to prove this will, becauſe their father and mother upon contingency (*viz.* if there ſhall be any remainder of the goods after the legacies before deviſed ſhall be paid) ſhall be legatees. This caſe was cited by *Powell junior* juſtice *in G. B.* this term.

The children of a reſiduary legatee, are not by the ſpiritual law competent witneſſes to prove a will. R. acc. ante. 85. 9. v.

Lambert *verſ.* Thornton.

Intr. Trin. 7 Will. 3. C. B. Rot. 416.

TReſpaſs for taking and impounding of a gelding. The defendant juſtifies, that *T. B.* was ſeiſed of the manor of *P.* in fee, and that there was a cuſtom within the manor, that the homage ſworn at the court baron ſhould make by-laws, &c. then he ſhews, that the homage at the court held

Where a defendant juſtifies taking a diſtreſs by virtue of a by-law made under a cuſtomary right, if the by-law ordains the diſtreſs, he need not ſhew a cuſtomary right to deſtrain.

before

A court baron may by preſcription be held before the ſteward of the manor. R. cont. Cro. Jac. 582. Semb. cont. Noy 20. Cro. Eliz. 792. D. cont. poſt. 862. & vide Co. Cop. ſ. 31. Co. Litt. 58. a. Where the homage at a court baron are ſtated to have a power to make by-laws, and a defendant juſtifies a diſtreſs under a by-law made at a court held before the ſteward, the court after a verdict for the plaintiff on the general traverſe will preſume ſuch a preſcription.

before the ſteward made a by-law, that ——————inhabitants within the manor ſhould be choſen annually by the homage to be field-reeves within the manor; and that if any inhabitant choſen by the homage to ſerve as field-reeve ſhould refuſe to ſerve, he ſhould forfeit 10*l.* which ſhould be levied by diſtreſs; and then he ſhews, that the plaintiff was elected, *&c.* and refuſed to ſerve, *&c.* by which the fine of 10*l.* *&c.* the defendant as bailiff, *&c.* took the gelding as a diſtreſs, *&c.* The plaintiff replies, *de injuria ſua propria abſque tali cauſa.* Verdict upon iſſue joined for the defendant. And motion was made in arreſt of judgment by *Wright* ſerjeant, that the defendant has not preſcribed to levy the penalty by diſtreſs. And it was argued ſeveral times, but afterwards it was adjudged, that it was well enough; becauſe the preſcription being for the by-law, and the by-law itſelf ordaining a diſtreſs, it is the ſame thing as if the preſcription had appointed the diſtreſs. Second exception, becauſe it is ſaid, that the by-law was made at the court held *coram ſeneſcallo*, where it ought to have been *ſectatoribus*. *Sed non allocatur*; for by preſcription a court may be held before the ſteward; and after verdict the court ſaid that they would intend it ſo, becauſe it was neceſſary to be proved upon the iſſue *de injuria ſua propria*. Judgment for the defendant. *Ex relatione m'ri Daly.*

Mich

Mich. Term.

8 Will. 3. B. R. 1696.

Sir John Holt *Chief Juſtice.*

Sir Thomas Rokeby
Sir John Turton
Sir Samuel Eyre
} *Juſtices.*

Duncomb *verſ.* Church, *Warden of the Fleet.*

The want of adding a prout patet after pleading a record is a defect in form only. Vide ante 35. & acc. 4 Ann. c. 16. ſ. 1. After a ſpecial imparlance ſaving all exceptions "as to the bill" only, the defendant cannot plead to the juriſdiction. R. acc. 12 Mod. 529. Lutw. 45. Bl. 1094. & ſee 3 Lev. 343. Gilb. Hiſt. C. B. 183. 184. Q. Whether to a plea of privilege in another court, the plaintiff can reply that the defendant was in cuſtody in the priſon of the court in which he ſues at the ſuit of a perſon having privilege in ſuch court. Vide poſt. 135. Str. 191.

DUNCOMB commenced an action *in B. R.* againſt the defendant, who imparled with *ſalvis omnibus advantagiis quoad billam prædictam*, and afterwards pleaded privilege *in C. B.* as warden of the *Fleet*. The plaintiff replies, that at the time of the exhibiting of his bill the defendant was *in cuſtodia mareſcalli in quodam placito debiti ad ſectam A. B.* an attorney of the king's bench. The defendant demurs. And exception was taken to the replication, becauſe it does not ſay, *prout patet per recordum*, and therefore the defendant is deprived of the benefit of joining iſſue. But *per curiam* it is aided by the general demurrer, and ſo it has been often ruled in the king's bench. For if the record be ſhewn in pleading, the plaintiff may reply *nul tiel record*, although the defendant has not concluded with *prout patet per recordum*; and therefore it is but form. And *Holt* after argument at the bar, ſeemed to be of opinion, that the plea was ill, 1. Becauſe after a general imparlance this matter could not have been pleaded; then though there is a ſpecial imparlance, yet this imparlance is with *ſalvis omnibus advantagiis ad billam* only, and therefore this plea, which is to the juriſdiction, is not ſaved. 2. It ſeems to him, that a privileged perſon may plead his privilege, notwithſtanding that he is in cuſtody of the marſhal, and declared againſt as in cuſtody. But if he be in cuſtody upon a waiver of privilege, or upon attachment of privilege, he

he is liable to the actions of all men. It seems hard, that whilst a man waives his privilege to one action, he should be exposed to all men; but if the case were so, it ought to be pleaded specially. But to this matter no positive resolution was given, because the suit was discontinued by consent of the parties.

Rex *verf.* Bernard.

S. C. Salk. 502. Skinn. 669. Comb. 390. 12 Mod. 115. Holt 152.

A corporation has no power of common right to elect a constable. Vide ante 70. But it may by custom. An indictment for not serving the office of a constable on the election of a corporation, must set forth the corporation's right to elect.

MOtion was made to quash an indictment against the defendant for refusing to serve the office of constable; which indictment set forth, that *Bernard* was elected by the mayor and aldermen of *Southampton* upon the fourth of *May*, *debito modo secundum consuetudinem*, &c. And the court refused to quash it upon motion, but drove the defendant to plead to it or demur. And afterwards the defendant having demurred, in *Hilary Term* 8 *Will.* 3, after argument by Mr. *Northey* for the defendant, and Sir *Bartholomew Shower* for the king, it was quashed; because although by custom the election of a constable may be by the corporation, because the government of the place is reposed in them; yet this is not of common right, but they ought to prescribe for it, which is not done here; for the *debito modo secundum consuetudinem villae*, &c. is not sufficient, but the prescription should have been specially made. And for this reason principally, though there were other faults in the indictment, judgment was given for the defendant.

Tite *verf.* episcopum Worcester.

In ejectment the court will amend the Nisi prius roll by inserting the name of one of several defendants. S. C. Salk. 48. 12 Mod. 107. Comb. 393. vide 2 Wilf. 161. 243. 8 Co. 162. a. vide also post. 116. vide tamen 8 Co. 161. b. And the judge who tried the cause, if all the defendants appeared upon the trial the postea. Vide Str. 1197. 1 Wilf. 33. No costs on amending the Nisi prius roll before judgment, tho' a writ of error may have been sued out for the fault rectified. Vide 1 Term. Rep. 280. Str. 834.

EJectment was brought against the bishop of *Worcester* and six others, who all seven entred into the rule to confess lease, entry, and ouster. The plea roll, the *distringas*, and the *jurata*, were against seven defendants, but the *nisi prius* roll, and the *postea*, made mention but of five defendants. And now after verdict for the plaintiff at *nisi prius*, it was moved *in B. R.* that for this omission of two of the defendants in the *nisi prius* roll, and in the *postea*, the action was discontinued against all. Upon which the plaintiff made application to *Treby* chief justice of *C. B.* before whom this cause was tried at *nisi prius*, to return the *postea*, that all the seven defendants were found guilty; and in truth the fact was so, for all the seven defendants appeared at the trial, and made defence, and verdict was given against them all. Upon which *Treby* chief justice demanded the opinion of his brothers *in C. B.* who were all of opinion, that it might be amended; for it was the error of the clerk in the transcribing only. Upon which *Treby* said, that he would return the *postea*, that all seven were found guilty. (All

which I heard, being preſent *in C. B.*) And afterwards the plaintiff moved *in B. R.* that the court would give him leave to amend the *niſi prius* roll, &c. by the plea roll. Againſt which it was objected, that the judge of *niſi prius* had no authority to try this iſſue; for the iſſue being betwixt *A.* and *B.* upon the *niſi prius* roll only, he had no authority to try an iſſue between *A.* and *B.* and *C.* eſpecially in this action, where one defendant may be found guilty, and another acquitted. 2. If the *poſtea* be amended, this will be to alter the verdict, and ſubject the jury to an attaint. Beſides that the authority of the juſtices of *niſi prius* is but miniſterial to the court, and the *poſtea* is an account of the matters committed to them. If they give account of an iſſue tried between *A.* and *B.* the king's bench cannot make this a trial between *A.* and *B.* and *C.* But by all the court order was given, that it ſhould be amended. For upon the whole matter it appears, that this was but a miſtake of the clerk; for it appears by the iſſue roll, that iſſue was joined by all ſeven, and therefore it may well be amended by it. As where debt is brought againſt the heir upon the bond of the anceſtor, in which he bound himſelf and his heirs; if in the declaration the word *heirs* be omitted, though the *giſt* of the action depends upon this word; yet becauſe it is but the ſlip of the clerk, who had the bond before him, it ſhall be amended by the bond. And this alteration will not ſubject the jury to an attaint: for iſſue was joined by all ſeven, and defence in fact was made by all ſeven, and all ſeven were found guilty. And it appears alſo, that the judge of *niſi prius* would have had perfect authority to try this cauſe between the plaintiff and the ſeven defendants, if the clerk had not made this ſlip; and therefore this ſlip of the clerk being amended, all will be complete. And the amendment was made accordingly. And afterwards Sir *Bartholomew Shower* moved, that the plaintiff ſhould pay coſts for this amendment, becauſe the defendants had ſued a writ of error for this error only, which was a great expence. But it was denied by the court, becauſe this amendment was made before judgment was given, at which time the defendants ought not to have ſued their writ of error, but ſhould have waited till judgment ſhould be given. Mr. *Salkeld*, Mr. *Jacob.* After rule for judgment for the plaintiff, and before entry of it, the defendant brought error. Afterwards in the entry of the judgment the clerk made an error by miſtake; and leave was given to the plaintiff, to amend without payment of coſts. *Mich.* 10 *Will.* 3. *B. R. Ex relatione m'ri Jacob.*

Declaration in debt againſt the heir upon the bond of his anceſtor amended, by inſerting the word "Heirs."

Olderoon

Olderoon *verſ.* Pickering.

8. C. Salk. 464. 3 Salk. 137. Holt 503. Carth. 376. 12 Mod. 103. Comb. 588.

Executors or adminiſtrators are not compellable to diſtribute eſtates pur autre vie Semb. acc. Comb. 475. Sed vide 2 P. Wms. 382. and the note there 3 P. Wms. 102 and particularly 14 G. 2. c. 20. ſ. 9. by which ſtatute they are.

THE plaintiff declared upon an attachment upon a prohibition; and the ſingle queſtion was, whether an adminiſtrator, who has an eſtate *pur autre vie* by the ſtatute of 29 *Car.* 2. *cap.* 3. ſ. 12. be compellable to make diſtribution of it after debts paid, by the 22 and 23 *Car.* 2. *cap.* 10. And Mr. *Ward*, argued, that he ſhall be compellable to make diſtribution of it. 1. Becauſe (*a*) an act ſubſequent may be within the equity of an act precedent. Then ſuch eſtate being made by 29 *Car.* 2. *cap.* 3. *aſſets* in the hands of the adminiſtrator, by this it is made ſubject to all the other qualities of *aſſets*; and from a freehold it is changed into a chattel, for it paſſes to the adminiſtrator without livery. Upon a *fieri facias* (which is only *de bonis et catallis*) againſt the adminiſtrator, it ſhall be ſold; and upon a plea of *plene adminiſtravit*, if ſuch eſtate *pur autre vie* remain in the hands of the adminiſtrators it ſhall be found againſt him. 2. The ſpiritual court has juriſdiction of ſuch ſuit for diſtribution, for the ordinary has power over ſuch eſtate, which he paſſes by the granting of adminiſtration; and therefore a legatee may ſue an executor in the ſpiritual court, though he has no other *aſſets* but ſuch an eſtate; for if the legacy be of 100*l.* and the executor hath goods and chattels but to the value of 10*l.* but he hath an eſtate *pur auter vie* to the value of the reſidue; in what court ſhall this legatee ſue, if not in the ſpiritual court, for (*b*) at common law a man cannot ſue for a legacy? beſides, admitting ſuch an eſtate to be a freehold, yet it may well be comprehended in the word *goods*, which the ſtatute of diſtributions make uſe of. For *bona* by the canoniſts and civilians ſignifies any thing in which a man hath property; and the ordinary, under whoſe controul theſe diſtributions are, is guided by thoſe laws. The ſtatutes of 31 *Ed.* 3. *St.* 1. *cap.* 11. and 21 *Hen.* 8. *cap.* 5. which appoint adminiſtration to be granted, mention the word goods, and yet terms for years are within thoſe ſtatutes. But farther, the 22 *Car.* 2. of diſtributions, appoints the diſtribution of the eſtate; and without doubt then this is within the word of the act, for it is an eſtate. And it is more reaſonable, that all the neareſt relations ſhould have diſtribution, than that one of them ſhould enjoy the whole. And therefore he prayed that the court would grant a conſultation. Mr. *Cheſhyre e contra* argued, that the 29 *Car.* 2. had made ſuch eſtate *aſſets*, which is an affirmative ſtatute introductive of a new law, and therefore implies a negative of all matters not neceſſarily incident to ſuch innovation. But the reaſon why this paſſes without livery, or may be ſold upon a *fieri facias*; or if an executor pleads *plene adminiſtravit*, if ſuch eſtate re-

(*b*) Sed vide Cowp. 284 and 289.

An affirmative ſtatute introductive of a new law implies a negative of all matters not neceſſarily incident. D. acc. Hob. 298. 4 Mod. 208.

(*a*) vide poſt. 499.

mains

mains in his hands, the iſſue ſhall be againſt him, is, becauſe theſe things are eſſential properties of *aſſets*, therefore the ſtatute having made ſuch eſtate *aſſets*, incidentally gives to it theſe properties. But to be diſtributable is a new quality not at all incident to it as *aſſets*, nor included in the notion of *aſſets*, for before this act there were *aſſets* which were not diſtributable. And the intire intent of the act is ſatisfied without ſuch diſtribution. For the ſtatute ſays, (*a*) that it ſhall be *aſſets* for the payment of debts; now to make this diſtributable, does not at all aſſiſt to the payment of debts. Beſides the ſtatute does not ſay, that all *aſſets* ſhall be diſtributable, but goods and chattles. But this eſtate, though it be *aſſets*, yet it remains a freehold, and the adminiſtrator is tenant to the *præcipe*. A ſtatute may make a fee *aſſets* for the payment of debts, but by this (as it ſeems) it ſhall not be *aſſets* for the payment of legacies. The ſtatute makes ſuch an eſtate *aſſets* in the hands of the heir as ſpecial occupant, but this is only for ſuch debts in which the anceſtor bound him and his heirs. And where there is no ſpecial occupant, it goes to the executors or adminiſtrators, to pay creditors, and for no other purpoſe. Beſides that, it is very dangerous to ſubject a freehold to the power of the ordinary, without expreſs words or neceſſary conſequence; but in this caſe there is neither the one nor the other. And for theſe reaſons he prayed judgment, that the prohibition ſhould continue. And for theſe reaſons it was ſo adjudged by the whole court. *Doy.*

Adminiſtrator is tenant to the præcipe of an eſtate pur autre vie. An eſtate pur autre vies ſets in the hand of the heir for ſuch debts only for which the anceſtor bound himſelf and his heirs.

(*a*) The words of the ſtatute are general that it ſhall be aſſets in the hands of the executor or adminiſtrator.

Hartop *verſ.* Holt.

S. C. Salk. 263. 5 Mod. 229. Comb. 393. 12 Mod. 105. Holt 271. See the writ of error. 5 Mod. 228. and Vol. 3. 73.

THE plaintiff recovered judgment in debt *in B. R.* upon which a writ of error was brought in the exchequer chamber, and the judgment was affirmed there; upon which a *ſcire facias* was ſued upon this judgment *in B. R.* and the plaintiff had judgment thereupon given for him. And now the defendant brought a writ of error *tam in redditione judicii quam in adjudicatione executionis*. And notwithſtanding this writ of error the plaintiff ſued execution, and took the defendant in execution. And now it was moved on the part of the defendant, that he might be diſcharged. 1. Becauſe the writ of error well lay. 2. Admitting that it did not lie, yet it would be a *ſuperſedeas* to the parties. And as to the firſt point, it was ſaid, that a writ of error will lie upon an award of execution, and that the execution was as well within the 27th of *Elizabeth, cap.* 8. as the judgment itſelf. For the ſtatute gives remedy in all actions mentioned there, when the party is grieved *in recordo et proceſſu*; then

Error lies not in the exchequer chamber on a mere award of execution. R. acc. 1 Vent. 168. Str. 1102. and ſee the bottom of the next page.

Nor does it lie on a judgment in a Scire facias upon a judgment in a court in which the original judgment has before been affirmed. R. acc. 1 Vent. 168.

Where error does not lie, the writ tho' ſued out, is no ſuperſedeas. R. acc. Str. 949.

ſince this is the grievance of the party, which the ſtatute would relieve, and the party is no more grieved by the judgment than by the execution; error muſt lie, as well upon the execution, as upon the judgment. 2. This *ſcire facias* comes in the place of debt at common law; and therefore as error would have lain upon a judgment in ſuch action at common law, ſo it muſt lie upon a judgment in *ſcire facias*, which is of the ſame nature. 2. It was ſaid, that admitting, that error will not lie in this caſe, yet it is a *ſuperſedeas* to the parties; becauſe it is the king's writ, and it does not belong to the parties to be judges whether it lies or not. But it was anſwered to the firſt point, and adjudged by all the court, that the intent of the ſtatute of 27 *Eliz.* was only to relieve the party grieved upon the merits of the cauſe, as it was at the time of the firſt judgment, and not upon any matter ſubſequent which ariſes afterwards. When therefore the firſt judgment was affirmed, the merits of the cauſe were allowed, and the exchequer chamber, who ought only to affirm or reverſe the firſt judgment, have executed their full power. It is true, that if a *ſcire facias* be brought to revive a dormant judgment *in B. R.* error will lie in the exchequer chamber *tam quam*, becauſe it is only in execution of the firſt judgment, and it is *quaſi* a kind of original action; but if a judgment of the king's bench be once affirmed in the exchequer chamber, and then a *ſcire facias* is brought upon it; it is privileged from any other writ of error; or otherwiſe the law would be infinite and without end. And the *ſcire facias* is not in nature of debt at common law; for the one is brought to obtain another judgment, the other to obtain execution. And *Holt* chief juſtice ſaid, that *Twiſden* juſtice was always of opinion, that error will not lie upon award of execution. As to the ſecond point it was anſwered and adjudged by the court, that this was the reſult of the firſt point; for if the writ of error will not lie, it cannot be a *ſuperſedeas* to the parties (who may proceed at their peril, and it had been puniſhable if the writ of error had lain) for it were unreaſonable to ſuperſede them by a writ of error which does not lie. Afterwards *Hil.* 8 *Will.* 3. *B. R.* it was held in the caſe of *Bonies* and *Rawlins* and *Man*, that error in the exchequer chamber upon judgment in *ſcire facias* againſt bail is not a *ſuperſedeas* to the execution, becauſe error does not lie there in ſuch caſe.

Error tam quam lies in the exchequer chamber on a judgment in B. R. in a ſcire facias upon a judgment, if the original judgment has not been affirmed in the exchequer chamber before. D. acc. 1 Mod. 79. 1 Vent. 169. & vide Cro. Car. 208. 334.

Error lies not in the exchequer chamber on a judgment in B. R. in ſcire facias upon a recognizance of bail.

R. acc. 1 Vent. 38. Yelv. 157. Hob. 72. Cro. Jac. 171. Cro. Car. 218. D. acc. 1 Vent. 169. and ſee poſt. 328.

Hicks

Hicks *verſ.* Downing.
alias
Smith *verſ.* Baker.

S. C. Salk. 13. 12 Mod. 100. Pleadings. Vol. 3. 236.

A termor may bring an action againſt his under-tenant for negligently keeping his fire, *per quod* the houſe was burnt. R. acc. Cro. Eliz. 461. D. acc. Salk. 19. 3. Lev. 359. Vide 10 Ann. c. 14. ſ. 1.

ACTION upon the caſe was brought by the plaintiff as aſſignee of the reverſion of a meſſuage againſt the defendant as aſſignee of a term of years of the houſe, for negligent keeping his fire, by which the houſe was burnt. And upon not guilty pleaded the verdict was for the plaintiff. And upon motion in arreſt of judgment it was reſolved,

1. That if leſſee for years of a houſe aſſign over all his term, and the houſe be burnt by the negligence of the aſſignee; no action lies for the aſſignor againſt the aſſignee for this. For the aſſignor had no reſiduary intereſt in the houſe, nor is he liable to the leſſor; becauſe he committed no wrong, the aſſignment being lawful, and the burning not being by his default. So if leſſee for three years aſſigns his term for four years, or demiſes the houſe for four years, he does not by this gain any tortious reverſion, and it does but amount to an aſſignment of his intereſt. And the law is the ſame as in the caſe aforeſaid,

In ſuch action the plaintiff muſt ſhew in his declaration that he had a reſiduary intereſt when the houſe was burnt. But he need not ſhew that it ſtill continues.

2. That if the leſſee for three years of a houſe demiſes it for two years; in reſpect of his reverſion he may have an action againſt the leſſee for two years, if the houſe be burnt by his default, becauſe he is liable over to the action of the leſſor.

The aſſignor of a term cannot maintain ſuch action againſt his aſſignee.

3. That it is not neceſſary, that ſuch leſſee for three years ſhould have a reſiduary intereſt in him, when he brings his action; but it is enough, that he had ſuch intereſt in him, when the houſe was burnt. And he ought to ſhew in his declaration, that he had an intereſt in him then to come, when the houſe was burnt. See *Cro. Car.* 135. *Weſt.* verſ. *Treude. Jacob.*

If a termor for years makes a leaſe for a time exceeding his intereſt it ſhall operate as an aſſignment. 2 Mod. 303. Vide Dougl. 2 Ed. n. 59.

Bracy's caſe.

S. C. Comb. 390. 5 Mod. 308.

Commiſſioners of bankrupts may aſk a witneſs when and in what manner he had been aiding in carrying away the bankrupt's goods and what he knew of the bankrupt's goode even from a time before the bankruptcy.

BRACY being committed by commiſſioners of bankrupts for not anſwering to the queſtions propoſed to him by the commiſſioners, was brought to the bar by *habeas corpus*, and after the return filed exceptions were taken, that the return was illegal. The firſt queſtion, was, when and in what manner he had been aiding and aſſiſting in carrying away the bankrupt's goods? And it was objected, that this queſtion

was not lawful; for to anſwer it, would be to accuſe himſelf, and to ſubject him to pay the double value of the goods. But *per curiam* upon view of the ſtatute, that which ſubjects a man to the penalty, is the not diſcovering what he knows concerning ſuch goods carried away; and therefore if *Bracy* had anſwered, that he was aiding in embezzling and carrying away of the ſaid goods, which goods now lie in ſuch a place; this would have avoided the penalty. And therefore (by them) the queſtion is good.

But they cannot commit a witneſs to remain in priſon until he ſhall conform to their authority. S. C. Salk. 348. 1 Bac. Abr. 381. Sed vide 5 Geo. 2. c. 30. ſ. 18. that the court or judge on a habeas corpus may re-commit him.

The ſecond queſtion was, what he knew concerning the bankrupt's goods from ——— laſt? And it did not appear when he became bankrupt, and ſo it might be after the time mentioned in the queſtion; and no body is bound to give account of what he knew of the goods before he became bankrupt. But by *Holt* chief juſtice he is bound to give account of it, for that tends to the diſcovery of what goods the bankrupt had at the time when he became bankrupt. Formerly the time was mentioned when he became bankrupt, but (*a*) it is omitted now, and that is the wiſer courſe.

(*a*) Vide 1 Atk. 78. 119. Dougl. 245. & 247. n. but particulaly Forr. 243, 244.

But afterwards an exception was taken, that the concluſion of the commitment was ill, for he was committed to remain in priſon without bail or mainprize, until he ſhould conform himſelf to the authority of the commiſſioners. Now this is ill, becauſe the commiſſioners have ſeveral authorities, and particularly one to make officers to ſummon all debtors to the bankrupt, *&c.* Now by force of this concluſion *Bracy* muſt remain in priſon, until he become their ſummoner. If it was, until he ſhall conform to their authority in this ſpecial matter, it had been good. Or (*b*) if the commitment were to remain in priſon until he ſhould be diſcharged by due courſe of law (*c*), it would be ill. As where a ſtatute gives authority to juſtices of peace, to commit until the party ſhall account; (*d*) they committed a man, to remain in priſon until he ſhould be diſcharged by due courſe of law, and it was held ill. And of this opinion was *Holt* chief juſtice. And by him the word *ſubmit* in the ſtatute does not mean an act of humble ſubmiſſion, but only to make anſwer to the queſtion propoſed, And the word [and] in the act means [*id eſt*] and ties the ſubmiſſion to this particular purpoſe. The priſoner was diſcharged. *Doy.*

(*b*) Commiſſioners of bankrupts cannot commit a witneſs to remain in priſon till he ſhall he diſcharged by due courſe of law. R. acc. poſt. 851.

(*c*) This was *Yaxley*'s caſe, Mich. 5 Will. & Mar. B. R. which was for not anſwering upon examination being committed for ſuſpicion of being a popiſh prieſt, upon 25. Eliz. and therefore ſuch commitment until he be diſcharged. *&c.* was not good, becauſe it was not purſuant to the act. 1 Salk. 351. Carth. 291. Comb. 224. Skinn. 369.

(*d*) Carth. 152.

Lee

Lee *verſ.* Brace. *Error* C. B.

Intr. Hil. 9 Will. 3. B. R. Rot. 929.

S. C. 12 Mod. 101. 3 Salk. 337. Holt 668. 3 Danv. Abr. 185. pl. 13. Carth. 345. with the arguments of counſel. 5 Mod. 266. pleadings and verdict Vol. 3. 99.

A limitation to a man and his heirs even in a deed may be ſo explained, as to paſs only an eſtate tail. R. acc. Litt. Rep. 253. 285. 315. 344. Cro. Car. 265. D. acc. Co. Litt. 21. a. Plowd. 541. a. Hob. 172 poſt. 623. 1145. 1147. 1152 (*b*)

EJectment. Upon a ſpecial verdict the queſtion was, if *A.* ſeiſed in fee makes a feoffment in fee to the uſe of himſelf for life, remainder to his ſon *B.* and his heirs, and for (*a*) default of ſuch iſſue remainder to the rights heirs of *A.* whether *B.* had an eſtate tail or fee. And it was adjudged *in C. B.* that *B.* had but an eſtate-tail. And after argument at bar *Holt* chief juſtice was of the ſame opinion; for the intent is apparent and the words which conveyed the eſtate in fee, are qualified by the ſubſequent words and converted into an eſtate-tail, *Salkeld.* (*c*) (*d*)

(*a*) In 12 Mod. Salk. Holt 3. Danv. Carth. and 5 Mod. ubi ſupra the limitation over is expreſsly "in default of the iſſue of the body of B."

(*b*) R. acc. in a will. Cro. Jac. 290, 415, 427, 448. 3 Lev. 70. poſt. 568. Cowp. 234. 410. 833.

(*c*) In Carth. ubi ſupra, the court are made to ground their determination upon the diſtinction between a conveyance by way of uſe, which they conſidered this to be, and a conveyance at common law, as to which ſee 3 Atk. 734. In Salk. and Holt ubi ſupra, upon the circumſtance of the reſtriction being inſerted in the ſame ſentence with the limitation.

(*d*) There is another reaſon (ſuppoſing A. to have had no children by any other wife than B's mother) why in the caſe of a will at leaſt, this limitation to B. muſt have been held to paſs an eſtate tail only, viz. becauſe the limitation over was to his collateral heirs: as to which point vide poſt. 568. and the caſes there cited.

Teuxera Dimater *verſ.* Hooper.

S. C. Comb. 394.

CASE. The defendant pleaded the abatement, that the plaintiff was an alien enemy born at, &c. The plaintiff replies, that he was born at *London, et hoc paratus eſt verificare, &c.* The defendant demurs. And exception was taken to the replication, that the plaintiff ſhould have tendered an iſſue, and not have concluded with an averment. *Sed non allocatur.* For by *Holt* chief juſtice, if the defendant pleads in abatement, the plaintiff has election, either to reply and tender an iſſue, or to plead with *hoc paratus eſt verificare*: and the defendant might have rejoined, that the plaintiff was not born at *London* and taken iſſue, if he pleaſed. But where a plea in bar is pleaded, if the plaintiff replies iſſuable matter, he ought to tender iſſue. Judgment for the plaintiff, that the defendant anſwer over. Mr. *Sheller.* But if alienage be pleaded at *B.* in bar; and the plaintiff replies, that he was born at *L.* and traverſes the being born at *B.* he ought to conclude with an averment. Ruled in this caſe, as Mr. *Place* told me. See *Raſtal. Entr.* 252. b. *Aſt.* 11.

To a plea in abatement tho' the plaintiff replies iſſuable matter he may conclude with an averment. Vide Carth. 302. 4 Mod. 285.

But to a plea in bar, he muſt in ſuch caſe tender iſſue. acc. Hern. 362. and ſee Str. 1177. cont. Raſt. and ſee Car. 265. Dougl.

Baument *verſ.* Pine.

BY *Holt* chief juſtice, an agent of a regiment is but a ſervant of the colonel, and the receipt of the agent charges the colonel. There is no privity between the king, or the ſoldier, and the agent.

The agent of a regiment is only the ſervant of the colonel.

Richards *verſ.* Hill.

S. C. 5 Mod. 206.

Where an act of itſelf implies a tort, a per quod is not neceſſary to maintain the action. Vide 2 Will. 313. poſt. 274. And if the plaintiff inſerts an inſenſible per quod, the court will even after verdict, conſider it as ſurpluſage. Diverting a water courſe from a mill implies a tort. And an action will lie thereon without adding a per quod the plaintiff could not grind. D. acc. poſt. 439.

THE plaintiff declares, that he was ſeized of an ancient water-courſe and mill, and that the defendant being conuſant thereof diverted the ſaid water-courſe, ſo that it could not flow to his mill for ſo long time in certain, *eo quod molare non potuit, &c.* After verdict for the plaintiff it was moved in arreſt of judgment, that the hindrance of the grinding is deſigned to be the *giſt* of the action, and therefore it ought to be ſhewn to expreſsly, but here it is not ſhewn intelligibly; for it ſhould be *molere*, which ſignifies to grind, but *molare* has no ſuch ſignification. *Sed non allocatur.* For, *per Holt* chief juſtice, *et totam curiam*, where the act implies a *tort* of itſelf, a *per quod* is not neceſſary to ſupport the action, but only aggravates the damages. Now here it appears a *tort* without the *per quod*, for it is ſaid that the water-courſe could not flow to his mill, and therefore it is good, eſpecially after verdict. Judgment for the plaintiff.

Mich.

Mich. Term

8 Will. 3. C. B. 1696.

Sir George Treby *Chief Juſtice.*

Sir Edward Nevill
Sir John Powell, *ſen. died laſt vacation at* Exeter *on the weſtern circuit.*
Sir John Powell *of* Glouceſter
} *Juſtices.*

Palmer *verſ.* Branch & ux'.

BRANCH and his wife libelled againſt *Palmer* in the conſiſtory court of *London*, for having ſpoken in a public coffee-houſe defamatary words of the wife, *viz*, *Palmer* ſaid, do you hear the news; *J. S.* aſked, what news? *Palmer* anſwered, Mrs. *Branch*'s thighs are bare, and *Backburſt* is between them; and added many words too obſcene to be repeated. And now upon ſuggeſtion, that by the cuſtom of *London* whores ought to be carted, and therefore by the cuſtom there, to call a woman whore is actionable, and that theſe words amount to the charging the wife with whoredom, Mr. ſerjeant *Gould* moved for a prohibition, and argued, that words as uncertain as theſe had been adjudged actionable at common law, and therefore 1 *Ro. Abr.* 66. *pl.* 13. *Roote v. Molling.* A man ſays of a woman, that ſhe did lie with a weaver of *Colcheſter* in a ditch, and the weaver's breeches were down, and they were at it; though ſhe might have lain with the weaver in the ditch without harm, yet theſe words were adjudged actionable. But to this caſe *Powell* juſtice anſwered, that it appeared by the report of this caſe in 1 *Rolls. Rep.* 420. that the plaintiff had declared with a *per quod maritagium amiſit*, or otherwiſe theſe words, as it ſeemed to him, had not been actionable. But *Gould*, admitting that an action would not lie for theſe words at common

No words are actionable by the cuſtom of London which do not neceſſarily import whoredom. Vide Dougl. 365. n. 14.

common law, yet in this case a prohibition ought to be granted, by him; for if *Palmer* had called Mrs. *Branch*, whore in express words, then without doubt a prohibition should be granted; because she might have an action in *London*, for whores there by the custom use to be carted. But the custom does not confine this to the specific word whore, but words which amount to it are actionable. And therefore *Mich.* 3 *Jac.* 2. between *Hook* and *Hawkins*, the words were, I never had a bastard, but Mrs. *H.* had a bastard, and that after her husband's death. It was adjudged, that these words were within the custom of *London*, because they were tantamount to the word whore. Then in the principal case all the by-standers, who heard these words, doubtless imagined, that Mrs. *Branch* had committed whoredom with *Backhurst*. But it was adjudged after several arguments at bar, that a prohibition should not be granted; for though it is not absolutely necessary to make use of the word whore, but words tantamount will bring it within the custom, as the case of *Hook verf. Hawkins* was; yet since the custom is only to cart whores, and every custom ought to be taken strictly, the words ought to be tantamount to accuse the woman of whoredom. But in this case the words may be true, and yet Mrs. *Branch* may be no whore; for the words import only lascivious actions and gestures. And therefore if the defendants proceed in *London* against *Palmer*, this court will grant a *habeas corpus*. Then the words being originally of ecclesiastical conusance, there is nothing to oust the spiritual court of this cause but the custom, and the custom does not extend to it. And therefore the spiritual court must have liberty to proceed, and not be prohibited.

Customs must be taken strictly. D. acc. 1 Bl. Com. 78.

Cotsworth *verf.* Betison.

In an action for a pound breach the plaintiff need not shew his right to distrain. S. C. Salk. 247.

THE plaintiff brought a special action upon the case against the defendant for a pound-breach; and declared, that he had taken a mare of the defendant *per* J. G. *servientem suum*, and had impounded her *quia cepit in damno suo apud parochiam de* St John Lee *existentem*, and that the defendant broke the pound, and chased out the mare, *&c.* The defendant pleaded, that he gave 6*d.* to the plaintiff in satisfaction of the trespass, which the plaintiff accepted in satisfaction, and gave leave to the defendant to take the mare out of the pound, and that he took her out accordingly, the gate being open, *&c.* The plaintiff replied, *de injuria sua propria absque tali causa.* Issue thereupon, and verdict for the plaintiff. And now serjeant *Pemberton* moved in arrest of judgment. 1. That the replication was ill, because the plaintiff should not have traversed the cause generally, but the acceptance in satisfaction. *Sed non allocatur.*

Where a defendant justifies a tort under a licence from the plaintiff, the plaintiff cannot take the general traverse. R. acc. 6 Co. 67. a. D. acc. Doctr. plac. 115. vide Burr. 316.

But it cannot be objected to after verdict.

For

For though ſuch iſſue is improper, and had been ill upon demurrer, yet is aided by the verdict. *Hob.* 76. *Banks* verſ. *Parker*. And ſo it was adjudged *Mich.* 13 *Car.* 2. *B. R. Beſty*'s caſe. 1 *Keb.* 125. 2. *Pemberton* argued, that the plaintiff had not intituled himſelf to his action, for he has not ſhewn any title to the place, where he ſuppoſes the mare was damage feaſant. Then if he has not title to the place where, &c. he could not deſtrain her, and conſequently the diſtreſs of the mare was tortious; and if the diſtreſs was tortious, the impounding was tortious alſo; and then the defendant may well juſtify the breach of the pound. *Sed non allocatur*. For *per curiam*, if a diſtreſs be taken without cauſe and impounded, the party cannot juſtify the breach of the pound to take it out of the pound, becauſe the diſtreſs is now in cuſtody of the law. But if the diſtreſs is taken without cauſe, before it is impounded, the party may make a *reſcous*. But in this caſe the taking of the diſtreſs is but an inducement to the action, and the breach of the pound is the *giſt* of the action; and therefore it is not neceſſary here to ſhew the cauſe of the diſtreſs ſo certainly. And *Raſt. Entr.* 444. and all the other precedents in *parco fracto* are in this manner. And therefore judgment was given by the whole court for the plaintiff.

If a diſtreſs is taken without cauſe, the owner may reſcue it before it is impounded. D. acc. 3 Bl. Com. 12. Co. Litt. 47. b. 160. b. 161. a. Gilb. on diſtreſſes. 51.

But if it is once impounded, he cannot juſtify a breach of the pound to take it out. D. acc. 3 Bl. Com. 12. Co. Litt. 47. b. 9 v. Gilb. on diſtreſſes. 51.

Philip *verſ.* Ketiſon.

IN action upon the caſe the plaintiff declares, that the defendant *falſo et malitioſe apud Stallum in comitatu Norfolciae crimen perjurii impoſuit* upon the plaintiff, *et quod poſtea ſcilicet ex malitia praecogitata apud Stallum praedictum fecit et procuravit quandam falſam informationem perjurii exhiberi* againſt the plaintiff *in nomine Edwardi Ward militis attornati domini regis generalis apud Weſtm. in com. Middx. &c.* Upon the general iſſue pleaded it was tried at *Norfolk* aſſiſes, and verdict for the plaintiff. And Mr. ſerjeant *Wright* moved in arreſt of judgment, that the *venue* was ill, becauſe there was nothing of the procurement, or of the exhibition of the information, in *Norfolk*; but all in *Middleſex*. And it is not like *Bulwar*'s caſe 7 *Co.* 1. becauſe there it is but the continuance of the ſame *tort*. But there are here two diſtinct *torts*, for he does not ſay, that the information was *de perjurio praedicto*; ſo that *non conſtat* that the information was for the ſame perjury. And it cannot be taken, that the procurement was at *Stallum*, becauſe the malice is ſpecially confined to *Stallum*, and the procurement is in *Middleſex* at *Weſtminſter*. If he had not interpoſed *Stallum* between the malice and the procurement, it might have been intended, that the whole was at *Stallum*. But here he has reſtrained this conſtruction by the poſition of the words. And though it is after verdict, yet it is not aided by (*a*) the ſtatute of jeofails. For the ſtatute aids,

Where an action is founded upon two dependent matters ariſing in different counties the venue may be laid in either. R. acc. Str. 727. 2 Mod. 23. adm. Blackſt. 1071.

(*a*) 16 & 17 Car. 2. c. 8. ſ. 1,

where

A miſ-trial is not aided unleſs the venue is laid in the proper county. Vide poſt. 330. 3 Lev. 394. 12 Mod. 7. 1 Vent. 22. 2 Mod. 24. See alſo poſt. 1214.

where the *venue* is laid in the proper county; though it be tried by an ill *venue*; but if it is not laid in the proper county the ſtatute does not aid it. And to this the court ſeemed to agree. See 1 *Saund.* 246. *Crafte* v. *Boite.* But as to the principal matter the court was of opinion, that this was but an action of one continued *tort*, and is all one with *Bulwar*'s caſe. For the procuring of the information is but the proſecution of the malice. And it cannot be intended, that the malice and the procurement could be in ſeveral places, and therefore it may be laid in the one county or the other. And for theſe reaſons the plaintiff had his judgment. See 2 *Mod.* 23. *Naylor* v. *Sharpleſs.*

Brigſtock *verſ.* Stanion.

In covenant the breach may be aſſigned as large as the covenant. R. acc. Cro. Jac. 304. 369. poſt. 478. 3 Mod. 69. 3 Lev. 170. ſee alſo Str. 208. R. cont. Cro. Jac. 486.

On a covenant for the quiet enjoyment of an office, if the plaintiff aſſigns for breaches, 1ſt that the defendant put in a deputy, per quod he (the plaintiff) was compelled to ſue out a mandamus, and 2dly proſecuted a writ of aſſiſe for the office, he need not ſtate either the mandamus or aſſize with a prout patet per recordum.

COVENANT. The plaintiff declares, that by certain articles of agreement made between the plaintiff and defendant, reciting, that whereas *William* biſhop of *Glouceſter* had granted to the plaintiff and his father the office of regiſter, *&c.* and that whereas *John* biſhop of *Glouceſter*, doubting if the grant made to the plaintiff and his father (being two) was good, had granted the ſaid office to the defendant's ſon; upon which differences aroſe between the plaintiff and defendant; it was agreed between the plaintiff and defendant, that the plaintiff ſhould ſue a feigned action againſt the defendant's ſon, to try his title to the ſaid office; and that the defendant's ſon ſhould plead without delay, and at the trial inſiſt only upon the validity of the grant; and that if judgment ſhould be given for the plaintiff in that action, that then the plaintiff ſhould quietly enjoy the ſaid office, and that neither the defendant's ſon nor any other man as his deputy, or in truſt for him, directly or indirectly, ſhould exerciſe or occupy the ſaid office, or receive any of the profits, *&c.* then the plaintiff ſhews, that he ſued an action, and that the defendant's ſon pleaded to iſſue, according to the agreement, and that *taliter proceſſum fuit*, that judgment was given for the plaintiff; then he avers performance of the whole on his part; and aſſigns for breach, that *John Fortune* at *D.* in the county of *Glouceſter*, ſuch a day, by the aſſent of the defendant's ſon, and as deputy to him exerciſed and occupied the ſaid office, and in truſt for him took the profits, and received divers fees, ſo that the plaintiff was compelled to ſue ſuch a day a writ of *mandamus* out of the king's bench directed to, *&c.* to be readmitted to the ſaid office, to the great charge and damage of the plaintiff. 2. He aſſigned for breach, that the defendant's ſon proſecuted a writ of aſſiſe for the ſaid office, which was delivered to the ſheriff of *Glouceſter in debita juris forma exequend'*. And to this declaration the defendant demurred generally. And ſerjeant *Gooding* for the defendant argued, that the breach was aſſigned too uncertainly and

and too generally, upon which no iſſue could be taken. For it is ſaid, that *John Fortune*, received divers fees in truſt for the defendant's ſon, but no mention is made of what fees. Now, it being a miniſterial office, the fees are certain. And therefore, though perhaps it is not neceſſary to aſcertain every individual fee, yet it is neceſſary to ſpecify ſome one. To which purpoſe it was adjudged between *Hill* and *Dade*, &c. *in B. R. Jac.* 2. Where the caſe in effect was thus; that *Dade* and the other defendants were farmers of the *Iriſh* revenue of the crown: *Hill* became ſecurity to the crown for the defendants for the payment of their rent, and they covenanted with him to indemnify him; upon which *Hill* brought covenant againſt the defendants, and ſhewed, that the defendants were in arrear in their rents, upon which the lands of *Hill* upon proceſs iſſuing out of the exchequer were extended, and his body taken in execution, whereupon he was forced to expend great ſums of money; upon which declaration the defendant demurred; and the opinion of the court was with the defendants, becauſe the declaration was too general, for it had not ſpecified what ſums he had expended. (But note, *Treby* chief juſtice ſaid, that he was counſel in the ſame caſe, and, by him, (*a*) no judgment was given in it.) And to the ſame purpoſe is (*b*) *Style, Rep.* 473, 476. *Arnold* v *Floyd*. 2. As this breach is aſſigned it does not appear, that the defendant's ſon did any act, but only aſſented that *John Fortune* ſhould exerciſe, &c. Now a man may be ſaid to aſſent to a thing, who does not oppoſe it. But that is no breach of this covenant, *quia actus non conſenſus facit reum.* Therefore the plaintiff ſhould have ſaid, that the defendant's ſon put *John Fortune* into the office, or protected him there when he was in. *Sed non allocatur.* For *per curiam* in an action of covenant the breach may be aſſigned as large as the covenant is; for all is recoverable in damages, and thoſe damages ſhall be for the real damages, which the party can prove that he has actually ſuſtained. But in debt upon a bond conditioned to perform covenants in a certain indenture ſpecified, there a preciſe breach muſt be ſhewn, becauſe a breach is a forfeiture of the whole bond. And therefore if this had been debt upon a bond with ſuch a condition, the plaintiff ought to have ſpecified the taking of ſome particular fee, for the taking of one ſingle fee would have forfeited the whole bond. And *Treby* chief juſtice cited a caſe between *Dixey* and *Jenner* adjudged in the king's bench when *Hale* was chief juſtice, 2 *Lev.* 85. 3 *Keb.* 142. 151. where the defendant covenanted with the plaintiff to build him a houſe, and to put cantelabers according to the rules preſcribed in the act for the rebuilding of *London*; and in covenant he aſſigned his breach, that the defendant did not put in ſuch cantelabers *ſecundum actum parliamenti*, &c. and did not ſay, of what

(*a*) Vide 1 Show. 72.

In debt upon bond conditioned to perform covenants a preciſe breach muſt be ſhewn. Semb. acc. poſt. 479. 3 Mod. 69.

(*b*) In this caſe the breach was larger than the covenant.

length

length or thickneſs they ought to be; and adjudged, that the breach was well aſſigned, they being the very words of the covenant; but if it had been in debt upon a bond conditioned to perform covenants, it had been otherwiſe. Then in this principal caſe, the breach being aſſigned in the words of the covenant, it being in an action of covenant, it is well aſſigned. 2. Serjeant *Gooding* argued, that the declaration is ill, becauſe it is ſaid, that the plaintiff ſued a *mandamus*, and the defendant an aſſiſe, but does not ſay *prout patet per recordum*. But to this ſerjeant *Wright* for the plaintiff anſwered, that they are not records until they are returned, and the ſhewing of the return is not neceſſary, but is only in aggravation of damages. But the very ſuing out of the aſſiſe, whether it be returned or not, is a breach of the covenant. Of which opinion was the whole court, and therefore judgment was given for the plaintiff.

Lockey *verſ.* Darby.

In debt upon a bond with a condition if the defendant pleads a collateral matter, the plaintiff need not aſſign a breach. R. acc. Yelv. 78. Salk. 138. Saund. 316. Str. 191. 297. D. acc. Str. 1031. R. cont. Saund. 103. But in debt on a bond conditioned to perform an award, if the defendant pleads "no award" the plaintiff muſt in his replication aſſign a breach. R. acc. 1 Brownl. 105. D acc. Yelv. 78. Salk. 138. Saund. 103 316. Sid. 186. Hob. 198. 199. 233. Lutw. 529. Str. 191. 299. 1031. If the defendant however even in debt on an award pleads any other collateral matter, the plaintiff need not aſſign a breach. R. acc. Sid. 290. 3 Lev. 17. 24. D. acc. Yelv. 79. Lutw. 529. Salk. 138. Com. 105.

LOCKEY brought debt upon bond againſt *Darby*. Upon *oyer* the condition appeared to be, that if the defendant *Darby* ſhould ſave the plaintiff *Lockey* harmleſs from all damage that might accrue to him, by the executing of a writ of execution, that then, *&c.* The defendant pleaded, that the plaintiff *Lockey* did not execute the writ, *&c.* The plaintiff replies and offers iſſue thereupon. And the defendant demurs. And ſerjeant *Birch* for the defendant argued, that the replication is ill, becauſe it has not aſſigned any breach, and therefore he cannot have judgment. And he compared it to the caſe, where debt is brought upon a bond conditioned to perform an award, the defendant pleads no award made; if the plaintiff replies and ſhews an award, he muſt alſo aſſign a breach, or otherwiſe he ſhall not recover. And for the ſame reaſon in this principal caſe he ſhould have ſhewn in his replication, that ſome action was ſued againſt him for the execution of this writ, or how he was damnified by it. *Sed non allocatur*. For *per curiam* the point here in iſſue is a collateral matter, to which the defendant by his plea has inveigled the plaintiff; and therefore the plaintiff is not obliged to ſhew a breach. For the defendant has admitted that the plaintiff was damnified by offering this plea of collateral matter. Beſides that, if the plaintiff had aſſigned a breach in the replication, the defendant could not have traverſed it, becauſe it would be a departure from his bar. But the caſe of an award ſtands upon its own bottom, and will not govern other caſes. And by ſerjeant *Wright* of counſel with the plaintiff, in the caſe of an award, if the iſſue be *non eſt factum*, or if the defendant pleads a releaſe of all demands, by which he offers a ſpecial point in iſſue, the plaintiff has no need to ſhew a breach.

Quod

Quod non fuit negatum per curiam. In the principal case judgment was given for the plaintiff.

Jenkins *verſ.* Turner. 1 Salk. 28. 1 Lutw. 265.

THE plaintiff brought an action upon his caſe againſt the defendant, *pro eo quod* the defendant *ſcienter retinuit quendam aprum ad mordendum et percutiendum animalia conſuetum qui quidem aper* ſuch a day and place *percuſſit et momordit* a mare of the plaintiffs, of which bite ſhe died. Upon not guilty pleaded, verdict for the plaintiff. And now ſerjeant *Wright* moved in arreſt of judgment, that the word *animalia* is too general and uncertain, for it may be they were ſuch animals, as though the boar uſed to bite them, and the defendant knew it, yet it would be no offence in the defendant to keep the boar ſtill; as if the boar had bit frogs, *&c.* which are animals. And though it may be objected, that it is aided by verdict, yet in this caſe that cannot be; for the general rule is, that (*a*) where a thing is ſo eſſentially neceſſary to be proved, that if it had not been given in evidence, the jury could not have given ſuch a verdict, there though it is not mentioned in the declaration, yet this defect ſhall be aided by the verdict. But our caſe is not ſo, for if evidence had been given, that the boar had uſed to bite any animal, and that he afterwards bit the plaintiff's mare, the jury would think, that this was a foundation good enough for them to find for the plaintiff. But the law is contrary, for unleſs the boar had uſed to bite horſes, ſheep, or ſuch like valuable animals, it would be no offence in the proprietor to keep the boar, notwithſtanding that he had bit frogs, *&c.* Beſides, that if ſuch a general charge ſhall be allowed, the defendant will not know what evidence he muſt prepare to defend himſelf. And he cited a caſe in this court between *Bayntine* and *Sharpe* in laſt *Eaſter* term, *Lutw.* 90. *Salk.* 662. (*b*) where the plaintiff declared, that the defendant kept a bull, and hoxed him, that he became mad, and that he ran at the plaintiff, and toſſed him, *&c.* Upon not guilty pleaded, verdict for the plaintiff: and the court ſeemed to be of opinion, that judgment ought to be arreſted, becauſe there was no *ſciens* in the declaration, which they held was not aided by the verdict; no more is this principal caſe aided by the virdict.

If a man keeps an animal after it has within his knowledge done any miſchief, if it afterwards does any other miſchief tho' of a different kind, an action will lie againſt him. vide Str. 1264. In ſuch action the plaintiff ought to ſtate the particular miſchief the animal had done before. But if he merely ſtates that the defendant kept a boar (or other animal, not by nature uſed to bite any other animal) which he knew was accuſtomed to bite animals, no objection can be taken after verdict. S. C. Salk. 662. 3 Salk. 13.

(*b*) S. C. cit. Str. 1010. Dougl. 826. Dougl. 685. And ſee Str. 1264. poſt. 606.

2. He argued, that admitting that the court will intend that *animalia* in this caſe will ſignify ſheep, *&c.* yet he ſaid that this is not ſufficient, for all the precedents are, that the uſage to bite or ſtrike, muſt be laid to bite or ſtrike the very ſame ſpecies, for the hurt of one of which ſpecies the plain-

(*a*) R. acc. ante, 91. 2 Show. 224. but ſee Doug. 658. Cowp. 826.

tiff

tiff brings his action. And therefore in this case the plaintiff should have declared, that the boar was accustomed to bite mares. For if a man keeps a dog, which bites a mare, and notwithstanding after notice of this the owner keeps the dog still, and afterwards he bites a man, the man has no remedy against the owner of the dog. And for these reasons he prayed, that judgment should be arrested. *Sed non allocatur.* For by *Powell* justice, if a man keeps a dog, which is accustomed to bite sheep, *&c.* and the owner knows it, and notwithstanding he keeps the dog still, and afterwards the dog bites a horse, this shall be actionable, notwithstanding that the precedents are all of the same species; because the owner, after notice of the first mischief, ought to have destroyed or hindred him from doing any more hurt. Now in this case the fact was, that the boar had bit a child before, of which the defendant had notice, and afterwards he bit this mare of the plaintiff's. The question then will be, how the plaintiff in such a case ought to declare? And it seems that he ought to have particularly shewn what mischief the boar had done before; and for want of that, upon demurrer it had been ill. But now the question is, if this declaration is not aided by the verdict, it being objected that this word *animalia* is too uncertain, for it might be frogs, *&c.* and that the defendant could not know what evidence he must procure, to defend himself at the trial? But he said, that this is no objection, for the defendant knows that no evidence can be given of any mischief done by the boar, but of that of which he hath had notice. And as to the uncertainty *Powell* justice said, that the judge of assise knew well that this would not be actionable, unless that the boar had used to kill or bite horses, sheep, *&c.* and not frogs; and consequently, if that had not been proved, he would not have permitted the jury to have given a verdict for the plaintiff. And for this reason the court will intend, that such things were given in evidence; and that greater uncertainties and defects had been aided by verdict. Serjeant *Lutwyche*, counsel for the plaintiff, cited, *T. Jones* 125. & *Wright* vers. *Berle.* 1 *Sid.* 223. 1 *Lev.* 141. 1 *Keb.* 781, 783, 792. And in *trover pro catulis* generally, *Anglice* whelps, *in C. B.* lately adjudged good after verdict. 3 *Lev.* 336. And in the same court *indebitatus assumpsit pro materialibus muri*, good after verdict, adjudged. And as to the case of *Bayntine* and *Sharp*, objected by the defendant's counsel, *Powell* justice answered, that there was no *sciens*, and for that the defendant was not liable to the action; and the court could not intend, that it was proved at the trial, because the plaintiff has no need to prove more than is in his declaration. But in this case there is *animalia* in the declaration, and therefore it was necessary for the plaintiff to prove that the boar used to bite some animals; and then after verdict we will intend, that they were such animals, as will support the action. But (by him) there may be a difference

The court cannot intend that any other facts were proved on the trial, than are laid in the declaration. R. acc. Dougl. 658.

difference between a boar and a dog; for it is the nature of a dog to kill animals which are *ferae naturae*, as hares, cats, &c. but it is not natural to boars to kill any thing. And therefore in the case of a dog there might have been a question, whether the word *animalia* had been good in the declaration, because it might have been intended of some such animals as they naturally bite and kill. But since a boar does not naturally kill any, it shall be intended as before is said. And therefore judgment was given for the plaintiff. See *Regist.* 106. *b.* the case in point, as this principal case was. Note; Though this case was several times argued, yet *Treby* chief justice did not give his opinion, the judgment being given by *Powell* justice, in his absence.

Stream *verf.* Seyer.

REplevin of a mare taken at a place called *B.* in *Bucks.* The defendant makes conusance, that the place contained six acres, and that *Robert Saunders* was seised thereof in fee, and being so seised, granted a rent-charge out of the same to *Robert Lee* in fee; that *Robert Lee* the father died, by which the rent descended to *Robert Lee* the son; and that *Robert Lee* the son, being seised thereof, the seventh of *February* 13 *Car.* 1. by indenture of bargain and sale, between him of the first part, and *Edmund Moss* of the second, bargained and sold the said rent to the said *Edmund Moss*, which indenture was inrolled within the six months; that *Edmund Moss* died, whereby the rent descended to *Edmund Moss* his son; that the rent was arrear, and that the defendant as servant to *Moss* and by his command took the mare in the place where, &c. as a distress, &c. The plaintiff pleaded in bar to the conusance, *non est factum* of *Robert Saunders*. And issue thereupon and verdict for the defendant, that it was the deed of *Robert Saunders*. And serjeant *Birch* moved in arrest of judgment, that the defendant by his own conusance shews, that *Edmund Moss*, under whom he claims, had no title to the rent. For he says, that *Robert Lee dedit et concessit*, by deed of bargain and sale inrolled, the rent to *Edmund Moss*, but he does not shew any consideration. Then without consideration this cannot be good by the statute. And it cannot be good by the common law, because it does not appear that any attornment was made by the terre-tenant. And he cited *Cro. Eliz.* 116. as a case in point (*a*). Then this cannot be aided by the verdict, because the issue was taken upon the other deed of *Robert Saunders*. *Sed non allocatur*. For *per curiam*, if the plaintiff had taken issue upon the bargain and sale, and it had been found for the defendant, it had been good after verdict, though no express consideration had been mentioned. As in the case of *Barber* v. *Fox in B. R.* in the time of *Charles* the second, where a bargain and sale was pleaded

Upon pleading a bargain and sale the consideration should be shewn. Semb. acc. 1 Vent 108. T. Raym. 200. 1 Lev. 308. But tho' it is not the objection cannot be taken after a verdict. R. acc. 1 Vent. 108. 1 Lev. 308. Tho' on a collateral issue.

(*a*) Upon demurrer.

pro

pro quadam pecuniæ ſumma, and it was not ſaid what ſum, and yet it was adjudged to be aided by the verdict. Then in this caſe the plaintiff has waived the benefit of this exception by taking of iſſue upon the other deed; but if he had demurred, this fault had been fatal to the defendant. But now after verdict it is good enough. And therefore judgment was given for the defendant, *niſi*, *&c.*

Hulbert *verſ.* Watts & ux.'

If the obligor in a bond upon condition renders the performance of the condition impoſſible, the bond is forfeited. Acc. Vin. 221. to 225. Secus where the impoſſibility is occaſioned by the act of God. D. acc. Co. Lit. 206. a. An infant may ſuffer a recovery by guardian. R. acc. Cro. Car. 224. W. Jones 318. 1 Vent. 73. 2 Keb. 627. 2 Saund. 94. Godb. 161. Adm. 1 Roll. Abr. 731. l. 1. 1 Sid. 321. D. cont. 10. Co. 43. a. Or privy ſeal, R. acc. 1 Vern. 461. Jenk. 209. pl. 60. Semb. acc. Hob. 196. Ley. 83. Salk. 567. Vide Cruiſe on Recov. c. 7. 2 Ed. p. 145, 146. But the court is not bound to let the latter paſs. R. acc. Hob. 196. Ley. 83. And tho' it does, 'tis avoidable by a writ of error. D. acc. Cruiſe on Recov. c. 7. p. 148. Semb. cont. Jenk. 299. pl. 60. Cro. Car. 224. W. Jones 318. 1 Vent. 73. 2 Keb. 627. 2 Saund. 94. 1 Sid. 321. q. v.

DEBT upon bond againſt the defendant and his wife as executrix to *Cornelius Cliffe*. The defendants pray *oyer* of the condition, which was to perform certain covenants contained in an indenture bearing the ſame date with the bond, in which *Cornelius Cliffe* covenanted with *Roger Hulbert*, *&c.* for him, his heirs and executors, that if *Roger Hulbert* ſhould pay to *Cliffe*, his heirs or aſſigns, 100*l.* within five years after the date of the indenture, that then *Cliffe*, his heirs and aſſigns, at the proper charges of *Roger Hulbert*, ſhould transfer to him, *&c.* the tenements, *&c.* free from all incumbrances by *Cliffe*, his heirs and aſſigns. The defendants plead, that *Cliffe* was ſeiſed of the tenements, *&c.* in fee, and being ſo ſeiſed, the 19th of *November* 3 *Will. & Mar.* by will in writing deviſed them to his daughter *Katharine Blicke* in tail, remainder to the defendant's wife in fee; that *Katharine Blicke* died without iſſue, whereby the lands came to the defendant's wife, who is ſeiſed of them in fee; and that the plaintiff *Roger Hulbert* did not pay the ſaid 100*l.* neither to *Cliffe* in his life-time, nor to *Katharine Blicke* in her life-time, nor to the defendant's wife, *&c.* The plaintiff replies, that *Katharine Blicke* at the time of the death of *Cliffe* was within the age of one and twenty years. The defendant demurs. And ſerjeant *Wright* for the defendant argued, that if there was any means by which the infant might have conveyed, then the deviſe to her would not be a breach of the covenant. But the infant might have conveyed theſe tenements by common recovery by guardian or privy ſeal. And it is the uſual practice, for infants to ſuffer common recoveries; ſo that *Katharine Blicke* might have performed her part, if the plaintiff had paid the 100*l.* But ſhe was not bound to convey, till the plaintiff paid the 100*l.* And therefore this is not like Sir *Antony Maine*'s caſe, 5 *Co.* 20. *b.* for there by the grant and render by fine for years Sir *Antony Maine* had diſabled himſelf from the taking of a ſurrender, and the making of a new leaſe; and therefore there it would be in vain, that the leſſee ſhould ſurrender to a man, who could not take it. But in this caſe if the plaintiff had paid the 100*l.* the infant might have conveyed the tenements by common recovery.

Sed

Sed non allocatur. For, *per curiam*, the deviſe to a perſon who was incapable to convey, within the five years, was a breach of the covenant. And it would be vain, to compel the plaintiff to pay the 100*l.* to a man who was incapable to perform his part. For as to the objection, that an infant may ſuffer a common recovery; though the king grant a privy ſeal, yet it is in the diſcretion of the court, whether they will permit it to paſs; and the judges do not permit it, but when it will be advantageous to the infant; and though it is paſſed, yet it is avoidable by error. And one may object in the ſame manner, that if a feoffment be made to a man upon condition to re-infeoff the feoffor, and the feoffee takes a wife, that this will not be a breach of the condition, becauſe the huſband and wife may levy a fine to the feoffor, which will bar the wife of her title to dower in theſe lands; but yet this is adjudged a breach, becauſe the party has once put it out of his power. But in the principal caſe, if *Cliffe* had died, and left an heir within age, to whom the land had deſcended; this had not been a breach, becauſe it had been an act in law. Judgment for the plaintiff, *niſi*, &c. See *T. Jones* 195, 196.

If feoffee on condition to re-infeoff marries, the condition is broken. S. C. put Litt, ſect. 357.

The Maſter and Company of Framework-knitters *verſ.* Green.

DEBT upon a by-law. The plaintiff declares, that king *Charles* the ſecond, by his letters patent, bearing date the nineteenth of *Auguſt* in the fifteenth year of his reign, incorporated them by the name of *The maſter, wardens, aſſiſtants, and company of Framework-knitters*, with power to make by-laws for the benefit of the corporation, and to inflict penalties for inforcing the performance of them; then they ſhew a by-law, that the maſter, wardens, and aſſiſtants, or the maſter and the greater part of them, ſhall aſſemble together annually upon the feaſt of St. *John Baptiſt*, and chuſe two perſons members of the corporation, to be ſtewards for the year enſuing, who upon the day after the feaſt of St. *Michael* next enſuing, if it were not *Sunday*, and if it ſhould be *Sunday*, then the next day after, ſhould provide a dinner for the maſter, wardens, and aſſiſtants, under the penalty of 10*l.* or ſuch leſs ſum as the maſter and wardens ſhould judge fitting, to be levied by diſtreſs, &c. or recovered by action of debt, to be paid to the maſter and wardens, &c. then they ſhew, that the defendant was elected ſteward, being one of the corporation, and had notice thereof, but did not provide a dinner for the maſter, &c. nor pay the 10*l.* to the maſter, wardens, and aſſiſtants; *unde actio accrevit* to the plaintiffs, for the 10*l.* *Nil debet* pleaded. Verdict for the plaintiffs. And upon motion in arreſt of judgment many exceptions were taken, to which the court gave no reſolution. But the chief objection was,

A corporation cannot by a bye-law impoſe a charge upon any of their officers, except for the general good of the corporation. Vide Lutw. 1230. But a bye-law in aid of a cuſtom impoſing ſuch a charge, is good, R. acc. Cro. Jac. 555.

that the by-law itſelf was ill, becauſe that it is not ſaid, that this dinner was appointed, to the end that the company ſhould aſſemble, and conſult of things beneficial to the corporation. For it does not appear, but that this was only for luxury. Then the by-law is unreaſonable, to compel a man to make a dinner, only for the luxury of others, without any benefit to himſelf or the reſt of the company. Then the by-law being unreaſonable, the penalty to perform it is unreaſonable alſo, and conſequently not obligatory. *Quod curia conceſſit.* And (by the juſtices) members of corporations are not bound to perform by-laws, unleſs they are reaſonable, and the reaſonableneſs of them is examinable by the judges. Then this by-law to make the dinner, cannot be good in this caſe of a new corporation, becauſe it does not appear to what purpoſe the dinner is made, and it may be only for good fellowſhip. But if it had been, to make the dinner, to the end that the company might aſſemble and chuſe officers, or any other thing for the benefit of the corporation, it had been well enough. But in the caſe of old corporations by preſcription a by-law to make a cuſtomary feaſt has been held good. And therefore judgment was arreſted, *niſi, &c.*

Marks *verſ.* Marriot.

Pleadings Lutw. 520. Lev. Ent. 41. Vol. 3. 106.

If an award is to be made in writing and ready to be delivered by a particular day, it is ſufficient to ſhew that it was made in writing by the day, without adding that it was ready to be delivered. S. C. Lutw. 524. R. acc. Cro. Car. 389. poſt. 247. 989. 1 Show. 98. 242. Carth. 158. 3 Mod. 330. Hardr. 399. But at all events if it was not to be delivered but upon requeſt, the objection cannot be taken until a requeſt is ſhewn. Vide Carth. 158. 3 Mod. 331.

DEBT upon a bond dated 2 *July*, 7 *Will.* 3. conditioned to perform the award of *J. S.* of all actions, cauſe and cauſes of action, ſuits, debts, treſpaſſes, damages, and demands, *&c.* whatſoever, *ita quod* the award be made in writing, and delivered, or ready to be delivered, before ſuch a day, upon requeſt to either of the parties, *&c.* The defendant pleads no award made. The plaintiff replies, and ſhews the award, by which the plaintiff ſhould pay to the defendant 30*l.* in full ſatisfaction of all demands, the 13th of *September* following, and that the defendant, upon the payment, ſhould ſurrender to the plaintiff the poſſeſſion of a houſe in which the defendant lived, and deliver to the plaintiff a deed by which the houſe was intailed to the plaintiff, and deliver to the plaintiff all bonds, *&c.* which he had againſt the plaintiff, and that the defendant ſhould execute a general releaſe to the plaintiff of all actions, *&c.* until the 12th of *Auguſt* following, and that the plaintiff ſhould then give a general releaſe to the defendant, then the plaintiff ſhews that the defendant had notice of this award, and aſſigns his breach, that although he had paid the money, the defendant had not ſurrendered the poſſeſſion of the houſe at the day appointed by the award. The defendant demurred. And ſerjeant *Girdler* for the defendant took exception, that the plaintiff has not ſhewn, that the award was

Under a ſubmiſſion of "all actions, ſuits, debts, treſpaſſes, damages, and demands," the arbitrators may award the ſurrender of the poſſeſſion of an houſe. ✠ Whether an award of mutual general releaſes to a time after the ſubmiſſion, is wholly void. *See the end of this caſe.*

ready to be delivered by the day; that being but an authority it ought to be purſued ſtrictly; and he cited *Jenkinſon* verſ. *Allen*, *Trin.* 27 *Car.* 2. *Rot.* 728. *B. R.* 3 *Keb.* 513, 556. 1 *Freeman* 415. in point. *Sed non allocatur.* For (by *Levinz* ſerjeant) when an award is made, it is ready to be delivered; and it ſhall be intended ſo, unleſs it be ſhewn, that it was refuſed to be delivered. And he ſaid, that it was lately adjudged accordingly in the king's bench; which *Powell* juſtice ſeemed to agree; but yet in this caſe the award was not to be delivered, till requeſt was made; but it does not appear here, that the defendant made any requeſt: and therefore it was well enough. The ſecond exception was, that the award of the poſſeſſion of the houſe was ill, becauſe that it is in the realty, and the ſubmiſſion was of all perſonal things; and though there was the word *demand*, yet it being coupled with debts, treſpaſſes, &c. it ſhall be conſtrued perſonally. And *Girdler* compared it with 9 *Edw.* 4. 43. *b.* *Fitz.* *Arbitrement*, *pl.* 16. where the ſubmiſſion was *de omnibus actionibus perſonalibus, fectis, et querelis*, and the award was, that the defendant ſhould releaſe to the plaintiff his right in ſuch a houſe; and adjudged a void award, becauſe the ſubmiſſion was perſonal, for *querelis* being coupled with perſonal actions, it ſhould be conſtrued perſonally. *Sed non allocatur.* For *per curiam*, in the 9 *Edw.* 4. *et* couples *querelis* to *perſonalibus actionibus*, but in this caſe it is general of all demands whatſoever. But by *Powell* juſtice, it is a queſtion whether the title to the land is ſubmiſſible, ſince it is in the realty, but this being a general ſubmiſſion it is well enough. But *Treby* chief juſtice ſaid, that things in the realty might be ſubmitted, as well as things in the perſonalty, but they could not be recovered upon the award. The third exception was, that the bond of ſubmiſſion is dated in *July*, and the award is, to releaſe all demands until the twelfth of *Auguſt* following, and the defendant muſt make the firſt releaſe, ſo that if the plaintiff will not make his releaſe afterwards, the defendant has no remedy; and then the award will not be reciprocal. For if the defendant will ſue debt upon the bond, and aſſign his breach in this, that the plaintiff has not executed the releaſe on his part, the plaintiff may plead the defendant's releaſe, in bar of the action upon the bond. And by *Powell* juſtice, as to this exception of the releaſe, the award is not maintainable. For (by him) the difference is, that if arbitrators make any award of mutual releaſes generally, this will relate only to the time of the ſubmiſſion, and this will be well enough. But if they award general releaſes to be executed until the time of the award made, this will be ill, becauſe it exceeds the ſubmiſſion, and will releaſe the bond of ſubmiſſion itſelf, and all *meſne* acts. And to warrant this difference he cited *Hill.* 16 & 17 *Car.* 2. *C. B. Rot.* 503. 1 *Keb.* 434. *pl.* 19. (*a*). But by *Treby* chief

Under a ſubmiſſion of all perſonal actions, ſuits, and quarrels, the arbitrators cannot award a releaſe of the right to an houſe.

Things in the realty, may be ſubmitted to, but cannot be recovered on an award.

(*a*) acc. 4. Mod. 188.

juſtice it has been held in ſuch caſe, that the ſubmiſſion bond ſhall be intended to be excepted. But nevertheleſs in the principal caſe they held the award good enough and reciprocal; becauſe the plaintiff was to pay 30*l.* to the defendant, and the defendant to ſurrender the poſſeſſion of the houſe to the plaintiff, ſo that no fault in the releaſes will vitiate it. And therefore judgment for the plaintiff.

General releaſes awarded upon the ſubmiſſion of a particular diſpute, tho' executed, releaſe only that diſpute. Vide Palm. 107. Bl. 1117. alſo poſt. 235, 663, 664. 3 Lev. 273, 274. An award of releaſes to the time of the award, is void only as to the time ſubſequent to the ſubmiſſion. R. acc.

Reſolved *Mich* 8 *Will.* 3. *B. R.* between *Stevens* and *Matthews*, that if a man ſubmits a particular controverſy to arbitration, and the arbitrators award general releaſes, which are executed, theſe releaſe no more than the particular controverſy And *per Holt* chief juſtice, if the arbitrators award releaſes *ab initio* until the time of the award, and the party releaſes until the time of the ſubmiſſion, this is a good performance of the award. And *Hil.* 8 *Will.* 3. *B. R. per Holt* chief juſtice, adjudged between *Cooper* and *Pierce*, that an award, to make general releaſes until the time of the award, is good; becauſe as to *meſne* acts between the ſubmiſſion and award, the award is void, and therefore it does not exceed the ſubmiſſion. And therefore judgment in this caſe for the plaintiff, where an action was brought to perform ſuch an award. 3 *Mod.* 264. *Rees* verſ. *Phelps*.

Winch. 1. 1 Roll. 437. Bridg. 58. Burt. 278. Adm. poſt. 961. D. acc. Bl. 1118, 1119. where 1 Roll. Abr. 242. l. 44. which is contra, is explained. Vide alſo Cro. Jac. 664. And a releaſe to that time is a good performance.

Smith *verſ.* Fuller and 14 other defendants.

Declaration in trover amended by inſerting the name of one of ſeveral defendants after error aſſigned for that defect, all having pleaded, evidence having been given againſt all, and all having been found guilty. Vide ante, 94,

TROVER. The plaintiff declares, that the goods came to the hands of all the defendants, but when he comes to the converſion, he omits the name of one of them. All the fifteen defendants plead by name. And evidence at the trial was given againſt all fifteen. And verdict for the plaintiff againſt all fifteen. And judgment was given for the plaintiff. And upon error brought *in B. R.* this omiſſion of the name of one of the defendants in the converſion was aſſigned for error. Upon which the plaintiff moves *in C. B.* for leave to amend. And ſerjeant *Wright* objected, this would charge another defendant than the plaintiff had charged. But *per curiam*, it appears that it was but *vitium clerici*, that evidence was given againſt all, and verdict againſt all fifteen. And though it was objected, that the jury could not find the fifteenth man guilty, but as the plaintiff had charged him, which was with trover but not with converſion; the court anſwered, that it could not be intended, that the jury would find him guilty of nothing, for it is no crime to find goods without converſion. And therefore an amendment was ordered upon payment of coſts.

Britton

Britton *verſ.* Gradon.

CASE upon ſeveral *aſſumpſits* againſt *Robert Gradon* eſq; the defendant comes in by ſpecial *ſuperſedeas* upon the *exigent*, and pleads in this manner: *Robertus Gradon per J. S. attornatum ſuum venit et defendit vim et injuriam quando, &c.* and pleads that he is a gentleman, *abſque hoc* that he is eſquire, *&c.* The plaintiff demurs. Serjeant *Girdler* for the plaintiff argued, that the defendant, by ſaying *defendit vim et injuriam quando, &c.* has made a full defence, and after that he cannot plead in abatement. Therefore *Trin.* 35 *Car.* 2. *B. R. Rot.* 1528, between *Gawen* v. *Surby*, *Lutw.* 7. the caſe was thus; treſpaſs, aſſault and battery. The defendant *venit et defendit vim et injuriam quando, &c.* and pleads outlawry in abatement after imparlance; the plaintiff demurs; and adjudged that the defendant anſwered over. 1. Becauſe after imparlance the defendant cannot plead in abatement. 2. He cannot plead ſuch a plea after a full defence by which he has admitted the plaintiff able to recover damages. So *Trin.* 4 *Will. & Mar. C. B. Meacock* verſ. *Farmer*, in treſpaſs, aſſault and maihem, the defendant *venit et defendit vim et injuriam quando*, and pleaded another action depending for the ſame cauſe undetermined, in abatement, and judgment *quod reſpondeat ulterius* for the ſame reaſon as before. Serjeant *Gould* for the defendant. It is good the one way or the other, for this is not a full defence, but the moiety of a defence; for a full defence is, when the defendant proceeds, and ſays, *et damna et quicquid quod ipſe defendere debet Trin.* 4 *Will. & Mar. B. R. intr. Paſ.* 3 *Will. & Mar. B. R. Rot.* 449. The defendant after *vim et injuriam quando* pleaded, that the defendant was an alien enemy; and the court held, that it was good the one way or the other. So *Hil. Will. & Mar. Rot.* 693. *Fenner* v. *Miller. Salk.* 217. 1 *Show.* 386. *Carth.* 220. *Holt* 219. 12 *Mod.* 21 Ejectment. The defendant *venit* & (*b*) *defendit vim & injuriam* (but *quando* was not in) *&c.* and he pleaded antient demeſne, and held good. So *Raſt. Entr.* 339. *b.* outlawry pleaded after *quando, &c.* 334. *a.* privilege as ſervant to a clerk in chancery 472. *miſnomer* in appeal 49 *b.* But *per Powell* juſtice, *quando &c.* amounts to a full defence, and *damna et quicquid quod ipſe defendere debet* is never put in. *Coke Co. Litt.* 127. b. ſays that a man cannot plead to the juriſdiction, without making defence, but this rule is not law generally underſtood; for a man may come and ſay, *venit & dicit*, that the lands are antient demeſne, and it is good without more ſaying. But the matter of full defence, or half defence, ſignifies nothing in this caſe, for the difference is, where the plea is in diſability of the perſon, as alien enemy, out-

Venit et defendit injuriam quando, &c. is a full defence. R. acc. Sty. 273. Lutw. 7, q. v. 4

A defendant cannot plead in diſability of the perſon after a full defence. (*a*)

But other pleas in abatement he may.

Nor miſpriſion of addition after a general defence.

Miſpriſion of addition cannot be pleaded by attorney. Sed vide poſt. 509. Unleſs he has a ſpecial warrant.

A defendant may plead to the juriſdiction without making defence. R. acc. 3 Lev. 182. & See acc. Raſt. 58. b.

(*a*) But it is now ſettled, that in all dilatory pleas, except ſuch as go to the juriſdiction, a full defence muſt be made. per Buller. J. Thomſon. v. Stockdale. H. T. 23 Geo. 3.

(*b*) In all the reports of this caſe, the plea is ſtated to have begun with *venit & dicit* only: and in 1 Show. Salk. Carth. & Holt *ubi ſupra*, the court is made to ſay, that for want of a defence, the plaintiff might have refuſed the plea.

lawry, &c. it cannot be pleaded after full defence, becauſe it is repugnant, for by the full defence the defendant has admitted the plaintiff able to recover damages, but other pleas in abatement may be pleaded after full defence, for a full defence never admits an ill writ. *Coke* ſays, that the defence admits the perſon of a plaintiff able to ſue, but he does not ſay that it admits the cauſe; and therefore *miſnomer* in the defendant may be pleaded after full defence, and *Raſtall* has many precedents of it. But there is a difference between a general defence and a ſpecial defence; as this which the defendant has made is general, and therefore he cannot plead *miſnomer* after it; but he might have made a ſpecial defence, viz. *Robert Gradon* gentleman, who is impleaded by the name of *Robert Gradon* eſquire *venit et defendit vim et injuriam quando*, and then he might have gone on with his plea of *miſnomer*. But here by his general defence he has admitted himſelf to be an eſquire as named in the writ, and therefore he cannot afterward gainſay it. But *Treby* chief juſtice was of opinion, that it was a general rule, that no body ſhall plead in abatement after a general defence or a full defence; and therefore he doubted much, if the diſtinctions which *Powell* juſtice had taken were law. A ſecond exception was, that the defendant comes in by attorney and pleads *miſnomer* where he ought to plead in perſon. But to this *Gould* anſwered, that *Raſt. Entr.* 108. *b. pl.* 12. is the caſe, and a precedent in point, upon ſight of which the defendant drew this plea. But by *Powell* juſtice, regularly an attorney cannot plead *miſnomer* in his client, but the defendant muſt plead it himſelf, becauſe the attorney is eſtopped by his warrant, to ſay that the defendant had any other name, than that by which he gave him his warrant of attorney. And therefore in this caſe the plea being by attorney is ill. But by leave of the court he might have a ſpecial warrant of attorney, and then the attorney ſhall not be eſtopped. *Long* 5 *Edw.* 4. 108. And in caſe of corporations the court ought to allow attornies to plead miſnomer by ſpecial warrant, becauſe the corporation cannot appear in perſon. And in 8 *Edw.* 4. 9. it is agreed, that there might be a ſpecial warrant in caſe of a particular perſon. But in this caſe it muſt be intended a general warrant, and ſo the attorney was eſtopped. And the ſpecial *ſuperſedeas* ſignifies nothing as to the attorney, but prevented the eſtoppel to the defendant himſelf. But there are ſome *miſnomers*, which attornies may plead, which are not contrary to their warrants. As 2 *Hen.* 6. 11. an action was brought againſt the late wife of *J. S.* the attorney ſaid his client was a counteſs; and it was agreed that the attorney might give his client the addition becauſe it was not contrary to his warrant. And the caſe in *Raſtall* 108. which miſled the defendant, with this difference, might be good in law; for the action is brought againſt *J. S.* of *Dale*; the attorney ſays, that there was two *Dales*, *Upper Dale* and *Nether*

In an action againſt a corporation, the court ought to grant the attorney for the corporation ſuch a ſpecial warrant, as ſhall not eſtop him from pleading a miſnomer.

Defendant may plead diminution of addition by attorney.

Nether Dale, and no ſuch town as *Dale* without addition, and this was good becauſe it was not contrary to his warrant, but is the ſame *Dale* with an addition. But *Treby* chief juſtice was of opinion, that *miſnomer* could not be pleaded by attorney, becauſe the attorney is eſtopped by his warrant 2 *Hen.* 6. 11. And he relied upon *Fitzh. Nat. Br.* 27. *a.* as expreſs in point, where it is ſaid, that he who pleads a *miſnomer*, ſhall not appear by attorney; and he had never ſeen a precedent to the contrary. That the firſt entry is in *Aſton's Placita Rediviva*, 1. which he did not regard, becauſe he ſuppoſed it paſſed *ſub ſilentio*. And as to the ſpecial warrant of attorney he doubted much of it. And it ſeemed to him, that there was no neceſſity for a corporation to plead a *miſnomer* by attorney; for if judgment be given againſt them by a wrong name, the judgment will be void; and there was no ſpecial warrant in *Raſtall*, therefore it ſeemed to him, that ſuch ſpecial warrant could not be granted. But they all agreed, that the plea in the principal caſe was ill for the reaſons aforeſaid. And therefore judgment, *quod defendens reſpondeat ulterius*. Like judgment was given this term between *Strange* and *Reynolds*, where the defendant pleaded *miſnomer* by attorney for the ſame reaſon. And between *Burdett* and *Cupper*, *Hill.* 8 & 9 *Will.* 3. *C. B.*

Judgment againſt a corporation by a wrong name void.

Jones *verſ.* Axen.

DEBT upon bond. The defendant pleads the ſtatutes for diſcharge of poor priſoners, and ſo demanded judgment if the plaintiff ſhould have execution againſt his body, houſhold goods, wearing apparel, or tools of his trade. The plaintiff demurs. The firſt exception to the plea was, that the ſtatute is miſrecited, becauſe it is pleaded to be made the 22 *Car.* 2. but the printed book is 22 & 23 *Car.* But to this ſerjeant *Levinz* anſwered, and it was agreed by the court, that the ſeſſion extends into both years, but it commenced the 24 *October* 22 *Car.* 2. and all acts made refer to the firſt day of the ſeſſion, unleſs it be otherwiſe provided by the act. So that this is an act of 22 *Car.* 2. and the printed book is falſe. 2. Exc. It is not ſaid, that notice was given to the plaintiff, to appear at the ſeſſions: but it is ſaid, that notice was given to *Thomas Jones*, but not to *Thomas Jones* the plaintiff, or *praedict.* So that the court will intend, that it was not to the plaintiff, but to another perſon. But to this it was not anſwered, and agreed by the court, that if it had been ſaid *cuidam Thomae Jones*, there the court would have intended another perſon, becauſe *quidam* is the ſame with *alius*; but ſince it is *Thomae Jones* generally, the court will intend, that it is the ſame *Thomas*

Acts of parliament prima facie relate to the firſt day of the ſeſſion. D. acc. Cowp. 475. vide poſt. 371.

The ſame name repeated upon pleadings, tho' without reference, ſhall prima facie be intended to mean the ſame perſon. R. acc. poſt. 420. 421. Bridgm. 99. ſemb. acc. Dyer 70. b.

Quidam has the ſame import with alius. D. acc. Dyer 70. b.

Where an exception is incorporated with a clauſe, he who pleads the clauſe, muſt take notice of, and anſwer the exception. R. acc. poſt. 421. D. acc. Str. 1101. Plowd. 376. 410. Aliter where the exception follows in a diſtinct clauſe. R. acc. Str. 1401. 1119. Plowd. 376.

Acts for the relief of insolvent debtors are public acts. R. cont. post. 390. Vide 1 Bl. Com. 85, 86.

Jones, of whom mention was made before. 3. Exc. was, that it is said, that the defendant was not imprisoned for 100*l.* but it is not said, that he was not imprisoned for a fine, therefore he might be imprisoned for a fine and then he is not dischargeable by the act. *Sed non allocatur.* For, *per Treby* chief justice, the difference is, that where an exception is incorporated in the body of the clause, he who pleads the clause, ought also to plead the exception; but when there is a clause for the benefit of the pleader, and afterwards follows a proviso which is against him, he shall plead the clause, and leave it to the adversary to shew the proviso. Therefore this proviso in the present act, being distinct, ought to be shewn by the plaintiff. 4. Exc. It is a private act, and ought to have been pleaded at large, for it does not concern all poor prisoners, but only those who were imprisoned at that time. But it seemed to the court, that it shall be construed a public act. 1. Because all the people of *England* may be concerned as creditors to these poor prisoners. 2. It is an act of charity, and therefore ought to have a more candid interpretation. 3. It is an act too long and difficult to be pleaded at large, so that it would put these poor people to a greater expence than they can bear, to plead it specially. And *per Treby* chief justice, if the act concerning the bishops were to be adjudged now, it would be adjudged a general act. But, *per curiam*, in this case the plaintiff must have a general judgment at present, with *cesset executio* as to the body, &c. of the defendant; or otherwise the plaintiff may be bound by rule of court, not to sue execution against his body, &c.

Serle *verf.* Darford.

Pleadings. Lutw. 1435. Vol. 3. 110.

An action of assault is transitory. R. acc. Cowp. 161. Bl. 983. 1055, & vide Cowp 177. The defendant may in a transitory action plead a local justification arising at another place than that in which the action is laid. R. acc. Poph. 101. Moor. 350. The plaintiff may answer the local justification. S. C. Lutw. 1437.

TRESPASS, for trespass, assault, battery, and wounding at *Hamerton* in *Norfolk*. The defendant pleads *quoad* the *vi et armis* and wounding, not guilty; and as to the residue of the trespass, the defendant pleads, that he was possessed of a close at *T.* in the same county, and that the plaintiff entered into the close with a great number of horses, and turned up the soil, that the defendant requested the plaintiff to quit the land; that the plaintiff refused, upon which the defendant *molliter manus imposuit* upon the plaintiff to maintain his possession, which is the assault, &c. and he traverses the assault, &c. at *Hamerton*. The plaintiff replies, and claims a way over the close to *T.* by prescription, and that the defendant, *adtunc et ibidem* broke the plaintiff's head, *absque hoc quod defendens molliter manus imposuit modo et forma prout*, &c. The defendant demurs. And serjeant *Wright* took exception to the replication, that there is here a traverse upon

upon a traverſe, which cannot be. *Sed non allocatur.* For *per curiam*, where the firſt traverſe is taken to the material point, there a traverſe cannot be taken upon a traverſe. But where the firſt is not to the material point, there a ſecond traverſe may be taken; and in ſuch tranſitory actions there may be a traverſe upon a traverſe. *Co. Lit.* 282. *b.* *Cro. Eliz.* 99, *Inglebath* v. *Jones.* 407, *Bateman* v. *Spring.* Then *Wright* ſerjeant took another exception, that the replication was a departure from the declaration, for the declaration is of an aſſault, *&c.* at *H.* and the replication admits that it was at *T.* And he cited 1 *Hen.* 6. 63. *Bro. Departure* 13, 14. 7 *Hen.* 6. 4. 8 *Hen.* 4. 16. *Girdler* ſerjeant *e contra.* That it is a tranſitory action, and if the defendant makes it local by his plea, the plaintiff may anſwer the plea, and it will be no departure. And he cited *Trin.* 13 *Car.* 2. *C. B. Rot.* 795. *Taylor* v. *Gabetus.* Treſpaſs by executor, *de bonis aſportatis in vita teſtatoris apud Eaſt Retford in Nottinghamſhire*; the defendant pleaded that *A.* was ſeiſed of a place called ——— in *North H.* in the ſame county, and made a leaſe thereof to the defendant, by virtue of which he entered, and as leſſee he juſtified the taking of the goods as damage feaſant, and traverſes the taking at *Eaſt R.* The plaintiff replies, that before *A.* was ſeiſed of that place, *&c.* in fee, *J. S.* was ſeiſed of the place, *&c.* in fee and leaſed to the plaintiff's teſtator, who entered and put in his goods, that the defendant of his own wrong took them, *abſque hoc* that *A.* was ſeiſed in fee *prout*; the defendant demurred, ſuppoſing this to be a departure, but judgment was given for the plaintiff for the reaſon aforeſaid. *Trin.* 23 *Car.* 1. *B. R. Rot.* 517. *Rogers* verſ. *Aſhdown. cit.* 1 *Keb.* 579. *Paſ.* 3. *Car.* 1. *B. R. Rot.* 933. *Hil.* 1 *Car.* 1. *B. R. Rot.* 706. *Trin.* 1 *Will. & Mar. B. R. Rot.* 641. all caſes in point. And of this opinion was the whole court. For in tranſitory actions the plaintiff has liberty to lay them where he pleaſes, and if the defendant makes it local by his plea, the plaintiff may vary in his replication, either in time or place. And *Powell* juſtice cited 1 *Keb.* 566, 578, *Lee* v. *Raines.* And (by him) the caſe of *Taylor* and *Gabetus* is expreſs in point. But (by him) in this caſe the plaintiff might alſo have replied, *de ſon tort demeſne*, becauſe the title of the land did not come in queſtion. Judgment for the plaintiff.

A material traverſe cannot be paſſed over. R. acc. Holt 96. Adm. 1 Saund. 22. D. acc. Str. 842.

But an immaterial one may, and a ſecond taken. R. acc. Poph. 101. Moor. 350. Str. 117, 837. 1 Saund. 20. Cro. Eliz. 99. D. acc. poſt. 369. 370.

If the defendant in an action in which the time is *primâ facie* immaterial makes it otherwiſe by his plea, the plaintiff may vary from the day mentioned in the declaration. R. acc. Salk. 222. 223. Str. 21, 806.

If the defendant excuſe an aſſault in defence of his poſſeſſion the plaintiff may take the general traverſe. Acc. *per cur.* Cro. Car. 98.

Nevill *verſ.* Packman.

S. C. Lutw. 1449. q. v. Pleadings. Lutw. 1447. vol. 3. 113.

TReſpaſs *quare clauſum ſuum fregit vocatum Horn-hill apud parochiam de R. et herbam pedibus ambulando conſumpſit et aliam herbam cum averiis depaſtus fuit necnon oves ipſius* the plaintiff *ibidem nuper inventas abſque rationabili cauſa fugavit cepit et imparcavit, per quod* the ſheep were damnified, *&c.* The

In treſpaſs for entering his cloſe called *H.* at the pariſh of *B.* and ſeizing the cattle *there* found, the word *there* refers to the pariſh, not the cloſe. See Lutw. 1449.

6 Term Rep. 164

A traverſe cannot be taken of matter not alleged, vide acc. ante, 64. and the caſes there cited.
But no objection can be taken to it on a general demurrer. D. acc. poſt. 238.

The defendant pleads not guilty to all but the taking and impounding of the ſheep; and as to that, he juſtifies, that he was ſeiſed in fee of a place called *Orchards* in *R.* and took the ſheep there damage feaſant, *&c. abſque hoc* that he took and impounded them *in clauſo prædicto vocato Horn-hill modo et forma* as the plaintiff has declared. The plaintiff demurs ſpecially. And adjudged for the plaintiff, becauſe the traverſe is ill. For he traverſes matter not alleged; for the plaintiff does not ſay, that the defendant took the ſheep in the cloſe called *Horn-hill*, but he ſays *ibidem inventas*, which *ibidem* refers to the pariſh and not to the cloſe. 1. Becauſe *Horn-hill* was the plaintiff's ſoil, and then the defendant could not impound the plaintiff's cattle in the plaintiff's ſoil. 2. *Ibidem* is always referred to the *ville*, to the end that the *venue* may come thence, for no *venue* can come out of a cloſe. But it ſeemed to the court that this was an idle traverſe, and had been ſurpluſage upon a general demurrer; but being here upon a ſpecial demurrer, it vitiates the plea. And therefore judgment for the plaintiff.

Allen *verſ.* Harris.

S. C. Lutw. 1538. Pleadings. Lutw. 1537. Vol. 3. 315.

An accord is no bar before execution. R. acc. Cro. Eliz. 193, 304. Raym. 203. 2 Keb. 690. D. acc. 1 Roll. Abr. 129. l. 3. 6. 11. Dyer 75. b. pl. 26. Bro. Accord. pl. 3. 6. 7. Doct. pl. 15. 1 Mod. 69. 2 Term Rep. 25. and ſee Com. Dig. Accord. B. 4. 2d Ed. vol. 1. p. 89.
But an award is R. acc. Carth. 188. D. acc. 6 Mod. 222. Semb. acc. Bro. & Dyer ubi ſupra. Sed vide Salk. 69. 1 Roll. Abr. 267. l. 21, 27. Lutw. 56.

TROVER for a waiſtcoat. The defendant pleads, that the plaintiff, in conſideration that the defendant at the ſpecial inſtance of the plaintiff aſſumed to pay to the plaintiff 20*s.* agreed to diſcharge the defendant of this trover, *&c.* and lays mutual promiſes to perform, *&c.* The plaintiff demurs. *Girdler* ſerjeant for the defendant. The old rule was, that an accord with ſatisfaction ought to be pleaded executed, that the plaintiff might be ſure of ſomething for his damages; but an arbitrement may be pleaded without performance, becauſe the parties may have reciprocal remedies. Then it being now ſettled, that the parties may have actions upon mutual promiſes, this accord may be pleaded, though not executed, becauſe each party may have his remedy, *T. Jones* 158. *Raym.* 450. *Caſe* v. *Barber*. *T. Jones* 168, *Wickham* verſ. *Taylor*. *Sed non allocatur*. For, *per curiam*, if arbitrement be pleaded with mutual promiſes to perform it, though the party has not performed his part, who brings the action, yet he ſhall maintain his action; becauſe an arbitrement is like a judgment, and the party may have his remedy upon it. But upon accord no remedy lies. And the books are ſo numerous, that an accord ought to be executed, that it is now impoſſible to overthrow all the books. But if it had been a new point, it might be worthy of conſideration. Judgment for the plaintiff. See 15 *Hen.* 6. *Accord.* 1. *Hil.* 7 *Edw.* 4. *p.* 6.

Robinſon

Robinſon *verſ.* Godſalve.

A perſon reſiding within a peculiar archdeaconry, cannot in general be ſued in the biſhop's court. R. acc. Cro. Car. 115. & ſee acc. 23 H. 8. c. 9. ſ. 2. But where the archdeaconry is not peculiar, the biſhop and archdeacon have concurrent juriſdiction. Vide 3 Bl. Com. 64.

UPON motion for a prohibition to ſtay a ſuit in the biſhop's court, upon ſuggeſtion that the party lived within a peculiar archdeaconry. Reſolved, *per curiam*, where the archdeacon has a peculiar juriſdiction, he is totally exempt from the power of the biſhop, and the biſhop cannot enter there and hold court, and in ſuch caſe if the party who lives within the peculiar be ſued in the biſhop's court, a prohibition ſhall be granted. For the ſtatute (*a*) intends, that no ſuit ſhall be *per ſaltum*. But if the archdeacon is not a peculiar, then the biſhop and he have concurrent juriſdiction, and the party may commence his ſuit, either in the archdeacon's court or the biſhop's, and he has election to chuſe which he pleaſes. And if he commence it in the biſhop's court, no prohibition ſhall be granted; for if it ſhould, it would confine the biſhop's court to determine nothing but appeals, and render it incapable of having any cauſes originally commenced there.

(*a*) 23 H. 8. c. 9. ſ. 2.

Bedam *verſ.* Clerkſon.

An award to pay money to a ſtranger unleſs it is ſhewn to be for the benefit of one of the parties, is bad. R. acc. Cro. Eliz. 4, D. acc. 5 Co. 78. a. Cro. Eliz. 758. Salk. 74. Semb. acc. 1 Roll. Abr. 249. l. 15. An award to deliver up a certain writing obligatory, without ſpecifying the date or penalty, is void for uncertainty. In an award that the one party ſhould on a particular day pay the other a ſum of money and deliver up a certain writing obligatory, and that *then* they ſhould execute mutual general releaſes, the word *then* refers to the day.

DEBT upon bond dated the fifth of *April* 4 *Will. & Mar.* conditioned, that if the defendant ſhould perform the award of *J. S.* of all actions and demands, *ita quod* the award be made and ready to be delivered by three of clock *poſt meridiem* 6 *April* (which was the next day) that then, &c. The defendant pleads, that *J. S. nullum fecit arbitrium de præmiſſis ante tertiam horam prædict. diei in conditione prædicta ſpecificat'*. The plaintiff replies, and ſhews that *J. S.* made an award after the entering into the bond, *et ante tertiam horam prædict. diei poſt meridiem, viz. undecima hora*, that the defendant ſhould pay to *W.* the plaintiff's ſolicitor, 28*s.* and that the defendant ſhould pay to the plaintiff upon the 14th of *April* 8*l.* and that he ſhould deliver to the plaintiff *quoddam ſcriptum obligatorium, vel quandam billam obligatoriam, quod prius habuiſſet, quodque adtunc alteruter eorundem faceret alterutri eorum generales relaxationes*, &c. and then aſſigns for breach, that the defendant did not pay to the plaintiff the 8*l.* The defendant demurs. Serjeant *Birch* for the defendant argued that the award is not good. For the award to pay 28*s.* to *W.* who is a ſtranger, is ill, except in ſome caſes, where it appears that it is for the plaintiff's benefit, or to diſcharge money owing by him; but nothing of that appears in this caſe, and therefore as to that the award is ill. *Quod curia conceſſit.* 2. Exc.

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If an award is to be made by three o'clock in the afternoon of a particular day, a plea in debt upon the arbitration bond that "no award was made before three o'clock of the day," would be ill upon demurrer. But is cured by a replication.

The award is, that the defendant ſhould deliver to the plaintiff *quoddam ſcriptum, &c.* which is altogether uncertain, for it does not ſay of what ſum the bond was, nor of what penalty, nor of whom it was obtained, and therefore it is void, for the uncertainty in that reſpect; *quod curia conceſſit.* Then he argued, that it was an award but of one ſide, and conſequently ill; for the releaſes cannot be performed until the bond be delivered to the plaintiff, which can never be, becauſe it is uncertain what bond is meant, and the releaſes cannot be executed till the bond is delivered to the plaintiff, for the words of the award are, that the defendant ſhould deliver to the plaintiff *quoddam ſcriptum obligatorium, &c. quodque adtunc* they ſhould execute general releaſes on both ſides. Now the *adtunc* ſhews, that the releaſes ſhould not be executed, until the bond ſhould be delivered to the plaintiff. So that the arbitrator has awarded, that the defendant ſhould pay to the plaintiff 8*l.* which is all of the award that is good, and ſo it is (*a*) an award of one ſide. *Sed non allocatur.* For *per curiam*, the *adtunc* refers to the 14th of *April*, and not to the delivery of the bond to the plaintiff; ſo that the award is mutual enough, for when the defendant has paid the 8*l.* he may demand a general releaſe. 4. Exc. That *alterutter* is uncertain, *viz.* one of the two. But *per curiam*, it is as good a word as one can uſe. *Wright* ſerjeant for the plaintiff took exception, that the plea was ill. For the defendant pleads, that the arbitrator made no award *ante tertiam horam prædict' diei*; now there are two third hours, and perhaps the award was not made before the firſt third hour, and yet it might be made before the third hour *poſt meridiem*; and therefore the defendant ought to have ſaid, *ante tertiam horam praedicti diei poſt meridiem*, for want of which *poſt meridiem* the plea is ill. And *per curiam*, this had been ill, if the plaintiff had demurred for it; but now it ſeemed to them, that the replication had made it good. But becauſe the award was mutual enough, and a good breach aſſigned, judgment for the plaintiff.

(*a*) Sed vide Com. 324. Burr. 2, 7. Bl. 1119. 1120.

Trench executor of Squire *verſ.* Trewin.

Upon mutual independent contracts in the ſame inſtrument either party may maintain an action before performance of his part. R. acc. Str 535, 712. Bl. 1312. 2 Saund. 155. 1 Keb. 178. 6 Vin. 437. pl. 5. Hob. 88. D.

COvenant upon articles of agreement between the teſtator *Squire* and the defendant, by which it was covenanted and agreed between them, that *Squire* ſhould aſſign to the defendant his intereſt in a houſe, *&c.* and that the defendant ſhould pay to *Squire* 30*l.* The plaintiff aſſigns for breach, that the defendant has not paid the 30*l. &c.* The defendant pleads, that *Squire* did not aſſign his intereſt in the houſe to the defendant. The plaintiff demurs. And adjudged for him, becauſe theſe are mutual and independant covenants, and the parties may have reciprocal actions; and therefore the plaintiff may bring his action before the aſſign-

acc. Dougl. 665. Adm. 8 Mod. 294. poſt. 664, 665. Covenants by one party to aſſign his intereſt in an houſe, and by the other to pay a ſum of money, are mutual and independent. Vide poſt. 665. Dougl. 665.

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ment of the houſe. And the defendant has a remedy after; if the other party does not perform his part. vide Cowel on Contracts

Green and fifteen others *againſt* Pope.

Intr. Hil. 7 Will. 3. C. B. Rot. 307.

If ſeveral ſuffer an intire damage from a particular tort, they may join in an action. R. acc. 2 Wilſ. 423. 2 Saund. 115. 1 Vent. 167. 2 Lev. 27.

If ſeveral join in ſuing a mandamus, they may join in an action for a falſe return. S. C. cit. 3 Lev. 363.

In ſuch action no exception can be taken to the mandamus.

A defendant cannot plead ſpecially what merely negatives the facts ſtated in the declaration. R. acc. poſt. 680, 968, 674. & ſee ante 88.

No peremptory mandamus notwithſtanding a judgment on demurrer for the plaintiff in an action for a falſe return, unleſs ſuch action was brought in the court which granted the mandamus. S. C. Salk. 428. Comb. 400. q. v.

GREEN and fifteen others bring an action upon the caſe againſt the defendant, for having made a falſe return to a *mandamus* to him directed. The plaintiffs in their declaration ſhew the act 1 *Will. & Mar. ſeſſ.* 1. *cap.* 18. which exempts the proteſtant diſſenters from the penalties of divers former acts, if they take the oaths and ſubſcribe the declaration there mentioned; and by that act it is enacted, that no meeting by proteſtant diſſenters for religious worſhip ſhall be allowed, untill the place for the meeting be certified unto the biſhop of the dioceſe, or the archdeacon, or to the juſtices of the peace at the general quarter-ſeſſions, and regiſtered or recorded there reſpectively, and a certificate thereof given without fee, *&c.* and the plaintiffs ſhew, that they were proteſtant diſſenters, and had taken the oaths, and ſubſcribed the declaration, according to the act; and that in the pariſh of *Hindley*, at a town called *D.* within the dioceſe of *Cheſter*, the plaintiffs had appointed a place called *The Chapel* for their religious worſhip, and that they had authority ſo to do; that *Green* one of the plaintiffs made a certificate of their appointment of this place to the biſhop of *Cheſter*, and delivered it to *Pope* the defendant, being regiſter to the biſhop, to regiſter it as he ought; that the defendant *Pope* refuſed to regiſter it; upon which the plaintiffs were driven to ſue a *mandamus* out of the king's bench, directed to the defendant, commanding him to regiſter the certificate, but that the defendant notwithſtanding did not regiſter it, but made return to the *mandamus*; that *Hindley* was an antient populous village, diſtant one mile from the pariſh church, and for theſe forty years laſt paſt this place called *The Chapel* had been, and yet is, a chapel of eaſe, and endowed with 50*l. per annum*, and had a miniſter appointed to officiate; and that there were ſeveral places within the pariſh already appointed for diſſenters for religious worſhip, *&c.* all which return the plaintiffs aver to be falſe; and for this falſe return they bring this action. The defendant pleads, that the return to the *mandamus* was true, and avers every particular of this return, *&c.* The plaintiffs demur. And, 1. It was reſolved, that this plea was bad, becauſe it amounts but to the general iſſue, it being all meer matter of fact, and having no intermixture of law. (*a*) Then *Birch* ſerjeant for the defendant argued, that judgment ought to be given for him, 1. Becauſe it is ſaid in the declaration that the plaintiffs appointed

(*a*) Vide ante 87, and the caſes there cited.

pointed the place, but the act gives no direction, who ſhall have authority to appoint the place; and therefore it ought rather to be done by the preacher, or otherwiſe with the conſent of the whole meeting. 2. They have no authority to appoint a chapel, but this place in the declaration they call a chapel. But to this the court anſwered, that a field or tavern may be called *The chapel*. 3. They ſhould have ſhewn, by whom this appointment was made, as by the diſſenters inhabitants within ſuch a town, &c. but it is ſo general here, that it may be by all the diſſenters in *England*. Then if it is no good appointment, the whole will fail; for then there will be no certificate, if no certificate no regiſtering: if no cauſe to regiſter, the refuſal was no ground for a *mandamus*; if no *mandamus*, then there can be no falſe return. 4. It is ſaid that the certificate was made by *Green* alone; but the act gives no authority to any one in particular, to make it. But *per Treby*, the act being general, any of them may well certify. 5. The *mandamus* in this caſe was not grantable, for there was here no diſturbance of a freehold, nor office of truſt, but a thing merely eccleſiaſtical. And if a man has a ſeat in a church, and is hindered of the enjoyment, no *mandamus* lies; and as to the plaintiffs this was in nature of a church. But to all theſe objections the court gave one general anſwer, that this action was brought for the falſe return to the *mandamus*, and therefore all the reſt is but inducement. And therefore whether a *mandamus* will lie or not, is not now before the court, but it muſt be taken *pro confeſſo*, that a *mandamus* was granted, and the defendant made a falſe return. The principal point therefore of the caſe was, whether the plaintiffs can join in this action or not? And this was ſeveral times argued at the bar. And the defendants counſel argued, that they could not. Becauſe that where perſons are jointly intituled to the action, they may all join in it, ſince the damages, which were the foundation of it, were joint. 7 *Hen.* 6. 42. 14 *Hen.* 6. 13. 31 *Aſſiſ. pl.* 49. 34 *Hen.* 6. 12. *b.* 30. 35 *Hen.* 6. 19. But where perſons are ſeverally damnified, as in treſpaſs, &c. there they cannot join. Therefore if *A.* and B. are in company, and *C.* ſays of them, that they are felons, they muſt ſue diſtinct actions, and cannot join. *Dyer* 19. *a. pl.* 112. If two are ſued in the ſpiritual court for ſlander, and they procure a prohibition, and the plaintiff in the ſpiritual court proceeds afterwards, yet they cannot join in an attachment upon prohibition. If a corporation by act of common council diſfranchiſe ſeveral aldermen, they cannot join in a *mandamus*, becauſe their intereſts are ſeveral. Now in this caſe the damages are ſeveral, for ſome will come to this meeting-houſe, and others not; then they only who come, and have not a ſeat, are damnified and not they who abſent

Mandamus will not lie for a ſeat in a church.

Several cannot join in an action for words. Semb. acc. Burr. 984.

Diſfranchiſed aldermen cannot join in *mandamus*.

abſent themſelves. Beſides that, if *A.* has not a ſeat, this is no damage to *B.* and ſo *vice verſa*. Then the damages here being ſeveral, the plaintiffs ought not to have joined in this action. But it was adjudged by the whole court upon great deliberation, that the plaintiffs might well join, for the damages in this caſe were joint; for they all jointly ſue the *mandamus*, they all jointly proſecuted, the charges were all joint, and theſe are the damages the plaintiffs ſue to recover. And by *Treby* chief juſtice, if the attorney ſues the plaintiffs for the charges of the ſuit of the *mandamus*; he muſt ſue them jointly, and the ſurvivors are liable. And tho' it was objected, that the plaintiffs had no need to join in the ſuit of the *mandamus*, yet (the court anſwered) ſince they have done it, the charges will ſurvive. And by *Powell* juſtice, the reaſon of the caſe where two join in prohibition, *&c.* will guide this caſe. Now if *A.* libels againſt *B.* and *C.* for tithes; *B.* and *C.* procures a prohibition; afterwards *A.* proceeds in the ſpiritual court; *B.* and *C.* ſhall join in the attachment upon the prohibition. Ow. 13. *Bartue*'s caſe. So (by him) *A.* libels againſt *B.* and *C.* for defamation, and they ſue a prohibition, they ſhall join in attachment upon it; and it is no objection to ſay, that the defamation was ſeveral, for that might be objected in the caſe of tithes, and yet there they ſhould join. See 8 *Aſſiſ. p.* 30. But if *A.* exhibits ſeveral libels againſt *B.* and *C.* there *B.* and *C.* cannot join in prohibition. 1 *Leon.* 286. *Gerrard* v. *Sherrington*. *Yelv.* 128. *Burgeſs* and *Dixon* v. *Aſhton*. *Noy* 131. But the whole court principally relied upon a cauſe adjudged in this court. *Mich.* 4 *Will. & Mar.* 3. *Lev.* 362. where the two church-wardens of *Chelſea* church, being elected by the pariſh by cuſtom, went to Dr. *Brampſton* the official to be ſworn; Dr. *Brampſton* refuſed to adminiſter the oath to them; upon which they ſued a *mandamus* directed to Dr. *Brampſton*, to command him to adminiſter the oaths; upon which he returned, that the cuſtom was, that the miniſter ſhould name one church-warden, and that the pariſh ſhould chuſe the other; and becauſe that the pariſh had elected two, he did not know, which of them he ought to admit; they brought jointly caſe againſt Dr. *Brampſton* for this falſe return; and exception was taken, that the damages were ſeveral, and the profits of the offices ſeveral; but to this it was anſwered, that the action was not brought, to recover damages for the profits of the office, for the office had no profits; but it was brought to recover the damages and charges expended in the ſuit of the *mandamus*; and for this reaſon it was adjudged, that they might well join; which does not differ from the principal caſe. But to make a diſtinction between theſe two caſes, it was objected, that the church-wardens might well join, becauſe they are a corporation in judgment of law, and may ſue for goods of the pariſh, which are taken out of their poſſeſſion,

If ſeveral join in ſuing a *mandamus*, they muſt all be ſued for the charges.

All who joined in procuring a prohibition muſt all join in an attachment thereon.

or

or may have treſpaſs, or appeal of robbery, for the goods of the pariſh. 12 *Hen.* 7. 27. which diſtinguiſhes them from this caſe, which was of common perſons. But to this the court anſwered, that church-wardens are not a corporation, till they are admitted: but this *mandamus* was ſued, to procure admittance, and conſequently then they were not a corporation. And *(per curiam)* this action is not brought, only to recover damages, but alſo to have a peremptory *mandamus*, in which all ought to join. For one of them cannot have a peremptory *mandamus*, where ſixteen joined in the principal *mandamus*, for the peremptory *mandamus* muſt purſue the principal. And *per Treby* chief juſtice, if the one ſues an action, for a falſe return, and has a verdict for him, and the other ſues an action, and has judgment againſt him: the court will be in doubt, whether they ſhall grant a peremptory *mandamus* or not. And for theſe reaſons all the court were of opinion, that the plaintiffs might well join. And therefore judgment was given for the plaintiffs. Upon which *Pemberton* ſerjeant moved in *B. R.* for a peremptory *mandamus*; but the king's bench denied to grant it; becauſe the peremptory *mandamus* ſays, that the return is falſe, *prout conſtat nobis per recordum* which cannot be ſaid here; for the king's bench cannot take judicial notice of the record of the common pleas, unleſs it come before them by courſe of law; and therefore the action for the falſe return ſhould have been brought in the king's bench, where the falſe return is, if the party deſigned to have a peremptory *mandamus*.

Brown *verſ.* Berry.

A plea in abatement is good, tho' it concludes in abatement, to the juriſdiction and in bar.

'Tis no plea in abatement that the defendant was a priſoner in the *Fleet*, brought to the bar by *habeas corpus*, and there charged with a declaration, and that there is no original againſt him.

CASE. The defendant pleads in this manner, *et prædict*, the defendant *venit et petit judicium de narratione prædicta*, becauſe he ſaith, that he was a priſoner in the *Fleet*, and brought to the bar by *habeas corpus*, and charged with the declaration, *et ulterius pro placito dicit*, that there was no original ſued againſt him, *ideo petit judicium quod narratio caſſetur, et quod curia cognoſcere non velit, et quod quærens ab actione ſua prædicta præcludatur.* The plaintiff demurs. And the defendant joins in demurrer, and concludes his joinder in demurrer in the ſame manner, as he had concluded his plea. But *per curiam*, though where a plea in abatement is pleaded in bar, final judgment ſhall be given; yet in this caſe the defendant having concluded in abatement, bar, and to the juriſdiction, it ſhall be taken as pleaded in abatement. But it is not a good plea in abatement, and therefore *reſpondeat ulterius* was awarded.

Dawſon

Dawſon *verſ.* Howard.

A judge at niſi prius cannot adjourn the jury to the court above after they have been ſworn, notwithſtanding the conſent of the parties to the cauſe.

IN ejectment the jury was charged with the evidence, and afterwards the lord chief baron *Ward*, being judge of aſſiſe at *Cumberland* where it was tried, upon the petition and conſent of both parties made a rule, that the cauſe for difficulty ſhould be adjourned into the bench, and that the jurors ſhould appear in bank at the day of *tres Mich. ſub pœna* 5*l.* to give their verdict between the parties, *ſi juſticiariis ita placuerit.* And *Pemberton* ſerjeant moved, that this ſhould be made a rule of court. But denied, becauſe the judge could not adjourn the jury, after they were ſworn and charged with the evidence, nor could inflict a penalty upon the jurors.

Scoles *verſ.* Lowther

S. C. cit. Cunn. on Tithes. 204.

Tithe is not payable for milk uſed in the owner's houſe. R. acc. Cro. Eliz. 446. 702. Win. 33. Hardr. 184. D. acc. Cro. Car 172. 2 Inſt. 651. 1 Roll. Abr. 646. l. 28. 42. Bunb. 3. Burn's Eccl. Law. Tithes 5.—3, 4. 4th Ed. 3 Vol. p. 433. Com. Dig. Diſmes H. 5. 2 Ed. Vol. 3. 96. Unleſs the owner's houſe is out of the pariſh. D. acc. Burn's Eccl. Law. ubi ſupra. Semb. acc. Hardr 184. Or for dry cattle kept for the plow. S. C. 5 Mod. 96. R. acc. Win. 33. Cro. El. 446. 702. Hardr. 184. Sho. P. C. 192. D. acc. Cro. El. 476. Cro. Car. 172. 2 Inſt. 651. 1 Roll. Abr. 646. l. 31. 34. Bunb. 3. Burn's Eccl. Law and Com. Dig. ubi ſupra. Unleſs they plough land in another pariſh. S. C. 5 Mod. 96. D. acc Burn's Eccl. Law. ubi ſupra. Semb. acc. Hardr. 184. See Sho. P. C. 192. In a ſuggeſtion for a prohibition to a ſuit for tithes of cattle kept for the plough or pail, the plaintiff ſhould allege that the parſon by reaſon thereof has uberiores decimas elſewhere.

Lowther is parſon of the pariſh of *Swillington*, and Mr. *Scoles* live in *Kippax* the next adjoining pariſh, and occupies a large parcel of arable land there, and has forty acres of meadow and paſture in *Swillington*, and four acres of arable land. *Lowther* libelled in the ſpiritual court of *York* againſt *Scales* for tithes of the cattle depaſtured in *Swillington*. *Scoles* upon a ſuggeſtion, that barren cattle kept for ploughing the land, and cattle for the pail for the uſe of the houſe, ought not by law to pay tithes, and that this cattle, for the tithes whereof *Lowther* now libels, is ſuch, moves for a prohibition. And it was granted to him *niſi*, &c. And now ſerjeant *Pemberton*, upon *affidavit*, that *Scoles* carried the milk of his cattle to his houſe in *Kippax*, and uſed it there, and that he made uſe of the dry cattle for ploughing his land in *Kippax*, moved that the rule might be diſcharged. And it was reſolved by the whole court, that the defendant *Lowther* ſhould have tithes of the milk. For though *Wright* ſerjeant objected, that if a man have arable land without a houſe, he is intituled to be diſcharged of the tithes of the milk, which maintains the ſervants, who plow the land, as well if he had had a houſe, in which the milk were ſpent; yet the court anſwered, 1. that the law was otherwiſe, for it is of the ſame nature with wood which is burnt in the houſe, which is exempt from the payment of tithes, only (*a*) ſo long as it is burnt in the houſe. So the law is in the caſe of milk, which is only diſcharged of tithes, becauſe it is uſed in the houſe. And *per curiam*, of (*b*) common right tithe milk is payable at the parſonage or vicarage houſe. 2. As to the tithes for the agiſtment of the barren cattle, the court ſaid,

(*a*) Vide Poſt. 137. Cro. Car. 80.

(*b*) Vide Poſt. 359. T. Raym. 278. R. cont. Bunb. 73. Carthew and Edwards. Burn's Eccl. Law, tithes 5. 12. 7. 4th Ed. 3d Vol. 467.

that if in this caſe there had not been any arable land in *Swillington*, it is without doubt, that the parſon ought to have had tithes. For the reaſon why cattle of the plough is excuſed from the payment of tithes is, becauſe they are employed for the improvement of the arable land in the ſame pariſh; by which the parſon has better tithes of the arable land; but here that reaſon fails, for the parſon of *Swillington* has no tithes of the land in *Kippax*. In the ſame manner where a man has wood in one pariſh, and arable land in another; if he makes uſe of this wood in making fences for his arable land, yet he ſhall pay tithes to the parſon where the wood grows. But it had been otherwiſe if it had been the ſame pariſh. The ſame law, where the wood grows in one pariſh, and is ſpent in the owner's houſe in another pariſh. Now then the queſtion here will be, whether the ploughing of theſe four acres of land in *Swillington* will excuſe this cattle from the payment of tithes? and *per curiam*, it will excuſe only thoſe cattle which only plow that land of the four acres, and not thoſe which plow any land in *Kippax*. For the parſon ought to have ſomething in lieu of the loſs of thoſe tithes, which can only be of the four acres in *Swillington*. Then *Powell* juſtice took exception to the ſuggeſtion, where the plaintiff ſuggeſts, that this barren cattle plow the land, *&c.* but does not ſay, *per quod* the parſon had *uberiores decimas* in another place. And (by him) *uberiores decimae* does not ſignify only, that the parſon will have better tithes out of the arable land, than he would have had, if the cattle had not plowed it; but it ſignifies, that he will have ſo much more tithes (than otherwiſe he would have had) as will fully recompence the loſs of the tithes of the cattle; or it will (as he expreſſed it) overweigh that loſs. But as to this ſignification of *uberiores decimæ* *Treby* chief juſtice doubted much. But in the principal caſe a prohibition was granted, *quoad* this cattle, which only plowed the land in *Swillington*. And as to the reſt, *Lowther* had liberty to proceed below.

No tithe for wood uſed to fence arable land, if in the ſame pariſh. Semb. acc. Burn's Eccl. Law. 5. 4. 8 4th Ed. 3d Vol. 447.

Intr. Hil. 7 Will. 3. C. B. Rot. 447.

Wade *verſ.* Baker *and* Cole.

In replevin if the defendant ſets forth a cuſtom for the lord of a manor to appoint a guardian to the cuſtody of the lands of any of his infant tenants, and avows taking cattle damage feaſant, the plaintiff cannot plead that he the plaintiff is guardian in ſoccage.

REplevin of twelve cows diſtrained by the defendants at a place called *Hobarts* at *Peaſon Hall* in *Suffolk*. The defendants make conuſance as bailiffs to *Daniel Sanſon*, and ſhew, that the place where, *&c.* was called *Hobarts*, and was cuſtomary, parcel of the manor of *Peaſon Hall*, held by copy of court roll; that *John Brown* the elder was ſeiſed in fee of the place where, *&c.* held at the will of the lord, according to the cuſtom of the manor; and that being ſo ſeiſed he died, whereby the land deſcended to *John Brown* his

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ſon and heir, who was under the age of fourteen years; that within this manor there is, and time whereof, &c. hath been a cuſtom, that if tenant in fee according to the cuſtom of the manor die ſeiſed of the lands held at the will of the lord, leaving his ſon under the age of fourteen years, that then immediately after the death of ſuch tenant, the lord of the manor ſhall have the cuſtody of the land, until the heir come to the age of fourteen; and that the lord himſelf, or by his ſteward, may aſſign to ſuch infant a guardian for theſe lands; that before the taking of this diſtreſs *F.* was ſeiſed of the manor in fee, and being ſo ſeiſed, at his court of his ſaid manor the 23d of *May* 1695 by *William Bates* his ſteward granted by copy of court roll the place where, &c. to *John Brown* and his heirs, who was then admitted, and granted the cuſtody of the place where, &c. to *Daniel Sanſon*, until *John Brown* ſhould come to the age of fourteen years; that *Daniel Sanſon* entered as guardian into the place where, &c. and thereof was and yet is poſſeſſed; and the defendants as bailiffs to him took the cattle damage feaſant, &c. The plaintiff pleads in bar of the conuſance, that *Anne Brown*, mother of the ſaid *John Brown*, after the death of her huſband entered into the place where, &c. as guardian in ſocage to her ſaid ſon *John*, and made a leaſe thereof at will to the plaintiff, who entered and put in his cattle, &c. The defendant demurs. And adjudged, 1. That the bar to the conuſance was ill, becauſe the mother could not be guardian in ſocage, becauſe there is here a particular cuſtom for the lord to have the cuſtody, which cuſtom is not denied. But then it was objected by the plaintiff's counſel, that the conuſance was ill; for the defendants make conuſance as bailiffs to *Sanſon* in the right of *Sanſon*, whereas the guardian in ſocage has no right in him; but it ought to be in right of the copyholder infant. And it was compared to *Cox* v. *Dawſon*, *Hob.* 215. *Hut.* 16. *Noy.* 27. 1 *Brownl.* 197. where it is adjudged, that the committee of a lunatick cannot bring *trover* for goods taken from off the lunatick's land. *Sed non allocatur.* For *per curiam*, guardian in ſocage may bring treſpaſs or ejectment in his own name. He may make a leaſe of the land in his own name, until the infant come to the age of fourteen. And he may make admittances of copyhold eſtates in his own name. 7 *Edw.* 3. 44. 15 *Hen.* 7. 13. And ſuch cuſtomary guardian ſhall follow the nature of a guardian at common law. The ſecond exception to the conuſance was, that the defendant hath pleaded, that *John Brown* the father was ſeiſed according to the cuſtom of the manor in fee, but in law it is only an eſtate at the will of the lord, and conſequently a particular eſtate, and then the commencement of it ought to be ſhewn; and therefore the defendant ſhould have ſhewn the grant to *John Brown*, or otherwiſe ſhould have laid an admittance,

Guardian of the land may avow in his own name, D. acc. Owen 115. Cro. Jac. 98. 2 P. Wms. 122.

In an avowry pur damage feaſance the defendant muſt ſet forth his title. R. acc. Lutw. 1232. 2 Wilf. 258. D. acc. Yelv. 148.

In ſetting forth a title the commencement of all particular eſtates muſt be ſhewn. R. acc. poſt. 331. 922. 4 Mod. 346. Cro. Jac. 103. 3 Wilf. 65. D. acc. poſt. 1230. Co. Lit. 303. b. 2 Vent. 182.

A copyhold in fee is but a particular eſtate. R. acc. 4 Mod. 346. Cro. Jac. 103. ſemb. acc. 2 Vent. 182.

An admittance to a copyhold may be pleaded as a grant. D. acc. 4 Mod. 346. Cro. Jac. 103.

Guardian of the land may bring treſpaſs in his own name, R. acc. Plowd. 293. Make leaſes, R. acc. 1 Leon. 158 322. 4 Leon. 7. D. acc. 2 Roll. Abr. 41. l. 16. Owen 115. Cro. Jac. 99. 2 P. Wms. 122.

Or grant copyholds. R. acc. Owen. 115. Godb. 143. Cro. Jac. 55. 98. Leon. 238. D. acc. 1 Roll. Abr. 499. l. 23. 2 Roll. Abr. 41. l. 11. 2 P. Wms. 122.

which would have amounted to a grant. 4 *Co.* 22. *b.* But to this *Levinz* and *Birch* ſerjeants for the defendants anſwered; 1. That the title of the lands did not come in queſtion, but only a collateral matter, *viz.* the cuſtody of the lands. 2. They confeſſed, that the heir might well plead his anceſtor's admittance as a grant, becauſe he is privy to his eſtate, and has the ſurrenders and copy of the admiſſion in his cuſtody; but the guardian is a ſtranger to theſe tranſactions, and does not know the former admiſſions; and therefore it cannot be ſuppoſed, that he can plead the admiſſion of *John Brown*, ſince it is out of his conuſance. 3. They ſaid, that the lord has admitted the dying ſeiſed of *John Brown* the elder, and the deſcent to *John Brown* the younger, for otherwiſe he could not have granted the cuſtody. 3. That which they principally urged, was, that the ſeiſin of the father was but only inducement, the title being made to the guardianſhip and not to the land; then when matter is ſhewn but as inducement to other matter, it has no need to be ſhewn ſo preciſely, as the *giſt* of the action ought to be. 1 *Leon.* 123. *Cro. Eliz.* 132. *Cro. Car.* 98. *Yelv.* 16, 56, 75. *Cro. Eliz.* 112. And of this opinion *Powell* juſtice ſeemed to be at the firſt; but afterwards, *mutata opinione*; he and *Treby* chief juſtice held the conuſance ill for this exception; for it is not bare inducement, but the very ground of the avowant's right. For if *John Brown* was not ſeiſed, and died ſeiſed, and the land deſcended to his ſon; then the lord will have no title by the cuſtom to have the guardianſhip, and conſequently no more will *Sanſon* have any right. Therefore the ſeiſin of *John Brown* the elder was the ground of the avowant's right; and might have been traverſed; which proves that it is not inducement, for inducement is never traverſable. But as to the objection that was made, that the lord has diſabled himſelf to take advantage of the cuſtom by having made a grant to the heir; the court anſwered, that this was but an admittance, which is generally pleaded in this manner. And for this reaſon judgment was given for the plaintiff by *Powell* juſtice, and *Treby* chief juſtice, *Nevill* juſtice *dubitante* upon the authority of the caſe of *Scavage* and *Hawkins W. Jones* 453. which caſe he ſaid ſeemed to be contrary to the reſolution of the other judges.

Inducement is never traverſable.

A father cannot by deviſe bar the lord of a manor of his cuſtomary right of guardianſhip. Adm. Co. Lit. 88. b. 13 Ed. 2. 6.

Note. In the argument of this caſe of *Wade* and *Barker* a caſe was cited adjudged in this court between *Clench* and *Cudmore*. *Intr. Paſ.* 3 *Will. & Mar. C. B. Rot.* 304. *Lutw.* 1187. 3 *Lev.* 395. *Comb.* 253. where *Cudmore* lord of the manor of *Coxhall* in *Eſſex* claimed the cuſtody of the copyhold lands by the cuſtom (whereof the copyholder died ſeiſed) as guardian, and the plaintiff claimed as guardian appointed by the will of the copyholder according to 12 *Car.* 2. *cap.* 24, until the ſon ſhould arrive at the age of one and twenty years. And adjudged for the lord, that this cuſtomary right

right was not taken away by the general words of the act; and that the copyholder could not appoint a guardian for his ſon till the age of twenty-one years by that ſtatute, becauſe the ſtatute extends only to lands and tenements at the common law.

Helyng *verſ.* Jennings in ſcaccario.

Trover pro uno veſtimento lineario pro pueris, Anglice a ſuit of child-bed linen, *pro uno chirographo, Anglice* a muff. Verdict for the plaintiff, and judgment after motion in arreſt. *Ex relatione m'ri Mather.*

Trover for a ſuit of child bed linen and a muff, unexceptionable after verdict.

Loggin *verſ.* Comitem Orrey. C. B.

COvenant. The plaintiff declares upon a deed, by which it was covenanted and agreed between the plaintiff and defendant, that the plaintiff ſhould deliver to the defendant his mare and that the defendant ſhould pay to the plaintiff twenty guineas at the day of the death of the counteſs of *Orrery* the defendant's mother, or at the day of marriage of the plaintiff, which of the two ſhould firſt happen; and he avers, that he delivered the mare to the defendant, and that he was married ſuch a day, and that the defendant had not paid, &c. Judgment by default, and writ of inquiry of damages executed. And now *Girdler* ſerjeant moved in arreſt of judgment, that the plaintiff has not averred, that the counteſs of *Orrery* was not dead, which he ought to have done, becauſe the guineas were to be paid at the contingency that ſhould firſt happen; ſo that if the counteſs of *Orrery* died before the plaintiff married, the plaintiff has ſlipped his opportunity. See *Yelv.* 175. *Rock* v. *Rock*. Beſides, that if ſhe was dead before the plaintiff married, the plaintiff might have ſued his action, and the recovery in that action would not be a bar here. *Sed non allocatur.* For *per curiam*, in ſuch caſe the defendant might well plead that recovery in bar; and though the plaintiff was intituled to his action upon the firſt contingency, if he tarry till the ſecond happen, it is but in his own delay, and the defendant ſhall not take advantage of it. Judgment for the plaintiff.

Upon a contract to do an act upon the firſt of two events, a performance may be inforced, tho' it is not called for until both have happened.

Walker *v.* Brook executor. Brook.

INdebitatus aſſumpſit was brought againſt the executor upon the *aſſumpſit* of the teſtator. The plea roll was, that the teſtator *non aſſumpſit*; but the poſtea was, that the defen-

If the verdict as entered on the poſtea, finds neither the affirmative or negative of the iſſue joined, but an irrelevant fact, if the fault appears evidently to have ariſen from the miſtake of the officer who made the entry, the court will amend it. Semb. acc. Burr. 384. Vide Str. 514, 515. Burr. 383. 1 Will. 33. Str. 1197. Dougl. 361, 647, 648, 718. Burr. 1237. 1 Will. 34.

dant

dant (a) *assumpsit* generally, and verdict for the plaintiff: and moved, that the *postea* might be amended. And it was granted; for *per curiam*, the jury have found the defendant guilty as the plaintiff has declared, which is upon a promise of the testator, the plea roll being right. But if the defendant had pleaded *quod ipse non assumpsit*, a repleader ought to have been granted. See 2 *Ventr.* 196. *Str.* 919. 3 *Wilf.* 423.

Parish in a recovery amended. Vide post. 209. 2 Wilf. 2. Loggin v. Rawlins. Barnes 4to. Ed. 21.

SErjeant *Pemberton* moved for liberty to amend a recovery suffered by *Jane Knight*, the lands being said in the recovery to lie *in parochia sanct. Mariae Salvatoris in Southwark*, whereas there is no such parish, for the proper name is *sancti Salvatoris*. And the court gave him leave to raise the word *Mariae*. And *per Treby* chief justice, the vulgar name is St. *Mary Overree*, that is, over the river; but *sancti Salvatoris* is the name used in pleadings.

(a) In the former editions the word "*non*" was here inserted; but that must have been thro' mistake.

Hilary

Hilary Term,

8 & 9 Will. 3. B. R. 1696.

Sir John Holt *Chief Juſtice.*
Sir Thomas Rokeby, *Sir* John Turton, *Sir* Samuel Eyre } *Juſtices.*

Memorandum, *Mr.* ſerjeant Wright, *having been counſel for the King againſt Sir* John Fenwick *in the houſe of peers, was before the beginning of this term made King's ſerjeant and knighted.*

Jones *verſ.* Bodeenor.

S. C. 5 Mod. 310. Salk. 1.

An attorney of one court may after putting in ſpecial bail to an action in another plead his privilege, either againſt the perſon at whoſe ſuit he was arreſted: R. acc. 3 Lev. 343. p. cur. acc. Salk. 544. 1 Wilſ. 306. Str. 864. Sem. acc. Bl. 1087, 1088. ante, 93. Vide Str. 191. A waiver of privilege in one action eſtopps a man from pleading it in any other. Vide Bl. 1088. poſt. 869. 2 Wilſ. 44. If the plaintiff however will avail himſelf of the eſtoppel, he muſt ſet it forth and rely upon it in his replication.

AN attorney of the common pleas being arreſted in the country at the ſuit of an attorney of the king's bench, gave bail in the king's bench, which was filed, and then a declaration by the by was delivered againſt him the ſame term at the ſuit of another man, to which he pleaded his privilege. And it was reſolved, 1. That though *A.* be *in cuſtodia mareſcalli mareſcalliae* at the ſuit of *B.* yet when *B.* declares againſt *A. A.* may plead his privilege, becauſe he comes here by coercion, and had no opportunity before to take advantage of it. See 22 *Aſſiſ.* 83, 4. and 26 *Hen.* 6, 7. Conuſance may be demanded, though a man be in cuſtody of the marſhal. *Pari ratione* he may plead his privilege. 2d. Reſolution. If *A.* files bail at the ſuit of *B.* and in the ſame term a declaration is delivered againſt *A.* at the ſuit of *C. A.* may plead his privilege againſt *C.* as well as againſt *B.* for it were abſurd, that *C.* who tops his ſuit upon the action of *B.* ſhould have more liberty or advantage

againſt

againſt *A.* than *B.* himſelf had. But if by any thing *A.* waives his privilege in the firſt action, he is then obnoxious to the ſuits of every body notwithſtanding his privilege. 3. Reſolved, that if after the defendant has waived his privilege, he ſhall yet plead it, the plaintiff in his replication muſt ſhew his waiver, and rely upon the eſtoppel.

Partridge *verſ.* Ball.

S. C Carth. 390.

In ejectment on the demiſe of a corporation, the demiſe ſhould be ſtated to have been by deed. But no objection can be taken after verdict. Vide ante, 109.

EJectment for lands in *Suffolk* upon the demiſe of the corporation of *Bury*. Upon not guilty pleaded, a verdict was given for the plaintiff. But it was moved in arreſt of judgment in *C. B.* that it does not appear upon the record, that the leaſe was by deed And the prothonotaries there certified, that the practice was notwithſtanding the common rule, of confeſſing leaſe, entry and ouſter, in ejectment for things incorporeal as tithes, or upon demiſes of corporations, to lay the demiſe by deed. But it was adjudged in *C. B.* that it was aided by the verdict. And judgment was given there for the plaintiff. Upon which error was brought in *B. R.* and that judgment was affirmed. And *Holt* chief juſtice ſaid; that at this day the caſe of *Cro. Jac.* 613. is not law. *Swadling* v. *Piers*. For now ejectments are grounded on fiction.

The caſe of the ſheriff of Eſſex.

When a ſheriff quits his office, the cuſtody of the county gaol can only belong to his ſucceſſor.

THE old ſheriff quitted the office without having delivered the gaol to his ſucceſſor, and the juſtices of peace, pretending title to keep the cuſtody of it, exclude the new ſheriff. Upon which a motion was made to the king's bench on behalf of the new ſheriff. And the court held, that the cuſtody of the gaol could not belong to any but to the new ſheriff. Upon which they made a rule, that the old ſheriff ſhould deliver the cuſtody of the gaol to the new ſheriff, without taking any notice of the juſtices of peace. And becauſe that the old ſheriff was out of poſſeſſion, the court gave order that this rule ſhould be ſerved upon the gaoler, to the end that he ſhould permit the old ſheriff to make delivery of the gaol over accordingly. And (*per Rokeby* juſtice) the county gaol is the priſon for malefactors, and the ſheriff ought to keep them there; but priſoners for debt, &c. where eſcape lies againſt the ſheriff for their eſcape, may be kept in what place the ſheriff pleaſes.

The ſheriff muſt keep malefactors in the county gaol. But he may keep priſoners for debt where he pleaſes.

Hicks

Hicks *verſ.* Woodſon.

S. C. Carth. 292. Comb. 403. Salk. 655. 12 Mod. 111. Cunn. on Tithes, 106. with the arguments of counſel, 4 Mod. 336. But no judgment. Skinn. 560. Holt 671. Plead. 4 Mod. 324. Vol. 3. 116.

IN attachment upon prohibition the plaintiff declared, that there is, and time out of mind, *&c.* hath been, a cuſtom within the hundred of *Huntſpittle*, in the pariſh of *Huntſbritch* in *Somerſetſhire*, that every occupier of land within the hundred ſhould be diſcharged of tithes of agiſtment of barren cattle, not employed in the plough, nor for the pail, that the plaintiff was an inhabitant for five years paſſed, and yet is, within the hundred, and occupies land there, and was and yet is poſſeſſed of divers barren cattle, for the tithes of which (notwithſtanding the ſaid cuſtom) the defendant libelled againſt the plaintiff, in the ſpiritual court, *&c.* and he declares alſo upon two *modus*'s for tithes of lambs, *&c.* and that the defendant ſued for tithes of them, *&c.* The defendant traverſed the *modus*'s and the cuſtom, and verdict for all was given for the plaintiff. And upon motion in arreſt of judgment by ſerjeant *Gould*, that this cuſtom was void, the queſtion was, whether a hundred may preſcribe generally in a *non decimando*, as in this caſe, to be free from the payment of tithes for herbage or agiſtment of cattle. And after ſeveral arguments at the bar it was reſolved, 1. that in things tithable by cuſtom only, and not *de jure*, a county or hundred might preſcribe *in non decimando*, generally; for in that caſe the county, *&c.* is diſcharged without a cuſtom to the contrary; ſo that it is but to inſiſt upon the old right, againſt which the cuſtom has not prevailed. See 13 *Co* 12. 1 *Roll. Abr.* 653. 654. 1 *Roll. Rep.* 22. *March* 25. But for things which are tithable *de jure*, a county or hundred could not preſcibe *in non decimando*, no more than a particular perſon; for it would be abſurd to ſay, that a hundred ſhall preſcribe *in non decimando*, where the particular perſons, of which it conſiſts, could not. 2. They reſolved, that wood is not *de jure* tithable, becauſe it does not renew annually. *Seld.* 237. 13 *Co.* 13. where it is ſaid, that in libels in the ſpiritual court for tithes of wood they allege a cuſtom. (But note, the practice of the ſpiritual court was affirmed at this day to be otherwiſe; but the court did not regard that, for *Holt* chief juſtice ſaid, that they made ſtones, gravel, and all things, tithable.) And therefore the caſe in *March.* 25. 1 *Roll. Abr.* 653, 4. may be good law, for the caſe there is of wood. But this principal caſe is of agiſtment of cattle, which is *de jure* tithable, as being recompenſed by the graſs, hay, *&c.* which otherwiſe would yield tithes; and therefore the cuſtom is void. And the court did not only arreſt the judgment but cauſed this entry to be made, *quia apparet*

A cuſtom within a hundred de non decimando for things tithable de jure is bad. Adm. Burn's Eccl. Law. tithes. 4. 4 Ed. Vol. 3. p. 400. Agiſtment of barren cattle not for the plough or pail is de jure tithable. vide ante 129. But wood is not. R. cont. Cro. Car. 80. Bunb. 61. and ſee 45. Ed. 3. c. 5. 1 Brownl. 94. 1 Lev. 189. Palm. 37. 38. Litt. Rep. 152. Bunb. 98. 99. Reg. 44. ante, 129. 130. 2 Inſt. 642 to 645. 1 Roll. Abr. 637 to 640. Doct. and Stud. Dial. 2. c. 55. Com. Dig. diſmes. H. 3. 4. 2d Ed. Vol. 3. p. 94. 95. 96. Burn's Eccl. Law. Tithes 5. 4. 4 Ed. Vol. 3. 437 to 448. Cunn. on tithes 134 to 140.

apparet curiae domini regis, &c. quod cuſtuma praedicta, &c. nullius eſt vigoris, ideo conſultatio, &c.

For the defendant theſe books were cited in this caſe. *Bro. diſmes.* 13. *Doct. et Stud. lib.* 2. *c.* 55. *Plowd.* 645. 1 *Roll. Abr.* 653. *pl.* 8. *Hob.* 297. 2 *Co.* 44. 8. *Hen.* 7. 1. *b.* 1 *Sid.* 447. For the plaintiff, 1 *Sid.* 321. 13 *Co.* 12. *Dyer* 363. 2 *Bulſtr.* 285. *March.* 25. 2 *Saund.* 145.

Rex *verſ.* Martin Rice.

S. C. 3 Salk. 90. Carth. 393. Salk. 166. 12 Mod. 116. Comb. 417. 5 Mod. 325

Churchwardens are temporal officers. D. acc. 1. Vent. 267. The officer of the ſpiritual court cannot refuſe to ſwear them ia. R. acc. Carth. 118. D. acc. Str. 610. See alſo poſt. 1379. 1405. Salk. 433.

A *Mandamus* was directed to the archdeacon of St. *Aſaph* to ſwear and admit *J. S.* being duly elected by the pariſh according to the cuſtom, to be church-warden. To which it was returned, that *J. S.* was *minus habilis*, being a poor dairy-man, *&c.* And the queſtion was, whether the archdeacon can refuſe the church-warden, elected by the pariſh by the cuſtom, for any cauſe whatſoever? And Mr. *Northey*, that he could, argued that the church-warden is *quaſi* a ſpiritual officer, becauſe he has the care of the church and all things belonging to it; and the archdeacon is more than a miniſter, for the party is examined before him in the ſpiritual court. And he likened it to the caſes, where it has been ruled, that the lord or ſteward of a leet might refuſe a conſtable for good cauſe, and the juſtices of peace have done the ſame. But it was reſolved, that the archdeacon has no power in ſuch caſe, to refuſe to ſwear and admit the church-warden. For the church-warden is an officer of the pariſh, and his miſbehaviour will prejudice them and not the archdeacon; for he has not only the cuſtody, but alſo the property, of the goods belonging to the church, and may maintain actions for them; and for that reaſon it is an office merely temporal, and the archdeacon is only a miniſterial officer. And therefore a peremptory *mandamus* was granted. And *per Holt* chief juſtice, in *London* both the church-wardens are appointed by the pariſh; but in other places the parſon chuſes one of them and the pariſh another; but this is (*a*) rather by cuſtom than by the common law.

But the lord or ſteward of a leet, or the juſtices, may refuſe to ſwear in a conſtable. Semb. acc. 2 Hawk. c. 10. ſ. 47. 48. 49.

(*a*) Vide March. 5 pl. 9. Str. 1246.

Rex *verſ.* Keite.

In an indictment on the ſtatute of ſtabbing it muſt be ſtated that the deceaſed had not

THE defendant *Keite* was indicted upon (*a*) two ſeveral indictments, the one for the murder of *Wells* one of his ſervants, and the other indictment was found upon (*b*) the ſtatute of ſtabbing; upon which two ſpecial verdicts were

when the mortal wound was given, a weapon drawn S. C. 12 Mod. 118. 3 Salk. 191. D. acc 1 H. P. C. c. 38. 1ſt Ed. 468. 1 Hawk. c. 30. ſ. 6. Q. Whether a man can be guilty of murder on that ſtatute, if the deceaſed had ſtruck him before ſuch wound given. S. C. Skinn. 666. Comb. 406. Holt 481. vide Foſt. diſc. 2. c. 6. ſ. 5. 4. Bl. Com. 193. If he can, and in a ſpecial

(*a*) A priſoner whoſe caſe can be brought within the ſtatute of ſtabbing, is uſually arraigned upon two indictments, one for murder at common law, the other on the ſtatute. Foſt. diſc. 2. c. 6. ſ. 2.—1 H. P. C. c. 38. 1ſt Ed. p. 468. (*b*) 1 Jac. 1. c. 8.

found,

found, *viz.* that *Keite* ſuch a day retained *Wells* to be his gardener, and that after ſome time he ſent *B.* another of his ſervants to *Wells*, to demand of him the key of the garden, having a deſign to diſcharge *Wells* from his ſervice; that *Wells* refuſed to ſend the key; upon which *Keite* went to ſeek his ſword, and having found it brought it with him to the kitchen, and there expoſtulated with *Wells*, who anſwered, that he might take the key if he would; and then *Keite* drew his ſword, and ſtruck *Wells* with it upon the head; and *Wells* taking the handle of a ſcythe attempted to ſtrike *Keite*, but he was hindred by a rack; but he punched *Keite* with it ſeveral times; and *Keite* retired towards the door, and gave a wound to *Wells* with his ſword in the —— of which wound *Wells* ſuch a day died, *&c.* And it was argued by Mr. *Cowper* king's counſel, *Mich.* term laſt, and by ſerjeant *Wright* king's ſerjeant this term, that this fact is within the ſtatute of ſtabbing, for the words of the act [unleſs firſt ſtricken by the perſon killed] muſt be intended of the firſt ſtroke of all; for otherwiſe the word *firſt* would be ſurpluſage; for then it would be no more than to ſay, [unleſs the perſon killed has then a weapon drawn, or has ſtricken, *&c.*] which was not the intent of the act, but that the act intends the firſt ſtroke of all. And in this manner it is adjudged by eleven judges againſt one, Sir *W. Jones Rep.* 340. And the word [firſt] was cautiouſly inſerted, for this ſtatute was enacted in the time of king *James* the firſt, (*a*) when many animoſities aroſe between the *Engliſh* and the *Scotch*, who uſing daggers, were accuſtomed to ſtab many of the *Engliſh ex improviſo*, which could not have been done by a flat ſword, the unuſual weapon of the Engliſh; therefore this ſtatute was deſigned to ſecure defenceleſs people from ſurpriſe, ſuppoſing that whoſoever ſtruck firſt, would be prepared. And if the word *firſt* ſhall not be expounded in this manner, the ſtatute will be eaſily eluded; for if *A.* being armed comes to *B.* who has no arms, and gives him a blow, *B.* naturally gives another to *A.* and then *A.* ſtabs *B.* by this conſtruction of the ſtatute *A.* will be out of danger of the act, becauſe *B.* had given him a blow. But certainly it was never the intent of the act, that a caſe ſo miſchievous ſhould be without remedy and puniſhment. Beſides that, this preſent caſe is ſtronger than that of *Jones* 340. for there the party that was killed, ſtruck him who killed him, before he had a mortal weapon, ſo that when he that was killed ſtruck, he could not be ſaid to have been in danger of his life, and to have ſtruck in defence of his life. But in this caſe the party killed was ſtruck firſt with a weapon drawn, and which threatened death; and then in ſuch a caſe it is natural, that a man ſhould ſtruggle in defence of his life, which he then might well imagine to be in danger. 2. The words of the ſtatute are [not having then a weapon drawn, now in this caſe *Wells* had no weapon drawn, for he had no

cial verdict on an indictment thereon the jury find that the parties exchanged blows before ſuch wound given, tho' they do not expreſsly ſtate who gave the firſt ſtroke, if it can be collected from the order in which the facts are ſtated it will be ſufficient. S. C. Skinn. 666. Comb. 406. Holt 481.

A ſpecial verdict on an indictment for felony, cannot be amended by the judge's notes. S. C. Skinn. 666. Salk. 47. Comb. 406. vide tamen Dougl. 362.

On an indictment for murder, if the jury bring in a ſpecial verdict, and find the killing in ſuch a way as to leave it uncertain whether the fact was murder or manſlaughter, there ſhall be a venire *fac.* de novo. S. C. Comb. 406.

If a maſter on the refuſal of his ſervant to deliver up a key, fetches his ſword, on a ſaucy anſwer ſtrikes him, and afterwards exchange of blows gives him a mortal wound therewith Q. whether this is murder. S. C. Skinn. 666. Com. 13. 5 Mod. 287. Comb. 406. Holt 481. An affault without legal authority

& ſufficient provocation followed by a mortal ſtroke is murder. S. C. Skinn. 666. Com. 13. Comb.

Vide Foſt. diſc. 2. c. 6. ſ. 17. Mod. 133.

406. Notwithſtanding an exchange of blows before ſuch ſtroke. S. C. Skinn. 666. Com. 13. D. acc. J. Kel. 130. 1 Hawk. c. 29. ſ. 17. c. 31. ſ. 26. 1 H. P. C. c. 40. 1ſt Ed. p. 482. 483. A perſon who has a power of correction, has no legal authority to ſtrike with an inſtrument likely to kill. S. C. Holt 481.—R. acc. J. Kel. 64. D. acc. 1 Hawk. c. 29. ſ. 5. Foſt. Diſc. 2. c. 1. ſ. 4. 1 H. P. C. c. 36. 1ſt Ed. p. 454. & c. 39. 1ſt. Ed. p. 474. J. Kel. 133. 4 Bl. Com. 182. ſee alſo Cro. Car. 93. Palm. 545. W. Jones 198. Kel. 127. 1 H. P. C. c. 36. 1ſt Ed. p. 454. Words cannot be a ſufficient provocation. S. C. Comb. 406. Agr. J. Kel. 55. D. acc. J. Kel, 60, 65, 130. poſt. 1298. 1 Hawk. c. 31. ſ. 27, 33. 4 Bl. Com. 200. In an indictment for murder, Q. whether the inſertion of the name of the deceaſed once too often in the charge is not fatal. S. C. 12 Mod. 118. Whether 'tis not too uncertain to deſcribe the wound as being in depth quite thro' the body. S. C. 12 Mod. 118.

thing but the handle of a ſcythe, which belonged to his buſineſs as a gardner, and it is no weapon. It hath been held, that a candleſtick, bottle, &c. are (*a*) weapons drawn within the act; but theſe reſolutions ſeem to be without foundation. For one may as well ſay, that if *A.* comes to *B.* in his ſtudy with his ſword drawn, and *B.* takes his book in his hand, that this book ſhall be a weapon drawn, which is abſurd. But the ſtatute intended a weapon defenſible againſt a weapon uſed to kill. And though theſe reſolutions aforeſaid may be ſaid to be *in favorem vitæ*, yet it is but *miſericordia puniens*. And for theſe reaſons they prayed judgment for the king upon the indictment upon the ſtatute of ſtabbing.

Againſt this it was argued for the priſoner by Sir *Bartholomew Shower* and ſerjeant *Levinz*, that this ſtatute, taking away the benefit of clergy, ought to be taken ſtrictly. The words are [not having then a weapon drawn] which [then] muſt refer only to that which was mentioned before; and no affray, quarrel, &c. being mentioned before, but only ſtabbing or truſting, it muſt relate to them; and conſequently having a weapon drawn at the time of the ſtab or thruſt is ſufficient. The intent of the act was to prevent murder by ſurpriſe, which cannot be where there is a ſtruggle, quarrel, or blows interchanged. And this is proved by the form of the indictments upon this occaſion, which are never that *A.* aſſaulted *B. qui adtunc non prius percuſſit*, and then *A.* ſtabbed *B.* but they are always that *A.* ſtabbed *B. qui adtunc non prius percuſſit*. Then the word [firſt] immediately following the word [then] and being coupled to it, muſt refer to it. For the words are [not having then a weapon drawn or then firſt ſtruck] then the words being disjunctive by the word [or] the one or the other, *viz.* whether the perſon killed had a weapon drawn, or had ſtruck the other, before he was ſtabbed, prevents the penalty of the act. Now in this caſe both theſe things happened. For 1. *Wells* had then a weapon drawn, *viz.* the ſnead of the ſcythe, which being pointed with iron is more offenſive than a candleſtick, bottle, cudgel, &c. which have been adjudged to be weapons drawn. *Sty.* 467. *Godb.* 154. *pl.* 204. And it is not like a book in a ſtudy, which is not ſo offenſive. 2. *Wells* had ſtruck the priſoner, before he was ſtabbed; for he punched him with the handle or ſnead of the ſcythe. But admit that the word [firſt] in the act ought to have ſuch conſtruction as the king's counſel would have it, yet in this caſe *non conſtat*, but *Wells* gave the firſt ſtroke of all, for it is found here, that *Keite* ſtruck *Wells*, and that *Wells* punched him; but it is not ſaid in the verdict, *ſuper quo* or *poſtea*, *Wells* punched him; ſo that it may be, that *Wells* ſtruck him firſt of all, for the placing of theſe words before thoſe is no

And to charge that the priſoner *ſtruck and gave* the mortal wound. Vide ante, 29. An indictment for murder may be quaſhed after a ſpecial verdict.

(*a*) Vide 1 H. P. C. c. 38. 1ſt Ed. p. 470. 4 Bl. Com. 194.

argument, that the act which theſe import, was done before the act which thoſe import; for the words could not be uttered altogether. The anabaptiſts may as well argue, that becauſe the words of the ſcripture are, go, teach, and baptize all nations, that the word teach being before baptize, people ought to be inſtructed in the goſpel before they be baptized; but this kind of argument will certainly be exploded.

If a ſpecial verdict does not expreſs the time when the facts it ſtates were done, if they could not have been done at the ſame time, it ſhall be intended they were done in the order they are ſtated.

To this objection the king's counſel anſwered, that when no time is expreſſed, and it is impoſſible that all ſhould be done at one time; the facts ſhall be conſtrued to be done in time, as the words are placed, eſpecially when the nature of the thing tends to ſuch conſtruction. As here it is found, that after that *Wells* ſaid to *Keite*, that he might have the key, the priſoner then drew his ſword; which muſt be intended immediately. And as to the paſſage out of the ſcripture, it would be a very good argument for the anabaptiſts, if there were no other paſſages there expreſsly contrary; and then the conſtruction of the doubtful ſentences muſt always be directed by thoſe which are expreſs.

If two men draw their ſwords upon a man who is unarmed, and kill him, he only who gives the wound is within the ſtatute of ſtabbing. R. acc. Sty. 86. Al. 43. Adm. 1 H. P. C. c. 38. 1ſt Ed. p. 468. 1 Hawk. c. 30. ſ. 7.

Sir *Bartholomew Shower* and ſerjeant *Levinz* proceeded in their argument for the priſoner, that this act muſt be taken ſtrictly, as appears by *Sty.* 467. For if two men draw their ſwords upon one man unarmed, and the one only gives the ſtroke, the other is out of the act, though the indictment may recite, that either of them made the ſtroke. And if it cannot appear which of them made the ſtroke, then both of them are out of the ſtatute. Now the intent of the act was to prevent murder by ſurpriſe, but in this caſe there was no ſurpriſe, for there was at the beginning an expoſtulation, and afterwards in the affray *Keite* retired; and then, it being in a large kitchen, *Wells* might have eſcaped, and could not be ſaid to be ſtabbed ſuddenly, and ſo this caſe is out of the intent of the act. Beſides that the act provides, (*a*) that it ſhould not extend to killing in any other manner than is here mentioned; and there is a ſpecial proviſo, that it ſhall not extend to any perſon, who in chaſtiſing his ſervant, contrary to his intent ſhall commit manſlaughter. And in this caſe without doubt the firſt blow was deſigned to correct the ſaucy refuſal of the key, *&c.* And the mortal blow was not with intent to kill, for it was not in the body, but was deſigned as a correction, as well for the preceding faults, as for the many punchings of the priſoner; for which they concluded, that this was out of the act.

Holt chief juſtice, if the verdict is imperfect, no judgment can be given, but a *venire de novo* ought to iſſue. For though it is a ſpecial verdict, yet it cannot be amended by the notes in felony, as it might in civil cauſes. And though

(*a*) This act is in general conſidered as being merely declaratory of the common law; D. acc. 1 Bulſt. 87. J. Kel. 55. Foſt. 2 Diſc. c. 6. ſ. 1. Hawk. c. 30. ſ. 5. and ſeveral caſes, though within the ſtrict letter, and not ſaved by any of the exceptions, have under circumſtances which would have juſtified, excuſed, or alleviated a charge of murder at common law, been held not to be within it. See ſeveral inſtances collected, Foſt. 2 Diſc. c. 6. ſ. 1.

the

the jury have found a killing (which the counſel objected was the ſubſtance of the charge, and ſo too perfect to be quaſhed) that is not enough; for the jury is charged with murder, and then if they find a killing ſo uncertain, as that it cannot be known whether it be murder or not, it is an imperfection in ſubſtance, and the jury could not diſcharge themſelves. But here the verdict is certain enough; for it is found, that *Wells* ſaid to *Keite*, that he might take the key if he would, and then the priſoner drew his ſword, which is immediately after. And to this opinion *Turton* juſtice agreed, for the facts muſt be ſuppoſed to be done, in the order that they are put and found by the verdict. But *Eyre* and *Rokeby* juſtices held the verdict uncertain, and therefore (by them) a *venire facias de novo* ought to iſſue.

But as to the matter in law *Holt* chief juſtice ſeemed to be ſtrongly of opinion, that the ſtatute intends, by the firſt ſtroke, any ſtroke before the mortal wound is given. This point came in queſtion at the beginning of the laſt reign, but was not determined. And therefore (by him) if *A.* ſtabs *B*, who before had given him a blow, or had aſſaulted him, *A.* is out of the penalty of this act. But the other juſtices gave no opinion to this, but were ſilent.

As to the ſpecial verdict upon the indictment for murder, Mr. *Cowper* and ſerjeant *Wright* argued.

1. That there was here a malice, in *Keite*; for the ſending for the key, with intent to diſcharge *Wells*, ſhews that *Keite* had diſpleaſure; and though there was new provocation, that does not hinder the former diſguſt from continuing. Beſides that, the manner of behaviour implies malice, for he went away to fetch his ſword, and brought it with him, which ſhews that he had an ill deſign; and then he expoſtulated with *Wells*, which ſhews deliberation.

2. Admit that *Keite* had no malice, yet to kill a man without provocation, or provocation ſufficient to make it manſlaughter, will be murder. Then here the denial of the key was not ſufficient provocation, nor a ſaucy anſwer of a ſtranger, much leſs of a ſervant who is under the care and protection of his maſter, and conſequently he ought to be more induſtrious for his ſafety. If *A.* kills *B.* for diſtorting his mouth and mocking him, it is murder. *Cro El.* 778. *J. kel.* 131. *Hale P. C.* 37. 1ſt *Ed.* 455. And though *Wells* before the mortal wound given ſtruck *Keite*, that is nothing, for it is but natural in defence of his life, ſince he was attacked with a naked ſword.

But

But againſt this it was argued by Sir *Bartholomew Shower* and ſerjeant *Levinz* for the priſoner, that murder heretofore was very uncertain. Sometimes a killing *ſe defendendo*, and death *per infortunium*, were eſteemed murder. By the canon law the puniſhment was only a fine. In *Stanford* 16. it is called *occulta occiſio*. So *Bracton* and *Fleta*. 2 *Inſt.* 240. 21 *Edw.* 3. 17. ſays, that it muſt be *felleo animo*. 3 *Inſt.* 55., *ex malitia præcogitata*. *Co. Lit.* 287. b. adds, with a man's will. And in murder it is not material, who ſtruck the firſt ſtroke, unleſs all the ſubſequent acts and ſtrokes are *ſe defendendo*. But in this caſe *Wells* compelled *Keite* to retire by which it appears, that his blows were offenſive, and not defenſive, which were ſufficient provocation, without making mention of the refuſal of the key and unmannerly anſwer. If two fight immediately upon a challenge, and the one is killed, it is but manſlaughter; and yet a challenge is but a ſmall provocation, being only an intercourſe of words. In *Mich.* 13 *Jac.* 1. in a caſe between the *King* and *Newbery*. *A.* ſaid to *B.* give me your bowl, *B.* anſwered, I will not be gulled; and after ſome diſpute *B.* killed *A.* with the bowl; and yet it was adjudged but manſlaughter. In the caſe of Mr. *Reneer*, *Cimbal* gave no ſtroke but in ſtruggling, and yet it was adjudged but manſlaughter in *Reneer*. *Turner's* caſe was ſtill ſtronger; for there *Turner's* footman not having cleaned his miſtreſs's clogs, *Turner* ſtruck him with the clog, of which ſtroke he died, and adjudged manſlaughter. In *April* 1666 the caſe of *Hopping* and *Hungate*, *J. kel.* 59. 137. was thus; *A.* preſſed *B.* who was a ſtranger to *Hungate*, *Hungate* followed the preſs-maſter, and demanded a ſight of his warrant, and after ſeeing it ſaid, that it was no warrant and after ſome words exchanged, *Hungate* drew his ſword firſt, and killed the preſs-maſter; and it was adjudged that this was but manſlaughter. *Hob.* 134. ſays, if (*a*) two maſters be playing their prizes, the one kills the other it is not felony; and yet the firſt act there is not lawful. So *A.* turns *B.* out of his houſe, *B.* comes to burn the houſe, *A.* ſhoots *B.* but manſlaughter, and yet the firſt act was unlawful. *A.* knowing that many people are coming in the ſtreet from ſermon, caſts a ſtone over the wall, intending only to frighten them, *&c.* 3 *Inſt.* 57. ſays, that this is murder; but that is not law, for to make murder there muſt be an intent to kill. *Hale P. C. c.* 39. 1*ſt Ed. p.* 475. (Note, *Holt* chief juſtice agreed with this, and ſaid that the opinion of *Coke*, 3 *Inſt.* 57. was too general, and ought to be qualified with the diſtinction that my lord *Hale* makes, *H. P. C. c.* 39. 1*ſt. Ed. p.* 475. (*b*) where the act is done with a deſign to do miſchief to any, and where not). But in this caſe the firſt blow was a lawful correction. Paſſion is a natural infirmity, and what proceeds from that, cannot be called murder; for paſſion is

If a duel enſues immediately upon a challenge, tho' one of the parties is killed, 'tis but manſlaughter. D. acc. 1 H. P. C. c. 36. 1ſt Ed. p. 452. 453. 1 Hawk. c. 31. ſ. 29.

If a man is illegally arreſted, and reſtrained of his liberty and a third perſon in endeavouring to reſcue him kills the perſon who reſtrains him, 'tis but manſlaughter. R. acc. poſt. 1296. adm. 1 Hawk. c. 31. ſ. 54. 1 H. P. C. c. 37. 1ſt Ed. p. 465. ſed vide Poſt. Diſc. 2. c. 8. ſ. 10, 11, 12, 13, 14.

(*a*) Vide J. Kel. 40. 41. 1 Hawk. c. 29. ſ. 4. 9. 12. Poſt. Diſc. 2. c. 1. ſ. 4.

(*b*) Vide 1 Hawk. c. 29. ſ. 6, 7, 8. 4 Bl. Com. 192.

a ſudden

a ſudden motion, and murder is *ex malitia præcogitata*, which implies conſideration. And the rule is, that when there is a deliberate act, tending immediately to death, or by neceſſary conſequence, it is murder. But in this caſe there was no deliberation, for the priſoner's paſſion might well be ſaid to continue, from the refuſal of the key until the mortal blow given. Wherefore they concluded, that this was but manſlaughter, and prayed judgment for the priſoner.

If a perſon who has a power of correction in correcting with a proper inſtrument accidentally gives a mortal ſtroke, 'tis but manſlaughter. D. acc. 1 H. P. C. c. 36. 1ſt Ed. p. 454. & c. 39. 1ſt Ed p. 473, 474. J. Kel. 65. 133. Foſt. Diſc. 2. c. 1. ſ. 4. 4 Bl. Com. 182. vide 1 Hawk. c. 29. ſ. 5.

Holt chief juſtice, The refuſing to deliver a key by a ſervant to his maſter, who had a deſign to diſcharge him, is no provocation; and if a maſter gives correction to his ſervant, it ought to be with a proper inſtrument, as a cudgel, *&c.* And then if by accident a blow gives death, this would be but manſlaughter. The ſame law of a ſchool-maſter. But a ſword is not a proper inſtrument for correction, and the cruelty of the cut will make a malice implied. And therefore in this caſe, if *Wells* had not been killed, *Keite* could not have juſtified this fact in an action of treſpaſs; for it was immoderate correction, and therefore *Weils* well might return the blows; ſo that the blows of *Wells* could not be called a provocation, nor the firſt act of *Keite* lawful. Then the words could not amount to a provocation, for bare words cannot make a provocation to kill or maim. Therefore in 1663, *J. Kel.* 64. 133. *Grey* commanded his ſervant *B.* to do ſomething; and afterwards *Grey* and *B.* doing their work at the anvil, *Grey* aſked *B.* if he had done the thing, *B.* anſwered yes; *Grey* told him, that if he did not take more care of his affairs hereafter he ſhould go to *Bridewell*; *B.* anſwered, that he ſhould like better to work there, than to ſerve *Grey*; upon which *Grey* killed *B.* with a blow of his hammer upon his head, and it was adjudged murder. In the caſe of *Hopping* and *Hungate* it was held manſlaughter by all the juſtices of the Common Pleas and barons of the Exchequer; becauſe though *Hungate* was a ſtranger to the perſon preſſed, yet this being done under pretext of authority, it concerned every ſubject; but all the judges of the king's bench held it murder. And all the judges agreed, that if this was no provocation, the exchange of blows afterwards would not make it manſlaughter. For (*a*) if *A.* of malice propenſe aſſaults *B.* *B.* draws his ſword, *A.* flies to a wall and there kills *B.* yet it is murder. In *Reneer's* caſe *Cimbal* ſtruck firſt. In *Turner's* caſe the event was extraordinary, for he could not intend to kill the boy with the clog. But if *A.* kills *B.* with an inſtrument of iron, *&c.* which might kill in probability, without any provocation, this will be murder. But the other juſtices did not give their opinion. And this caſe being argued now the laſt day of the term, the court did not give their opinions to the matter in law. But *Holt* chief juſtice took exception to the indictment upon the ſtatute of ſtabbing, that it was only ſaid [not having

(*a*) D. acc. 1 Hawk. c. 29. ſ. 17. c. 31. ſ. 26. 1 H. P. C. c. 40. 1ſt Ed. p. 482.

having firſt ſtruck] but it is not ſaid [not having a weapon drawn] for if the priſoner had killed *Wells*, after that he had a weapon drawn, he would be out of the intent of the ſtatute; and therefore all the court held this a fatal exception. Then to the indictment for murder, *Holt* chief juſtice took ſeveral exceptions. 1. Becauſe it is ſaid, *prædictus J. Keite* the priſoner *in ipſum Jacobum Wells inſultum, &c. fecit, ipſum Jacobum Wells cum quodam gladio, &c. quem in manu dextra, &c. ipſum Jacobum Wells in et ſuper, &c. pupugit, &c.* and ſo there is one *Jacobum Wells* more than there ought to be. 2. It is ſaid that *Keite* gave to *Wells* a wound of the breadth of one inch, *et profunditatis* totally through the body; which (by him) is uncertain. In 5 *Co.* 120. a, *Long*'s caſe, *totaliter penetrans in et per corpus* was held well enough; but there was no *profunditatis* mentioned, and there are no precedents which warrant this caſe; and he ſaid, that he had cauſed ſeveral indictments at the *Old Bailey* to be ſearched. 3. It is *percuſſit et dedit*, where it ſhould have been *percuſſit dans*, for the former is not ſo certain, becauſe it might be by another ſtroke; but the precedents are both the one way and the other. He did not ſay abſolutely, that theſe exceptions to the indictment of murder are fatal; but he ſaid, that if the king's counſel did not inſiſt to demand their judgment upon the verdict, he ſhould make no ſcruple to quaſh it. And the king's counſel not oppoſing it, both the indictments were quaſhed. And *Holt* chief juſtice gave order to the clerk to make an entry, *quia indictament' minus ſufficien' &c. ideo, &c.* And Mr. *Keite* was bailed, to be tried at the next aſſizes, where he was found guilty of manſlaughter, and had his clergy, *&c.* and died of the ſmall pox 1697 in *Wiltſhire*, his own country.

Roe *verſ* Gatehouſe.

S. C. Salk. 663. Carth. 379. Comb. 404. 5 Mod. 305.

ASSUMPSIT in which the plaintiff declares, that inaſmuch as the defendant being indebted to the plaintiff in——— for goods ſold, ſuch a day *ſuper ſe aſſumpſit* to pay the plaintiff the ſaid ſum; *cumque etiam* the plaintiff had found meat, *&c.* for *J. S.* at the ſpecial requeſt of the defendant, which amounted to ſo much, *ſuper ſe aſſumpſit* to pay the plaintiff, *&c.* Verdict for the plaintiff, and entire damages were given. And it was moved in arreſt of judgment, that every promiſe is a diſtinct declaration, and that in the ſecond promiſe (which for greater reaſon might be eſteemed a new count, by virtue of the words *cumque etiam*) *non conſtat* who made the promiſe, *J. S.* or the defendant. Perhaps it was *J. S.* and then it will not bind the defendant. Then damages being given *ratione præmiſſorum* vitiates the whole, for the word *præmiſſorum* extends to both the breaches aſſigned. And this

In a declaration conſiſting of ſeveral counts upon indebitatus aſſumpſit, if there is a nominative caſe to the aſſumpſit in the firſt count, it ſhall, after verdict at leaſt, if neceſſary, be extended to the aſſumpſit in the reſt. R. acc. Lutw. 234. & ſee poſt. 899.

1517.

I. uncertainty

uncertainty is not aided by the verdict, and it cannot be made good by intendment; for the promiſe is the *giſt* of the action; and the *giſt* of an action, though after verdict, cannot be taken by intendment. *Noy* 50. *Cro. Eliz.* 913. *Trin.* 4 *Jac.* 2. *B. R. rot.* 993. *London verſ. Hart.*

The giſt of an action cannot even after verdict, be taken by intendment. D. acc. Dougl. 658. and ſee ante, 109. and the caſes there cited.

But *e contra* it was argued for the plaintiff, that it ſhall be intended, that the defendant aſſumed; for the money paid was to his uſe, and at his requeſt. Beſides that, if the defendant ſhall not be the nominative caſe to *aſſumpſit*, then there is no promiſe; for it has no nominative caſe, and ſo no damages were given for it, but for the breach of the other promiſe, and to it *præmiſſorum* muſt relate. But it would have been otherwiſe if there had been a promiſe, but not a binding one in law for ſome collateral account; becauſe the jury not knowing the law, might be ſuppoſed to conſider it as a promiſe, and ſo give damages for it. But here there is no promiſe, and therefore no damages given for it. But judgment was given for the plaintiff, becauſe the *cunque etiam* in effect is all one with *ac etiam*, and ſo couples both the ſentences together, and makes the defendant the nominative caſe to govern the ſecond *aſſumpſit* as well as the firſt. For the plaintiff's cauſe of action ariſes from both the promiſes; and it cannot be ſuppoſed, that the plaintiff would bring an *aſſumpſit* againſt the defendant, becauſe *J. S.* made the promiſe. See 1 *Sid.* 222. *Latch.* 151, 272. *Per Holt* chief juſtice, if divers conſiderations are mentioned in one *aſſumpſit*, and one of them is void and the others good, and damages are given *ratione præmiſſorum*, this will not arreſt the judgment, becauſe the damages ſhall be intended to be given only for thoſe that are good.

Tho' ſeveral conſiderations, ſome of which are bad, are mentioned in one aſſumpſit, and general damages given, the plaintiff ſhall have his judgment, Per Cur. acc. Cro. Eliz. 848. See alſo Str. 1094. poſt. 239. 10. Co. 130. a.

Chamberlain *verſ.* Harvey.

S. C. Carth. 396. with the Arguments of Counſel 5 Mod. 186. Entry, vol. 1. 129.

No man can have property in the perſon of another while in England. R. acc. Salk. 666. pl. 1. vide 1 Bl. Com. 423. Therefore treſpaſs will not lie, unleſs with a per quod, for taking a Negro ſlave in England. Treſpaſs lies for the taking an apprentice. Adm. Bro. Labourers, pl. 21. See Cowp. 54.

TRESPASS for taking of a *Negro pretii* 100*l.* The jury find a ſpecial verdict; that the father of the plaintiff was poſſeſſed of this *Negro*, and of ſuch a manor in *Barbadoes*, and that there is a law in that country, which makes the *Negro* part of the real eſtate: that the father died ſeiſed, whereby the manor deſcended to the plaintiff as ſon and heir, and that he endowed his mother of this *Negro* and of a third part of the manor; that the mother married *Watkins*, who brought the *Negro* into *England*, where he was baptized without the knowledge of the mother; that *Watkins* and his wife are dead, and that the *Negro* continued ſeveral years in *England*; that the defendant ſeized him, *&c.* And after argument at the bar ſeveral times by Sir *Bartholomew Shower* of the one ſide, and Mr. *Dee* of the other, this term it was adjudged, that

that this action will not lie. Treſpaſs will lie for taking of an apprentice, or *haredem apparentem*. An abbot might maintain treſpaſs for his monk; and any man may maintain treſpaſs for another, if he declares with a *per quod ſervitium amiſit*: but it will not lie in this caſe. And *per Holt* chief juſtice, *trover* will not lie for a *Negro*, *contra* to 3 *Keb.* 785, 2 *Lev.* 201, *Butts* v. *Penny*.

Hill. 5 *Will. & Mar. C. B.* between *Gelly* and *Cleve*, adjudged that *trover* will lie for a *Negro* boy; for they are heathens, and therefore a man may have property in them, and that the court, without averment made, will take notice that they are heathens. *Ex relatione m'ri Place.*

Paſch. 5 *Ann. B. R. Smith* v. *Gould*, *poſt.* 1274, adjudged that it lies not. Trover lies not for a negro ſlave.

Derry *verſ.* duciſſam Mazarine.

S. C. Salk. 116. 646. Comb. 402.

DERRY brought an action againſt the ducheſs for wages, and money lent; the defendant pleaded (*a*) coverture, and iſſue thereupon. And notwithſtanding that there was very ſtrong evidence at the trial, that the duke of *Mazarine* the defendant's huſband was alive in *France*, the jury find for the plaintiff; becauſe the ducheſs had lived here in *England* for twenty years as a *feme ſole*, and had contracted continually as ſuch; and he who was her huſband, is an alien enemy. And it was moved on behalf of the ducheſs, that this verdict was againſt evidence and law, for a *feme covert* cannot be ſolely charged for debts and contracts, without divorce and alimony, although the huſband be a foreigner. But by *Holt* chief juſtice, (*b*) when the huſband is an alien enemy, and under an abſolute diſability to come and live here, the law perhaps will make the wife of ſuch a huſband chargeable as a *feme ſole* for her debts and contracts. For this caſe does not differ from the caſe of my lady *Belknap* and my lady *Weyland*, *cit. Co. Litt.* 132. *b.* 133. *a.* 1 *Roll. Rep.* 400. who were allowed able to ſue and to be ſued upon the abjuration or baniſhment of their huſbands, as if they had been ſole. And afterwards the plaintiff had his judgment, as Mr. *Colman* told me.

The wife of a man who is under an abſolute diſability of coming into this country may be ſued as a feme ſole. Adm. Bl. 1081. 1 Term Rep. 8. and ſee 1 Term Rep. 5. Co. Litt. 132. b. 133. a. and 13th Ed. n. 3. 1 Roll. 400. 1 Bulſtr. 140. 4 Vin. 152. Com. Dig. Abatement F. 2. 2 Ed. vol. 1. p. 17. ſee alſo Bl. 903. At leaſt the ſuit is unexceptionable after verdict. Vide 2 Wilſon 308. & Powell Cont. 75-

(*a*) In Salk. ubi ſupra the plea is ſtated to have been "non aſſumpſit" which is moſt probable; becauſe otherwiſe, in all likelihood, the ſpecial matter would have been ſet forth in the Replication. (*b*) In the marginal abſtract Salk. 646. and in 2 Wilſ. 398. the verdict in this caſe is conſidered as clearly againſt law, and its equity made the ground of the refuſal of the new trial, ſed vide Salk. and Comb. ubi ſupra and Bl. 1181.

Redwood *verſ.* Coward.

Intr. Trin. 8 Will. 3. Rot. 645.

S. C. Salk. 328. 5 Mod. 323. Holt 272. 12 Mod. 109.

ERROR of a judgment of the palace court in *aſſumpſit* after verdict; and the error aſſigned was, that in the verdict the record is, that the jury *aſſident damna*, where it ought to be *aſſidunt*; as if judgment is entred with (*a*) *conceſſum* inſtead

Terms of art need not be uſed in a verdict. Vide 2 Saund. 96. Tho' they muſt in a judgment.

(*a*) Vide 26 & 27 Car. 2. c. 8. ſ. 1.

of *conſideratum*, it is error, and for this the judgment ſhall be reverſed. But againſt this *Ward* argued, that *aſſident* is more elegant *Latin*, for the ſimple verb is of the ſecond conjugation, and therefore the compound ought to be of that alſo. And for authorities there is *Plowd.* 348. 4 *Co.* 7. *b.* in point. But *per Holt* chief juſtice, the elegancy of the *Latin* is not conſiderable, for the law preſcribes for odd words; but there is a difference between a verdict found by lay people, and a judgment given by a court. Therefore in the former caſe if the words are of the ſame import that the jury intends, all is well; but in the other the terms of art muſt be uſed. *Conceſſum* in a judgment is ill, becauſe the judgment does not appear to be given upon mature deliberation, as all judicial acts ought to be. Judgment was affirmed.

Rex *verſ.* Burdett.

'Tis a great contempt to circulate papers relative to the merits of a cauſe upon the eve of it's trial. S. C. Salk. 645. Vide Com. 602. But not a ſufficient ground to ſet aſide a verdict (tho' for the crown upon a criminal proſecution) unleſs the circulation can be fixed upon the proſecutor. S. C. Salk. 645. 'Tis a contempt in the jury to take any evidence with them upon retiring from the bar without either the leave of the court or conſent of the parties. S. C. Salk. 645. But their verdict ſhall not on that account be ſet aſide unleſs the evidence made for that party only for whom they found. S. C. Salk. 645. See alſo Palm. 325. Cro. Eliz. 189. 1 Sid. 235. 1 Keb. 824.

INformation was brought againſt *Burdett*, farmer of *Newgate* market, for extortion; and the extortion was aſſigned, for that he had taken divers ſums of money of the market people for rent for the uſe of the little ſtalls in the market, and divers great ſums for fines. And at *niſi prius* in *London*, upon the general iſſue pleaded, the defendant was found guilty. And now it was moved by Sir *Bartholomew Shower*, Mr. *Northey*, *&c.* to ſet aſide the verdict. And two irregularities were aſſigned. 1. That a certain printed paper, repreſenting the pretended ill practices and the pernicious conſequences of them, was ſent to all perſons, who probably would be of the jury, to induce them to find the defendant guilty. 2. That the jury took with them out of court an order of the common council, without the leave of the court or conſent of the parties. And they cited the caſe of my lady *Joy*, where a verdict was ſet aſide, becauſe the jury took with them a map of the premiſes out of court. But as to the firſt, *Holt* chief juſtice ſaid, that it was a great crime in thoſe who had done it; and he ſaid, they ſent him one of them by the penny-poſt, but caſting his eyes upon the title, he ſaw what it was, and did not read it; but that was not fixed upon the informers, and if the delivery of papers by a ſtranger were ſufficient to avoid a verdict, the caſe would never be decided. As to the ſecond point, he ſaid, that it was irregular to take the act of common council; but the matter of the act being evidence on both ſides, it would not ſet aſide the verdict. The ſame law (*a*) if the jury eat at their own coſts, this will not ſet aſide the verdict, but it is fineable. In my lady *Joy*'s caſe, the map which the jury took with them, was evidence only on one ſide, and therefore, finding a verdict accordingly, it was ſet aſide. And as to the fact which was the ground of this information, it was urged now in *B. R.* and alſo at *Guildhall*, by ſerjeant

(*a*) D. acc. Salk. 645. 12 Mod. 111. Bro. Verd. pl. 19. 3 Bl. Com. 375.

Wright

Wright at the trial of another information for the like fact (for there were ſeveral preferred againſt the defendant) that this was extortion, becauſe the people had not free liberty to ſell their wares in the market according to law. And he compared it to the caſe of a miller, who, if he takes more for toll than is due by the cuſtom is puniſhable in every leet. But it was held by the court of *B. R.* and by *Holt* chief juſtice at *Guildhall*, that if the defendant erects ſeveral ſtalls, and does not leave ſufficient room for the market people to ſtand and ſell their wares, ſo that for want of room they are forced to hire the ſtalls of the defendant, the taking of money for the uſe of the ſtalls in ſuch caſe is extortion. But if the people have room enough clear to themſelves, to come and ſell their wares, but for their farther conveniency they voluntarily hire theſe ſtalls of the defendant, without any neceſſity compelling them: there it is no extortion, though the defendant takes a fine and rent for the uſe of them. (*a*) And the caſe of the miller is not parallel to this caſe, for there when the cuſtom has aſcertained the toll, if the miller takes more than the cuſtom warrants, this is perfect extortion: but in this caſe the law has not appointed any ſtalls for the market people, but only that they ſhall have the liberty of the market, which the defendant does not abridge, having left them room enough beſide the place where the ſtalls are ſet; and then if they will enjoy the convenience of the ſtalls, they muſt comply with the defendant's terms. Therefore this caſe rather reſembles the caſe of new mills, where the miller is not reſtrained to any certain toll; but the perſons who will have their corn ground there, muſt comply with the miller's demands; and whatſoever he takes, it is not extortion, becauſe it is the voluntary agreement of the parties. And afterwards theſe diſputes were ſubmitted to the arbitration of Sir *Bartholomew Shower* and ſerjeant *Wright*, and ſo the informations were diſcontinued.

If the owner of the ſoil of a market covers the market place ſo completely with ſtalls, that the market people are obliged to uſe them, taking ſtallage is extortion. Vide 10 Co. 102. a. Co. Litt. 368. b. Hutt. 53. 2 Term Rep. 148. Otherwiſe where ſufficient ſtanding room is left.

(*a*) Where cuſtom has aſcertained the toll of a mill, taking more than the cuſtom warrants is extortion.

It was ſaid by *Holt* chief juſtice, at the trial at *Guildhall*, that if a man be indicted for taking extorſively twenty ſhillings, and there is but proof of one ſhilling, yet the defendant is guilty. And (by him) the extorſive agreement, or uſurious agreement, is not the offence, but the taking; for a pardon after the agreement, and before the taking, does not pardon the extortion or uſury.

The actual taking, not the agreement to take conſtitutes uſury. R. acc. Dougl. 223. & vide Bl. 792. or extortion.

Bennet *verſ.* Talbois.

S. C. 5 Mod. 307. Carth. 382. Comb. 420. Holt 661. Com. 26. Salk. 212. 12 Mod. 121.

TRESPASS *quare clauſum fregit et herbam cum duabus vaccis conculcavit et conſumpſit et in clauſo venatus fuit, &c. exiſtente inferiori artifice, viz. pannario, et alia enormia, &c.* and

Hunting in alieno ſolo is actionable at common law. R. acc. B. 900. vide 1 Term Rep. 334. The ſtatute as to inferior tradeſmen gives no new advantage but is merely a partial repeal of the 22 & 23d of Car. 2d. It extends to all inferior tradeſmen, however they may be diſtributed in point of eſtate. S. C. cit. 3 Bl. Com. 215. Semb. cont. 2 Will. 70

concludes,

concludes, *contra formam ſtatuti*. Upon not guilty pleaded, verdict for the plaintiff. And *Webb* moved in arreſt of judgment, 1. That it is not ſaid, that the defendant is not qualified by eſtate to hunt, without incurring the penalty of the act; for if he be, he might hunt by law. But to this it was reſolved by the court, that hunting is a treſpaſs *in alieno ſolo* at common law, and actionable. Then the new ſtatute 4 & 5 *Will. & Mar. cap.* 23. *ſ.* 10. only, as to this point of inferior tradeſmen, repeals the ſtatute of 22 & 23 *Car.* 2. *cap.* 9. which enacts, that the party ſhall recover no more coſts than damages, when the jury give damages under forty ſhillings. But no act enables the party to hunt in another's ground; and therefore it is not material, how the perſon is qualified, in the caſe of an inferior tradeſman, as to his eſtate. Then it was moved, that the plaintiff having concluded, *contra formam ſtatuti*, this goes to the whole, and therefore it is ill; for the treſpaſs is an offence at common law, and not againſt any ſtatute. But to this *Holt* chief juſtice anſwered, that (*a*) if an act of parliament increaſes the penalty, or deprives the party of the benefit of the common law, there he ought to conclude *contra formam ſtatuti*. But if a man brings an action for ſuch an offence, and for a thing that is an offence only at common law, and concludes *contra formam ſtatuti*; though in grammar this goes to the whole, yet the court will refer it only to the offence that is prohibited, &c. by the ſtatute, and it ſhall be ſurpluſage as to the offence at common law. And he reſembled it to the caſe of *Page* and *Harwood*, *Allen* 43. So if a man brings an action for an offence *contra formam ſtatuti*, where there is no ſtatute, there the *contra formam ſtatuti* ſhall be ſurpluſage. And he cited a caſe in 1 *Vent.* 103. where *A.* brought an action for withdrawing his wife *contra formam ſtatuti*, and becauſe there was no ſtatute, this was adjudged ſurpluſage. But in this caſe the act of *Will. & Mar.* does not create a new penalty, but is a reſtitution of (*b*) the common law; and therefore the party has no need to declare with *contra formam ſtatuti*; and therefore it will be the better way hereafter to omit the *contra formam ſtatuti* in ſuch caſes. And if the plaintiff declares that the defendant was an inferior tradeſman, he ſhall have full coſts. Then here, ſince he has declared with a *contra formam ſtatuti*, where there was no need of it, without doubt it ſhall be ſurpluſage. And therefore judgment was given for the plaintiff, *niſi*, &c. And in *Eaſter* term it was abſolutely given for the plaintiff.

Where a ſtatute merely gives a collateral advantage, the party has no occaſion in order to avail himſelf of it, to conclude with a contra formam ſtatuti. Such a concluſion when unneceſſary or impertinent ſhall be rejected as ſurpluſage. R. acc. poſt. 1163.

(*a*) A concluſion contra formam ſtatuti is proper where a ſtatute increaſes a penalty, or takes away the benefit of the common law. A concluſion contra formam ſtatuti, however it may refer grammatically ſhall be extended to ſuch things only to which it is in fact applicable.

(*b*) This dictum ſeems rather inaccurate, a party not being intitled to coſts at common law. Vide 1 Wilſ. 317. 2 Inſt. 288 289. Say. Coſts 1.

Rex

Rex *verſ.* Yaites.

YAITES was convicted of killing rabbits in a private warren, by inquiſition taken before a juſtice of peace, and was fined 20*s.* a rabbit. And Mr. *Northey* moved to quaſh the inquiſition, becauſe the juſtices of peace have no authority to ſet a fine upon a man for ſuch offence. For the ſtatute 22 & 23 *Car.* 2. *cap.* 25. *ſ.* 4. gives treble coſts and damages, but no fine. And the ſtatute 4 & 5 *Will. & Mar. cap.* 23. extends only to game, which cannot be extended to rabbits kept in a private warren. And of this opinion was the whole court, and therefore the inquiſition was quaſhed.

Juſtices of peace cannot fine a man for killing rabbits in a private warren.

Walker *verſ.* Stokoe.

S. C. Carth. 368.

WALKER brought a writ of error, which was quaſhed; and now he brought error *coram vobis reſidet*, reciting *quod venire fecimus* the record by a former writ returnable *in curia noſtra coram nobis*. And Mr. *Northey* moved laſt *Michaelmas* term, that the writ of error *coram vobis*, &c. being entred upon the ſame roll with the former writ of error (as it ſhould be, otherwiſe the whole would be, though after verdict, diſcontinued) and it is apparent upon the former writ of error that it was returnable before the King and Queen; then ſince this writ recites, that the former writ was returnable before the King only in his court, it ought to be quaſhed. But againſt this Mr. *Carthew* argued, that ſince the *coram nobis reſidet* recites that in a record concerning ſuch a matter between *A.* and *B. coram nobis jam reſidente*, &c. there is error; this is ſufficient, and the reſt is but ſurpluſage, that will not abate a writ of error, which is but a commiſſion to examine errors, and has no need to be ſo preciſe as an original writ. Beſides that, the *coram vobis reſidet* mentions, that the record was removed before the King and Queen by a former writ of error returnable *coram vobis in curia noſtra*, which may be true and good *Latin*, though it relates to King and Queen. *Sed non allocatur*. For, *per curiam*, the authority of the court is given to them by the *coram vobis reſidet*, which is to examine errors in a record removed in a writ of error *coram vobis in curia noſtra*, and there is no ſuch writ, or perhaps there was ſuch a one, and alſo another record between the ſame parties removed by writ of error returnable before the King and Queen. Then here the *coram nobis* is annexed to the return of the laſt, and therefore ill. For though the former writ of error was quaſhed, yet it is not as if it had never been, for it is there ſtill, though it cannot be proceeded upon, and

If a record is once removedby a writ of error, though the writ is afterwards quaſhed, the record continues in the court of error. R. acc. poſt. 1403 vide Yelv. 6. 228. The miſrecital of a former writ of error in a writ of error *coram vobis*, is fatal. If one writ of error is quaſhed, a writ of error *coram vobis* muſt be entered on the ſame roll with the former.

and the king's bench ought to take notice of its being quaſhed by them, and ſo ought the plaintiff alſo, the *coram nobis reſidet* being grounded upon it. And *Holt* chief juſtice ſaid, that if the writ of error had been granted in the time of the King and Queen, and then the Queen had died, and then the record had been brought into the king's bench, this had been ſuch a record as the *coram nobis reſidet* deſcribes. And he took the diſtinction, (*a*) where the ſuit is to defeat a record, then the variance is fatal; but where the ſuit goes to another collateral matter, and not to defeat the record, there it is otherwiſe. And upon this diſtinction the caſe in 31 *Aſſiſ. pl.* 1. is held to be good law, becauſe the diſcharge of the *aide prier* is but collateral to the demand in the aſſiſe. And for theſe reaſons the writ of error *coram vobis* was quaſhed, *niſi*, &c. (*b*).

In a ſuit to defeat a record, any variance in the deſcription of the record, is fatal. Vide Yelv. 211. 1 Sid. 138. Str. 1110. poſt. 704 347. 1202.

(*a*) And therefore Holt C. J. ſaid he did not approve the reſolution of Gay v. Adams. 2 Saund. 291. (*b*) And it was afterwards quaſhed abſolutely. Carth. 370.

Benzen *verſ.* Jeffries.

The maſter of a ſhip may hypothecate her for neceſſaries even upon land in the courſe of the voyage. R. acc. poſt. 982. Str. 695. Adm. 1. Vez. 443. D. acc. 1 Vez. 155. vide poſt. 805. 12 Mod. 406. The admiralty is the proper court to ſue in, upon an hypothecation. D. acc. poſt. 806. 983.

MOTION was made for a prohibition to the court of admiralty, where a ſuit was proſecuted againſt a ſhip, which the maſter had hypothecated for neceſſaries, being upon the ſea in ſtreſs of weather. And the ſuggeſtion was, that the agreement was made, and the money lent, upon the land, *viz.* in the port of *London*, it being a *Venetian* veſſel, which came here by way of trade, and not ſtreſs of weather. But *per Holt* chief juſtice, the maſter of the ſhip has power to hypothecate it, but he cannot ſell it; and by the pawning, the ſhip becomes liable to condemnation. This was reſolved in ſolemn debate in the caſe of *Coſtard v. Lewſtie*, 2 *Will.* & *Mar. B. R. Comb.* 135. *Holt.* 48. Then there is no remedy here for the hypothecation, but by way of contract. Therefore ſince the king's bench cannot do right to the parties, it will not hinder the admiralty from doing them right. For if the king's bench allows the hypothecation, and yet denies the remedy, it will be a manifeſt contradiction. An action was brought upon the ſtatute 2 *Hen.* 4. *cap.* 11. for ſuing in the admiralty upon an hypothecation, and it was held to be out of the ſtatute, in the time of my lord *Hale*. And as to the objection, that the contract was made upon the land, and the money paid there; it muſt of neceſſity be ſo, for if a man be in diſtreſs upon the ſea, and compelled to go into port, he muſt receive the money there, or not at all. And if his ſhip be impaired by tempeſt, ſo that he is forced to borrow money to refit, otherwiſe ſhe will be loſt, and for ſecurity of this money he pledges his ſhip; ſince the cauſe of the pledging ariſes upon the ſea, the ſuit may well be in the admiralty court. But becauſe there was a precedent, where a prohibition in ſuch caſe had been granted; the court granted the prohibition, and ordered

ordered the plaintiff to declare upon it, for the law ſeemed clear to them, as before is ſaid.

Rex *verſ.* Penny.

S. C. Comb. 414.

THE defendant was indicted, for having ſpoken theſe words of Mr. *Martin* a juſtice of peace: *I did not care if all the* Martins *had been hanged five years ago. And the juſtice is now turned out of the commiſſion.* And upon motion this indictment was quaſhed, for an indictment does not lie for theſe words, but Mr. *Martin* ſhould have recourſe to his action.

Draper *verſ.* Glaſſop.

The ſtatute of limitations may be given in evidence upon nil debet. R. acc. 1 Salk. 278. ſed vide Bl. 702. Burr. 2630. 1099. Dougl. 629. poſt. 389. 421. Cowp. 548. But not on non aſſumpſit. R. acc. Salk. 278.

PER Holt chief juſtice, if the defendant pleads *non aſſumpſit*, he cannot give in evidence the ſtatute of limitations, becauſe the *aſſumpſit* goes to the *præter*-tenſe; but upon *nil debet* pleaded the ſtatute is good evidence, becauſe the iſſue is joined *per verba de præſenti*, and without doubt *nil debet* by virtue of the ſtatute; and it is no debt at this time, though it was a debt.

The preſident and college of phyſicians *verſ.* Talbois.

A corporation may ſue by their name of creation, notwithſtanding an expreſs power given them to ſue by another. R. acc. poſt. 680. and vide poſt. 472.

THE plaintiffs brought an action againſt the defendant *tam quam*, for (*a*) practiſing without licenſe, &c. And ſerjeant *Darnall* took exception, that the action was miſconceived, for it ſhould have been ſued ſingly in the name of the preſident according to *Cro. Jac.* 121, 159. *Cro. Car.* 186. But *per curiam*, the precedents have been the one way and the other; and this ſeems to be the better method, for being a corporation, it is natural for them to ſue by their name of creation.

(*a*) Vide 14 & 15 H. 8. c. 5. ſ. 1. 13.

Bracy's Caſe.

No copy of papers of a private Nature. R. acc. poſt. 705. 927. Str. 646. 717. 1005. Bl. 850. and vide Str. 1203. D. acc. Bl. 44. 45. Str. 308. Depoſitions taken by commiſſioners of bankrupts are of a private nature, and the court will not order the party who made them a copy.

BRACY was examined before commiſſioners of bankrupts for having taken certain goods of *A.* who was a bankrupt, and *Bracy* made depoſitions. Afterwards the commiſſioners of bankrupts aſſigned theſe goods to the creditors of *A.* who brought an action againſt *Bracy*. And now *Bracy* moved in *B. R.* that he might have a copy of the depoſitions in order to defend himſelf, upon allegation that they were in nature of a public memorial, and that by ignorance and ſurpriſe he had ſubſcribed many things to his prejudice.

But

But the motion was denied; for *per curiam* theſe depoſitions are not of a public nature, but taken by the commiſſioners to defend themſelves; and therefore they could not order a copy of them.

John Arthur's caſe.

S. C. Salk. 495. Holt 518.

An outlawry for felony cannot be reverſed without a ſci. fa. againſt the lords mediate and immediate. R. acc. Comb. 372. D. acc. Bro. ſci. fa. pl. 68. Bro. Utlagary. pl. 10. Vide 4 Mod. 366. 10 Mod. 188. Unleſs the attorney general will confeſs a ſuggeſtion that the outlaw has no lands. R. acc. 12 Mod. 545. 626. 668. Bro. ſci. fa. pl. 194.

JOHN *Arthur* was outlawed for burglary, and now he brought error to reverſe it. But *per Holt* chief juſtice, he muſt ſue a *ſcire facias* againſt all the lords mediate and immediate; or the more expeditious way is, that he may ſuggeſt upon the record, that he has no lands, and if the attorney general confeſſes this, he has no need to ſue a *ſcire facias*.

Hoe *verſ.* Nathorp.

S. C. 3 Salk. 154.

Where the original is evidence without further proof, a copy is evidence. P. Cur. acc. Lynch v. Clerk. 3 Salk. 154. Str. 126. 307. Semb. acc. poſt. 746. 10 Co. 92. b. Cowp. 17. Dougl. 572. and n.

RESOLVED *per curiam*, that the immediate copy of an original is good evidence where the original itſelf is evidence. Therefore the copy of a (*a*) church regiſter, the copies of (*b*) town books, of (*c*) proceedings in courts baron, of proceedings in the eccleſiaſtical and admiralty courts, and the copy of a probate of a will which concerns perſonal goods, is good evidence; but the copy of a probate of a teſtament, as to the real, is not evidence, becauſe (*d*) the probate itſelf is not evidence in ſuch caſe.

(*a*) Per Cur. acc. Dougl. 166. D. acc. Dougl. 572. n. (*b*) Semb. acc. Str. 126. 307. (*c*) D. acc. Dougl. 572. n. (*d*) R. acc. poſt 774.

Tregany *verſ.* Fletcher.

The courts will take notice that the exchequer in Wales is a court. A recovery without an original to warrant it is good until reverſal. Agr. 3 Co. a. In pleading the uſes of a recovery, the deed of declaration ſhould not be ſet forth. S. C. Salk. 676. Comb. 403. Vide 9 Co. 11. b. Where there is a deed to lead the uſes of a recovery, a parol averment that the recovery was ſuffered to other uſes, is inadmiſſible. S. C. Salk. 676. R. acc. Cro. Jac. 29. per Cur. acc. 9 Co. 10. b. poſt. 289. And ſuch uſes can in pleading only be confeſſed and avoided. S. C. Salk. 676.

ERROR out of the great ſeſſions in *Wales*. Replevin. The defendant makes conuſance, that *A. B.* ſeiſed of *Blackacre*, &c. in fee, deviſed them to *C. D.* in tail, and *C. D.* ſuffered a common recovery, and made a ſubſequent deed, by which he agreed, that the recovery of *Blackacre inter alia* ſhould be to the uſe of *J. G.* for ſecurity of a rent-charge, and that it ſhould be lawful to him to diſtrain for arrears of rent, and then he avers that the rent was arrear, and for the arrears he makes conuſance as bailiff to *J. G.* The plaintiff demurs. And judgment was for the avowant. Upon which the plaintiff brought error. And *Northey* took exception, that in pleading the common recovery it is ſaid, that the writ of entry in the *poſt* iſſued out of the exchequer, and does not ſay, out of the court of exchequer. *Sed non allocatur*. For *per Holt* chief juſtice, if there was no original, the recovery would be good until reverſal; but farther the king's bench will take notice, that the

exchequer

exchequer in *Wales* is a court; and therefore it is well enough. 2. Exc. That the defendant ſhould not have pleaded the deed as a declaration of uſes, but as 9 *Co.* 11. *b. Dowman's* caſe. And *per Holt* chief juſtice, if a precedent deed be made, whereby it is agreed, that the recovery, which is to be ſuffered, ſhall be to ſuch and ſuch uſes, and a recovery is afterwards ſuffered accordingly; one cannot aver the recovery to be to other uſes than thoſe mentioned in the deed, without ſhewing a new agreement; but if the uſes are declared by a ſubſequent deed, there they ariſe by the recovery, and there may be a parol averment, that the recovery was to other uſes; but a ſubſequent deed is very ſtrong evidence. In caſe of a precedent deed he muſt confeſs and avoid, but in caſe of a ſubſequent deed a man may traverſe the uſes. And therefore here the defendant ſhould have pleaded *quæ quidem recuperatio habita fuit, &c.* to ſuch and ſuch uſes. 2. The defendant pleads here a grant of a rent-charge out of the place where, *&c. inter alia*, whereas he ſhould have ſhewn all the particular lands; for the plaintiff may come and reply, that you have purchaſed part, whereby (*a*) the intire rent is extinct. This method of pleading is ill. *Adjournatur.*

But ſuch averment may be made againſt the uſes in a ſubſequent deed of declaration. S. C. Salk. 676. Per. Cur. acc. 9. Co. 10. b. poſt. 290.

And ſuch uſes traverſed. S. C. Salk. 676.

In an avowry for a rent-charge, the defendant ſhould ſpecify the particular lands out of which the rent was granted. S. C. 3 Salk. 302. R. cont. poſt. 644.

(*a*) Vide Sav. 69. Noy 5. Litt. Sect. 222. Co. Litt. 147. b. 148. a.

Hilary

Hilary Term

8 & 9 Will. 3. C. B. 1696.

Sir George Treby *Chief Juſtice.*

Sir Edward Nevill
Sir John Powell } *Juſtices.*

15 Car. 2 rot. cp. 50-

Wilmore *verſ.* Clerk and Howard.

The recognizance of bail is forfeited by the return of non eſt inventus on the ca. ſa R. acc. Cro. Jac. 165. Str. 717. Keely v. Medley, B. R. M. 24 G. 3. Agr. 2 Wilſ. 67. D. acc. poſt. 721. But if a render is made before the court riſes on the return day of the laſt ſci. fa. the court will ſtay the proceedings againſt the bail. *(a)* Vide Burr. 1360. ſee alſo Imp. Pr. C. B. 2d Ed. 423. poſt. 720. Tho' they may have accepted a declaration. But ſuch render cannot be pleaded. R. acc. Cro. Jac. 165. D. acc. poſt. 721.

THE plaintiff had obtained judgment in an action againſt *J. S.* in which the defendants were bail, and after *non eſt inventus* returned upon a *capias ad ſatisfaciendum* againſt *J. S.* the plaintiff *Wilmore* ſued a *ſcire facias* againſt the defendants as bail, but before the return of the writ *J. S.* ſurrendered himſelf in diſcharge of his bail. Upon which it was moved by ſerjeant *Bonithon* on behalf of the defendants, that all proceedings upon the *ſcire facias* might be ſtaid. To which it was objected, that this matter ought to be pleaded, and was not proper for a motion, eſpecially ſince the defendants had accepted of the plaintiff's declaration, as in this caſe they had done. *Sed non allocatur.* For *per Curiam*, the condition of the recognizance is, that if the defendant be condemned in the action, he ſhall pay the condemnation, or render his body to priſon. The queſtion then will be, at what time this render ought to be. And the law ſays, it ought to be, when the plaintiff in the original action has ſignified, that he will ſue execution againſt the body (for he may ſue execution againſt the goods and lands by *elegit* or *fieri facias* if he pleaſes) which he does *(b)* by ſuing of the *capias ad ſatisfaciendum.* So that if a render be made upon the return of the *capias ad ſatisfaciendum*, *cepi corpus*, the bail may plead this in a *ſcire facias* upon the recognizance, or in debt upon the recognizance; for the bail may plead *(c)* all the ſame pleas in debt upon the recognizance, that they may plead in *ſcire facias* upon the recognizance. But if *non eſt inventus* be returned upon the *capias ad*

(a) This is the modern practice too, except in proceedings by original (Imp. Pr. C. B. 2d. Ed. 423. Imp Pr. B. R. 3d Ed. 350.) for there on a render before the court riſes on the quarto die poſt. of the return day of the laſt ſci. fa. the court will ſtay the proceedings againſt the bail Imp. ubi ſupra. Burr. 2134. See alſo Hanſley v. Page, Barnes 4to. Ed. 75. 1 Wilſ. 269. 270. Maſon v. Bruce, Barnes, 4to. Ed. 66. *(b)* Vide Burr. 1360. *(c)* D. acc. ante 83.

ſatisfaciendum.

ſatisfaciendum, the condition of the recognizance is broken and a render can never after be pleaded. Nor would the court heretofore accept ſuch a render. *Cro. Eliz.* 738. *Alyſon* v. *Byſton*. But a great miſchief accrued from this practice; for then they ſued a *capias ad ſatisfaciendum* returnable the next day, ſo that the bail had no time to bring in the body. To prevent which miſchief the judges indulged the bail ſo far as to permit them to render the body upon the return of the firſt *ſcire facias*, if the *capias ad ſatisfaciendum* was returnable *de die in diem*. *Cro. Eliz.* 618. pl. 4. But if the *capias ad ſatisfaciendum* was returnable at the next ſummons, then the bail was held ſtrictly to render the principal upon the return of the *capias ad ſatisfaciendum*, and not after. *Cro. Eliz.* 738. But when *Popham* was made chief juſtice, he extended this favour ſo far, as to admit a render any time before the return of the ſecond *ſcire facias*, or upon the return *ſedente curia*. But this was diſallowed. 3 *Bulſt.* 182, *Moor* 850, the *Spaniſh* ambaſſador *v. Gifford*. But the practice of the King's Bench hath continued, and is now uſed as *Popham* had eſtabliſhed it; ſo that they always admit a render upon the return of the ſecond *ſcire facias*, *ſedente curia*, or any time before. So if *ſcire feci* be returned upon the firſt *ſcire facias*, then the render muſt be upon that return. But all the admittances of theſe renders are *ex gratia curiæ*, and not *ex merito juſtitiæ*; for the condition of the recogniſance is broken by the non-render upon the return of the *capias ad ſatisfaciendum*. And therefore theſe renders can never be pleaded, but the party muſt be relieved by motion; it is ſaid, *Litt. Rep.* 194. that by the courſe of the common pleas a render may be made after the return of the *ſcire facias*, but the court now doubted of that, and *Cook* chief prothonotary ſaid, that the practice was always contrary. But *Powell* juſtice ſaid he remembered, that Mr. juſtice *Twiſden* cited a caſe in the king's bench, where the render was made upon the day of the return of the ſecond *ſcire facias*, but it was at a judge's chamber after the court was up, and that render was diſallowed. But *Treby* chief juſtice ſaid, that it ſeemed to be a good render. And *Cook* chief prothonotary certified to the court, that ſuch renders had been frequently allowed. And a rule was made to ſtay proceedings upon the *ſcire facias*. Note; It was reſolved this term *in* *B. R.* in a caſe between *Conyers* and *Man* and *Rawlins*, 12 *Mod.* 112. where the bail pleaded in *ſcire facias* upon the recognizance, payment by the principal before the return of the ſecond *ſcire facias* againſt the bail, that the plea was bad, for in ſtrictneſs of law the recognizance was forfeited by the ſuing out of the firſt *ſcire facias* againſt the bail.

A plea of payment by the principal, *before the return of the ſci. fa. againſt the bail* is bad.

Owen

Owen *verſ.* Saunders.

The death of the cuſtos rotulorum doth not vacate the clerkſhip of the peace. See 4 Mod. 167. Comb. 209. 12 Mod. 42. Holt 189. 1 Show. 426. 506. 516.

A bare power of nomination may be executed by parol.

The cuſtos rotulorum has only a bare power of nominating the clerk of the peace.

A nomination to an office durante bene placito under a power of nominating quamdiu the party bene ſe geſſerit, is void.

A nomination to the clerkſhip of the peace in theſe words, "I nominate and appoint I. S. to be clerk of the peace according to the act of parliament," is good.

ASSISE *de libero tenemento* in *Kent*. The plaintiff made plaint for the office of clerk of the peace, whereof he was ſeiſed, until the defendant diſſeiſed him. The defendant pleads in perſon, that the plaintiff was never ſeiſed of an eſtate whereof he could be diſſeiſed, and if he was, then *nul tort nul diſſeiſin*. The recognitors of the aſſiſe find a ſpecial verdict; they find the ſtatute 1 *Will. & Mar. ſeſſ.* 1. *cap.* 21. *ſ.* 5. which enacts, that the *cuſtos rotulorum* of the county ſhall nominate and appoint a fit perſon to be clerk of the peace *quandiu ſe bene geſſerit*, who by himſelf or his ſufficient deputy ſhould execute the ſaid office, which act appoints an oath to be taken by him before he enter upon his office, that he hath not given, *&c.* any thing for the ſaid office; they find that the earl of *Winchelſea* was *cuſtos rotulorum* of the county of *Kent* in 1689, 1 *Will & Mar.* and that he then by writing under his hand and ſeal nominated and appointed the plaintiff *Owen* to be clerk of the peace *durante bene placito*; that this was brought into the ſeſſions of the juſtices of peace, and that upon the reading thereof a diſpute aroſe concerning the validity of it, and upon which the earl of *Winchelſea* at the next general ſeſſions held 25 *June*, 1690, came into the court, and without any reference to the writing ſaid in the hearing of all preſent, I do nominate and appoint the ſaid *Philip Owen* (*viz.* the plaintiff) to be clerk of the peace according to the act of parliament, that Mr. *Owen* was admitted, and took the oath according to the act, and executed the ſaid office until *September* following; that the lord *Winchelſea* died, and the lord *Sidney* (now earl of *Romney*) was made *cuſtos rotulorum* of the county of *Kent*; and that he nominated and appointed the defendant *Saunders* to be clerk of the peace by deed, *quamdiu ſe bene geſſerit*; that he was qualified, and was admitted; that the defendant diſturbed the plaintiff *Owen* in the execution of the ſaid office, *&c.* This caſe was ſeveral times argued at the bar by ſerjeant *Darnall* and ſerjeant *Birch*, *&c.* for the plaintiff, and by *Gould* and *Wright* King's ſerjeants for the defendant; and now this term it was ſolemnly argued on the bench. And *Powell* juſtice for the defendant ſaid, that he would conſider four things.

1. The nature of this office.

2. If an office be grantable by parol.

3. If this grant *durante bene placito* be good. And,

4. If

4. If the nomination of *Owen* by the earl of *Winchelſea* was good by parol.

1. And as to the firſt point he ſaid, that it had been objected, that this clerk of the peace was originally but a deputy to the *cuſtos rotu'orum*, and therefore not properly an officer. But he was of opinion, that he is, and was originally an officer, and not merely a deputy to the *cuſtos rotulorum*. The ſtatute 12 *Ric.* 2. *cap.* 10. appoints wages for him, and there he is called the clerk of the juſtices of peace; and he is in nature of an attorney general to the king. In 2 *Hen.* 7. 2. he is called the clerk of the peace. And though it was objected, that the Statute of 1 *Will. & Mar.* enacts, that the *cuſtos rotulorum* ſhall appoint the clerk of the peace with power to make a deputy; yet that (he ſaid) was needleſs, for the clerk of the peace might make a deputy by the 37 *Hen.* 8. *cap.* 1 *ſ.* 3. and he does not derive his power from the *cuſtos rotulorum*, but from the act. So that it ſeemed very clear to him that it is an office.

The clerk of the peace was always a diſtinct officer from the cuſtos rotulorum. Vide 12 Mod. 13. D. cont. Holt 188.

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2. As to the ſecond point he ſaid, that the 21 *Hen.* 7. 37. is an expreſs authority, that an office cannot be granted without deed, eſpecially if it be an office for life. A ſteward of a court for life is not retainable without deed, but a ſteward may be retained for years by parol; but ſuch a one is not properly a ſteward, for he cannot take ſurrenders out of court, but he may hold a court, or take ſurrenders in court. 1 *Leon.* 227. *Godb.* 142. *Dier* 248. *a. pl.* 79.

A ſteward of a court cannot be retained for life by parol. Semb. cont. 4 Co. 30. a. b. Cro. Jac. 526. Co. Litt. 61.b.Co.Compl. Cop. ſ. 45. Ed. 1764. p. 104. though he may for years. But ſuch ſteward cannot take ſurrenders out of court. R. cont. Cro. Jac. 526. Semb. cont. 4 Co. 30. a. D. cont. 4 Co. 30. b. Co. Compl. Cop. ſ. 45. Ed. 1764. p. 104. & Co. Litt. 59. a. 13 Ed. n. 6. ſee alſo poſt. 660. Co. Litt. 58. a. 13 Ed. n. 5. ante 76. Com. 84.

Objection. The King by *parol* nominated *Weſt* to be clerk of the crown. 2 *Anderſ.* 119. *Dyer* 150. *b. pl.* 1.

Anſwer. The queſtion there was, whether the perſon was capable, and not whether the King could grant without deed. And it is probable, that the party obtained letters patent afterwards. But if the caſe there be looked upon as an authority, that the King can grant an office for life by parol, it is an extraordinary caſe; for that the King cannot grant an office without deed is very manifeſt. And the admiſſion there cannot make the party an officer, for that is only to admit him to the exerciſe of it; ſo that it muſt be ſuppoſed, that he had letters patent, or otherwiſe the caſe there cannot be law.

Admiſſion of an officer conveys no right, but merely a power of exerciſing it.

3. As to the third point he ſaid, that after the ſtatute of 37 *Hen.* 8. the *cuſtos rotulorum* might grant the clerkſhip of the peace *durante bene placito*, but ſince the new act 1. *W. & Mar.* it muſt be for life. For though there are no negative words in this laſt act, yet becauſe a grant *quamdiu ſe bene geſſerit*

ferit (which this new act appoints) is contrary to a grant *durante bene placito* (which was allowed by the former act) this latter act is a repeal of the former. For where two acts are affirmative, though there be no negative words, yet the latter, being contrary to the former, amounts to a repeal of the former. And this point was resolved in the king's bench *Pasch* 7 *Will.* 3. *Comb.* 317. 4 *Mod.* 293. *Holt*, 190, after several arguments. For the plaintiff *Owen* obtained a *mandamus* directed to the justices of peace of *Kent*, to restore him to the office of clerk of the peace; upon which they returned this appointment of the plaintiff by the earl of *Winchelsea*, *durante bene placito*, &c. and the court of king's bench resolved, that no peremptory *mandamus* could be awarded; for the earl of *Winchelsea* had but a bare authority by the act, to appoint the clerk of the peace *quamdiu se bene gesserit*, and therefore not having pursued his authority, his appointment is void and not warranted by the act.

A statute, tho' it contains no negative words, repeals all former acts with which it is inconsistent. D. acc. 11 Co. 63. a. 2 Wilf. 146. see also 2 Inst. 200. Co. Litt. 115. a. 13th Ed. n. 8. Str. 1102. Dougl. 179.

Objection. But he said, that it might be asked, why, if *Owen* has been admitted according to this grant *durante bene placito*, he should not be in for life, and the words *durante bene placito* rejected? As in 10 *Co.* 34. *a.* it is held, that the appointment of master of an hospital during the will and pleasure of the appointer, where he ought to be appointed for life, was good; for the words [will and pleasure] shall be rejected as void; and when he is nominated, he is master by force of the letters patent. And why not in this case? But to this he answered, that there was a difference between the mastership of an hospital and an office. The first is in nature of an incumbency, and the master as soon as he is appointed, with his brethren, hath the whole estate in him, and may maintain a writ of right. 1 *Vent.* 151. And it is repugnant to appoint any limitation, for by the grant he hath the whole estate. *Dav.* 45. *a. b.* If the King grants, and limits no estate, it is void; but in the case of an incumbency such a grant in the King's case is good, because it is not capable of a limitation, nor is grantable in reversion; but an office is capable of a limitation, and the grantee has no more estate in him, than it pleases the grantor to limit. And so there is a difference.

4. As to the fourth point he held, that this nomination by *parol* was not good, for he said, that it is a rule in law, that incorporeal estates will not pass without a deed. Uses at common law might be created by *parol*, because the law took no notice of them, but since the (*a*) statute no use will arise by *parol*. *Pop.* 47. In some cases offices are grantable without deed, as where in corporations the officers are elected, because the election is notorious enough; but where the

An use cannot be created by parol. See acc. 2 Car. 2. c. 3. s. 7.

(*a*) 27 H. 8. c. 10.

mayor

mayor of a town, or a particular perſon, has power to nominate an officer, it ought to be by deed.

Objection. That in this caſe the *cuſtos rotulorum* had but a power, and this might be executed at common law by *parol*, as where an executor had *had* lands deviſed to him to ſell, he might ſell by *parol*. 19 *Hen.* 6. 23. *Co. Lit.* 113. *a.*

Anſwer. The executor might ſell in that caſe by *parol*, becauſe the grantee was in by the will, and had no need to make a title by the executor, but might plead that he was in by the will, and give the power in evidence. But in this caſe no man can make a title by the act of parliament, but muſt ſhew in pleading that the *cuſtos rotulorum* appointed him. But a power cannot be always executed by parol, for the king has no office in him, but a power to grant and nominate, yet this muſt be by deed; and why not in the caſe of the *cuſtos rotulorum?*

Objection. A preſentation may be by *parol*. *Co. Lit.* 120. *a. Cro. Jac.* 248.

A preſentation to a living by parol is good. D. acc. 1 Brownl. 162. But a donation muſt be by deed. Vide 2 Bl. Com. 23.

Anſwer. That is but a bare nomination, and the biſhop for good cauſe may refuſe. But in the caſe of of donative it muſt be by deed. The ſame law in the caſe of the maſterſhip of an hoſpital. And the reaſon is, becauſe it carries a freehold incident to it. Now the grantee of this office hath a freehold, and ſo it was adjudged *Paſch.* or *Trin.* 3 *Will. & Mar. Harcourt* v. *Fox* (4 *Mod.* 167. *Comb.* 209. 12 *Mod.* 42. *Holt.* 189. *and very much at large*, 1 *Show.* 426. 506. 516.) where the caſe was thus; the earl of *Clare* being *cuſtos rotulorum* of the county of *Middleſex*, appointed *Harcourt* to be clerk of the peace for that county *quamdiu ſe bene geſſerit*, and afterwards the earl of *Clare* was removed, and the earl of *Bedford* made *cuſtos rotulorum*, who nominated *Fox*; and it was adjudged in the king's bench, that *Fox* was not well nominated, becauſe *Harcourt* being nominated to hold this office *quamdiu ſe bene geſſerit*, his office did not determine by the removal of the *cuſtos rotulorum*, as it would have done before the ſtatute of 1 *Will & Mar.* and this caſe was affirmed in the houſe of lords. *Sho. P. C.* 158. In auditor *Curle's* caſe, 11 *Co.* 4. *a.* the words of the act were, that the king ſhould name, *&c.* and reſolved, (*a*) that it muſt be under the great ſeal of *England*. And it is all one with the word grant. And though it has been objected, that this was, becauſe the king is tied to circumſtances by reaſon of the dignity of his perſon. Anſw. That was not conſidered at all in the caſe. If *A.* deviſes *Dale* to ſuch perſon as the king ſhall name, here the king may nominate by *parol*; ſo the king may preſent to a church by parol, becauſe the preſentee is in by inſtitution and induction. *Quare imp.* 60. Jac. 248. 1 Brownl. 162. Moor. 874. or appoint his menial attendants.

(*a*) Vide Fitzg. 90. 290.

The king may by parol execute a bare power of nomination preſent to a church. D. acc. Co. Litt. 140. a. Cro.

But he cannot pass an interest from himself but by deed. D. acc. Dr. and Stud. Dial. 1. c. 8. 2 Bl. Com. 346.

So the king may retain a chaplain by *parol*. *Cro. El.* 424. *Moor.* 193. But where there is an interest derived from him it cannot be by parol. And the king has the same power in taking as giving. 7 *Co.* 12. *a.*

But if there is a bare power in any one, this may sometimes be executed without deed; as where the chief justice of the common pleas appoints an officer, if a *memorandum* be made of it, it will suffice. But that is not like our principal case. Besides that the inconvenience will be great, if a freehold be suffered to pass by *parol*; for then a nomination at dinner, or at drinking, will be sufficient to transfer a freehold, which will be inconsistent with the rules of law, which require greater solemnity in passing such estates, to the end that the fact may be notorious; which design of the law, if this be permitted, will be totally frustrated: for which reasons he concluded, that judgment ought to be given for the defendant.

But against this it was argued by *Treby* chief justice, and *Nevill* justice, for the plaintiff. And *Treby* chief justice said, that he would consider, whether the grant by deed was good.

1. As to the first he said, that he would submit to the resolution of the king's bench in the case of *Rex* v. *Owen* upon the *mandamus*, that it was not good; though it seemed to him, that 10 *Co.* 34. was against that resolution; for here the words [during pleasure] will be void, as they were there; and the distinction which his brother *Powell* had made, would not aid it; for in this case that nomination by the *custos rotulorum*, since the statute has enacted that it shall be *quamdiu se bene gesserit*, is as incapable of any other limitation, as the mastership of the hospital was.

2. But as to the second point he was of opinion, that judgment ought to be given for the plaintiff, because the nomination was good by *parol*. And he said, that he would consider.

1. What a grant is.

2. What a nomination is.

3. This office. And,

4. Authorities and objections.

The proper mode of conveying incorporeal freeholds is by grant. Corporeal by livery.

1. As to the first, he said, that a grant is a gift in writing, by which an incorporeal freehold, &c. ought to be conveyed, as rents, &c. *West's Symboleogr. lib.* 1. *part* 2. *f.* 290. D. acc. 2 Bl. Com. 317. Co. Litt. 9. *a.*

And

And corporeal inheritances were paſſed by livery and feoffment. All inheritances according to the general rule may paſs by one of theſe means, and the law has not appointed a third. But the king in reſpect of his perſon muſt grant by letters patent, and cannot make a feoffment by *parol*.

2. As to the ſecond, nomination is a declaration by words, whether the words be in writing or ſpoken. If *A.* grants a leaſe to *B.* for ſo many years as *J. S.* ſhall name, *J. S.* may nominate by *parol*. Cuſtom that the lord admiral may nominate and appoint by *parol* a regiſter of the admiralty court, is good by the opinion of the court. *Dyer* 152. *b. pl.* 9. 153. *a. pl.* 10. *&c. Bendl.* 50. *pl.* 89. If a nomination by *parol* is good by cuſtom, *a multo fortiori* it is good in caſe of an act of parliament. Then it is here, as much as if the act had ſaid, that the nominee of the *cuſtos rotulorum* ſhould have the office during his life; ſo that after the *cuſtos rotulorum* has nominated, the nominee is in by the act.

3. The original of this office of *cuſtos rotulorum* is not very clear; but in probability the truſt of the conſervation of the rolls was committed to one of the juſtices of the peace, and then he was called *cuſtos rotulorum*; and probably by the conſent of his brethren he nominated the clerk of the peace. He is called ſo 13 *Hen.* 4. 10. *pl.* 33. And in *Dier* 175. *b. pl.* 26. it is ſaid, that it ſeems in reaſon, that the juſtices were before clerks. 12 *Ric.* 2. *cap.* 10. calls him clerk of the juſtices, and appoints him wages. 2 *Hen.* 7. 1. firſt makes mention of the *cuſtos rotulorum*; then comes the 11 *Hen.* 7. *cap.* 15. and appoints two juſtices of the peace to controul the eſtreat of the ſheriffs, who ought to be named by the *cuſtos rotulorum*.

Before the 37 *Hen.* 8. *cap.* 1. the clerk of the peace was conſtituted by *parol* only, and that without deed, as the preamble implies by the uſe of the words [nominate and appoint]. When the preamble mentions the king, it makes uſe of the word [grant] when of the *cuſtos rotulorum*, it makes uſe of the words [nominate and appoint;] which, as before is ſhewn, is by *parol*. The *cuſtos rotulorum* might nominate the clerk of the peace for a leſs time, than he was *cuſtos rotulorum*, but not for a longer time; and the *cuſtos rotulorum* himſelf was but at the will of the king. And after this ſtatute of 37 *Hen.* 8. he might be nominated by *parol*, or at leaſt the one way or the other, for acts of parliament ought to be taken in the vulgar ſenſe.

The ſtatute of 1 *Will. & Mar.* makes uſe of the words [nominate and appoint,] which ought to be expounded according to the expoſition of the common law; ſo that now

ſince the new ſtatute nomination by *parol* is good, for the act had no deſign to alter the conſtituting of this officer, in which the word [grant] is omitted, and perhaps *de induſtria*. And this way of nomination continued, notwithſtanding that it is now made a freehold.

The common law allows nomination by *parol*, and eſpecially of under officers. *Dyer* 114. *b. pl.* 63. *Vaux* the filazer was diſcharged by *parol*, though it ſeemed to him, that this was hard. The chief juſtice, who is in by grant of the king, by cuſtom may nominate a clerk, *&c.* who may have a greater eſtate than the grantor. So it was in the caſe of the regiſter of the court of admiralty. When a ſtatute makes uſe of words, which have relation to a cuſtom, they ought to be interpreted accordingly, as if the cuſtom came in queſtion, it ſhould be interpreted. And therefore the (*a*) ſtatute of wills inſerted the words [in writing] for otherwiſe a deviſe by *parol* would have paſſed lands, as they were paſſable by ſome cuſtoms before. So in this caſe the ſtatute uſes the words nominate, *&c.* and therefore it ought to be conſtrued as the common law would conſtrue it, which is by *parol*.

A ſtatute in aid of a cuſtom ſhall be conſtrued as the cuſtom itſelf, if it came in queſtion, would. Vide poſt. 201.

Beſides, where an officer can conſtitute another officer, who is to continue in his office for longer time than he who conſtitutes him is to continue in his; this muſt be by cuſtom or act of parliament. For by the common law no man can grant the acceſſary, for longer time than he hath intereſt in the principal. 1 *Rell. Abr.* 511. *l.* 8. 13. But by virtue of a cuſtom or ſtatute he may. As the chief juſtice of the common pleas may nominate an officer who ſhall be in for his life; or the lord of the manor for one day may grant, and the grantee by the cuſtom ſhall be in for his life. Therefore in this preſent caſe the clerk of the peace after nomination is in by the act; and without doubt an act of parliament is not inferior to a cuſtom in efficacy. But it has been proved before, that freeholds and inheritances will paſs by cuſtom without deed by *parol*; as where lands are deviſed by cuſtom, there is no livery to paſs them, nor deed; for though there is a will, yet it is no deed. So the clerks of aſſiſe are not (*a*) officers by *Weſtm.* 2. but by cuſtom, nor can they be in by grant, for they have a freehold, while the juſtices have but an eſtate at will.

(*a*) D. acc. 2 Inſt. 425.

Objection. That in that caſe the juſtices grant the clerkſhip of aſſiſe by deed.

Anſwer. A writing ſealed and delivered may be part of a cuſtom, and yet may not be abſolutely neceſſary. *Raſt. Quare impedit, Prochein avoidance* 1. If a cuſtom then has ſo

(*a*) 32 H. 8. c. 1. and now ſee 29 Car. 2. c. 3. ſ. 5.

much

much power, much more has an act of parliament; and ſince the legiſlators have omitted the word grant in this act, the court ought not to put it in.

As to the admiſſion, he did not believe that neceſſary, becauſe the act makes no mention of it; nor is the entry upon record more material, than as it amounts to an evidence.

As to *Dyer* 150. 2 *Anderſ.* 119. he ſaid, that though they were authorities for him, yet ſince it was but a ſingle caſe, he did not rely much upon it.

Objection. The words of the act in auditor *Curle*'s caſe were nominate and appoint, and yet the king executed it by grant.

Anſwer. Where the king, his heirs or ſucceſſors may nominate, this raiſes an inheritance in them, and they may well derive an eſtate of an inheritance out of them; but that does not hold place in our caſe, and therefore the caſes differ.

Objection. It is not policy to permit freeholds to paſs without ſolemnity, *&c.*

Anſwer. It is true, that *Doctor and Student*, *Perkins*, *Littleton* and *Coke*, ſeem to ſay ſo; but yet a rent may be aſſigned for dower by *parol*, or rent for *owelty* of partition. *Perk. ſect.* 62. *Co. Lit.* 34. *b.* 169. *a. Hob.* 153. *Littlet. ſect.* 251, 2. An aſſignment of rent for dower or owelty of partition by parol, good. Sed vide March. 7. pl. 15.

29 Car. 2. c. 3. ſ. 1. & Co. Litt. 169. a. 13th Ed. n. 4. Vide

Objection. *Non conſtat* to what act of parliament the earl of *Winchelſea* referred himſelf.

Anſwer. It muſt be intended the firſt of *Will. & Mar.* for that act in effect, as to this purpoſe, repeals the act of *Hen.* 8. (which point *Powell* juſtice agreed.)

And for theſe reaſons, by the opinion of theſe two judges againſt *Powell* juſtice, judgment was given for the plaintiff.

Note, that *Powell ſenior* juſtice was ſtrongly of this opinion of the chief juſtice upon the argument of the caſe at the bar; but he died before this reſolution was given.

Afterwards error was brought upon this judgment *in B. R.* where the caſe was argued ſeveral times. And afterwards *Holt* chief juſtice pronounced the opinion of the court. That the *cuſtos rotulorum* may appoint the clerk of the peace by

S. C. Salk. 467. 3 Salk. 250. 5 Mod. 368. 1. Carth. 426. 12 Mod. 199.

by *parol*. For when the act of 1 *Will. & Mar.* says that the *custos rotulorum* shall appoint, and he does it accordingly, it is but the execution of a power, and not properly a grant; for every grantor should have an interest to grant, but the *custos rotulorum* has no interest, at most but at the will of the king, and therefore he cannot transfer an estate for life. Tenant for life of a manor or park makes a bailiff, or parker for life; it must be by deed, because it is a grant; but it is determined by the death of the tenant for life. If a man makes leases for three lives, there must be livery; but if tenant for life with power to make leases for three lives makes a lease accordingly, livery is not necessary. If a man devises, that his executors shall sell land, &c. sale may be made without livery. The same law if a man devise that his executors shall grant a rent, they may do it without deed. *Co. Litt.* 113. Many corporations have power to make a town clerk, and they create him by election; and the town clerks have freeholds, and may have assise, if they are disturbed. (Note, that Mr. *Crispe* said that in *London* they create the town clerk under the common seal, but *per Holt* it is not necessary.) 1. No law requires no nomination to be by deed. And *Dyer* 150. is a case in point, that [nominate] does not import a grant by deed in a custom, much less does it import it in an act of parliament. But, 2. All the court was of opinion, that this was not a good appointment. 1. Because it does not say, that the earl of *Winchelsea* appointed Mr. *Owen* to be clerk of the peace of the county of *Kent*, nor in truth of any other county. Objection: These words must be expounded according to the circumstances. Answer: That will be dangerous to the plaintiff, for then notwithstanding the finding of the jury these words must refer to the deed. 2. He nominates *Owen* clerk, according to the act of parliament. The act appoints three things to be done. 1. To appoint the officer. 2. To limit the estate. 3. To shew now it shall or may be executed, *viz.* by deputy. Now here the *custos rotulorum* has not done any one of them, and therefore this being a bare authority not pursued is void. 3. It is uncertain what act the *custos rotulorum* intended, for there are two of them, that of *Hen.* 8. and that of *Will. & Mar.* 4. The verdict is contradictory, for the words [do nominate and appoint the said *Philip Owen*] must refer to the deed, for no *Owen* is mentioned before but him. And therefore for these reasons all the court were of opinion, that this judgment ought to be reversed; and the judgment was reversed accordingly *Trin.* 10 *Will.* 3. *B. R.* And afterwards upon (*a*) error brought in parliament in *Hilary* vacation 1699, this last judgment was reversed, and the judgment of the common pleas affirmed for the benefit of Mr. *Owen*, who died within three or four days after this judgment was given in parliament.

(*a*) See the assignment Lill. Ent. 278.

Kempe

Kempe, *verſ.* Crews.

S. C. Lutw. 1577. Pleadings, Lutw. 1573. vol. 3. 134.

Int. Hil. 7 Will. 3. C. B. Rot. 1684. 8 Lincs 671

TRESPASS for his cloſe broken, called *Broadcloſe* in *Devonſhire*, and for taking and impounding three cows, &c. To all, beſides the taking and impounding, the defendant pleads not guilty; and as to that, he ſays, that he was poſſeſſed for a long term of years of the place where, &c. that he demiſed to *Williams* for part of the term, rendering rent; and for rent arrear he took the cattle in the place where, &c. as a diſtreſs, &c. The plaintiff replies, that the cattle were not *levant* and *couchant*; upon which iſſue is taken, and verdict for the plaintiff. And *Darnell* ſerjeant moved for a *repleader*, becauſe this was an immaterial iſſue. For if the cattle were upon the land, though they came by eſcape, they may be diſtrained for rent, though they were not *levant* and *couchant*. *Co. Lit.* 47. *b.* But if this rule is laid too general, yet this difference will reconcile all the books; if the cattle are treſpaſſers upon the tenement, the leſſor may diſtrain them for rent, though they were not *levant* and *couchant*; but if they enter into the land by the tenant's default, becauſe the fences were not repaired, there they muſt be *levant* and *couchant*, before they are liable to diſtreſs for rent. 41 *Edw.* 3. 26. *b.* 22 *Edw.* 4. 49. 1 *Roll. Abr.* 668. takes notice of theſe books and others, and ſeems to make this diſtinction.

Gould king's ſerjeant for the plaintiff: The iſſue is not immaterial. For though *Coke* lays down a rule, that cattle which come upon the land by eſcape may be diſtrained for rent, yet the books there cited do not warrant this opinion. For the difference is between an ancient ſeignory and a rent *de novo*. All the books that *Coke* cites are of an ancient ſeignory, and there the lord may diſtrain what he finds upon the land, though the cattle have not been *levant* and *couchant*. And it is reaſonable, becauſe the lord has no other remedy but diſtreſs, for he cannot have an aſſiſe until the tenant makes reſcous, &c. Beſides, that ancient ſervices were ſmall, and for this reaſon the miſchief was not ſo great. But on the other hand it would be very miſchievous, if the leſſor might diſtrain the cattle of a ſtranger, before they were *levant* and *couchant*. For if a man reſerves a rent greater than the value of the land, it would be unreaſonable that the cattle of a ſtranger coming in by eſcape ſhould be reſponſible for it. Beſides, that in this caſe the leſſor might have debt againſt his leſſee, but the lord could not have debt againſt his tenant. And this difference is warranted by *Dyer* 317. *b. pl.* 9. *Cro. El.* 550.

If an iſſue could have been material, it ſhall be intended after verdict that it was ſo. Vide Str. 973.

The cattle of a ſtranger may be diſtrained for a modern rent ſervice the inſtant they come upon the premiſſes liable to the diſtreſs, if they came thereon either by the default of the owner, D. acc. 3. Bl. Com. 8. Co. Lit. 47. b. 13th Ed. n. 3. Sed vide 2 Leon. 7. See alſo 2 Vern. 131. or with his conſent, D. acc. Cro. Eliz. 550. 3 Bl. Com. 8. See alſo 2 Vent. 50. 3 Lev. 260. Pr. c. Chan. 7. 2 Vern. 129. but if through the default of the tenant, not until after notice. R. acc. Dyer 317. b. pl. 9. D. acc. 3 Bl. Com. 9. Co. Litt. 47. b. 13th Ed. n. 3. R. Cont. 2 Saund. 289.

Where a defendant juſtifies taking the cattle of a ſtranger as a diſtreſs for rent, a replication generally that they were not levant and couchant will be bad upon demurrer, but unexceptionable after verdict.

Fl. 550, by *Wilmesley*, and 2 *Leon.* 7. by *Manwood.* And *Doctor and Student Dial.* 1. *cap.* 7. *Ed.* 1721. *fol.* 27. expressly contradicts *Co. Lit.* 47. *b.* And *Palm.* 43. *Laty's* case says, that when cattle escape, and the owner retakes them upon fresh pursuit, there are not distrainable for rent; otherwise if they had been *levant* and *couchant.* In *Hil.* 20 & 21 *Car.* 2. *C. B. Rot.* 1770 *Colwell v. Milnes*, a case in point. There the plaintiff brought trespass for the taking of his horse; the defendant justified the taking of it for a distress for arrears of rent incurred upon a demise by the defendant of the place where, &c. to the plaintiff; the plaintiff replied, that the horse was not *levant* and *couchant*; issue thereupon, and verdict for the plaintiff; and *Pasch.* 21 *Car.* 2. serjeant *Seys* moved in arrest of judgment, that this was an immaterial issue; and then *absente Hild* justice, the court seemed to incline to that opinion; but *Trin.* 21 *Car.* 2. *Wild* being present in court, the plaintiff had judgment by the opinion of the whole court.

But admit that this had been ill upon demurrer, yet since here the defendant has taken issue upon the replication, and verdict is found for the plaintiff, the defendant has slipped his opportunity, and the plaintiff shall have his judgment. And he cited 2 *Roll. Rep.* 241, *Gwyn verf. Davenport.* and *Cro. Jac.* 44, *Francis verf. Tringer*, to prove that a collateral issue being taken and found for the plaintiff, though the issue is not good, yet the plaintiff shall have his judgment, because the defendant should have avoided the ill replication by pleading. And in *Michaelmas* term last past *Powell* justice was of opinion, that in case of an ancient seignory the lord may distrain cattle for the services, which came in by escape, though they were not *levant* and *couchant*, although it be in default of the fences, which the tenant of the land ought to maintain, because the lord has nothing to do with the repairing of the fences. But in case of rent reserved upon a lease for years the lessor cannot distrain such cattle, until they be *levant* and *couchant*, for if the lessor had had the land in his own hands, he ought to have repaired the fences; and when he puts in a lessee, he ought by covenant, &c. to oblige him to repair. And therefore in that case if the law would allow the lessor to distrain the cattle of a stranger, which come in by escape, before that they be *levant* and *couchant*, it would be in effect to allow a man to take advantage of his own wrong. Therefore the opinion of *Coke* cannot be maintained so generally, no book warranting it, unless 10 *Hen.* 7. 21. *b.* Therefore it must be intended, that if the cattle come in by default of the owner of the cattle, then they may be distrained, before they be *levant* and *couchant.* 7. *Hen.* 7. 1. 15 *Hen.* 7. 17. but if in default of the tenant of the land, there they cannot be distrained until they have been *levant* and *couchant*; that is to say, for rent upon leases for years. 15 *Hen.*

For the services of an ancient seigniory, the lord may distrain whatever cattle he can find on the land. D. acc. 2 Saund. 290. Gilb. on Distr. c. 1. s. 2. 2d Ed. p. 34. and see 2 Roll. Rep. 124. Sed vide Co. Litt. 47. b. 13th Ed. n. 3.

*Hen.*7. 17. And in ſuch caſe the leſſor ſhall not take the cattle, before that he has given notice to the owner that they are upon the land liable to his diſtreſs. And if the diſtrainer chaſe cattle in a place liable to his diſtreſs, and gives notice to the owner of the cattle, and he does not come to take them away, they are now become diſtrainable. But in caſe of diſtreſs by the ancient ſeignory aforeſaid, the owner may prevent the diſtreſs by making freſh purſuit. 15 *Hen.* 7. 17. 2 *Roll. Rep.* 124. *Gill v. Gawen.* But in this caſe nothing appears of any default in the fences; but the plaintiff has only replied that the cattle were not *levant* and *couchant*; but he ſhould have gone on and ſhewn the default in reparations by the tenant; and then if the verdict had been for the plaintiff, he would have had his judgment. But now the juſtification of the defendant is *prima facie* a bar; to defeat which the plaintiff only ſays, that the cattle were not *levant* and *couchant*; which may be true, and yet the juſtification good; for notwithſtanding any thing that appears in the caſe, the cattle were diſtrainable, though they were not *levant* and *couchant*. And therefore it ſeemed to him, that the iſſue was immaterial. But he ſaid, that it might be a queſtion, whether it was not aided by the ſtatutes of jeofails? for if it has but the ſemblance of an iſſue, it ſhall be aided; and that might be the reaſon of the judgment in *Colwell* and *Milnes* caſe.

But *per Treby* chief juſtice, where the cattle eſcape accidentally, there they are not diſtrainable, until they have been *levant* and *couchant*; but if they eſcape by default of their owner, they are diſtrainable the firſt minute. But in this caſe it does not appear, by what means they came into the plaintiff's land. Therefore ſince the defendant has taken iſſue upon the levancy and couchancy, it muſt be intended after verdict againſt him, as much as if he had ſaid that he will admit that they came in by ſuch means, whereby the levancy and couchancy ſhould be material, to intitle him to the diſtreſs. But if the defendant had demurred upon the replication, then it muſt have been taken more ſtrongly againſt the plaintiff, and then it would have been ill. Or otherwiſe the defendant might have rejoined, that the cattle came in by the plaintiff's default. But now after this iſſue it ſhall be taken more ſtrongly againſt the plaintiff. And (by him) if *a repleader* is to be awarded, the replication ſhall not be ſet aſide, but only the firſt jeofail, which was the taking of iſſue upon it by the defendant. But (*per Powell* juſtice) the replication is part of the iſſue, and ought to be ſet aſide if a *repleader* is granted; for when a *repleader* is awarded, no error ought to be left upon the record. And therefore if the declaration be good, and the bar, replication and rejoinder ill, if a *repleader* be awarded, all ought to be ſet aſide but the declara-

Upon a repleader all the pleadings ſhall be rectified. R. acc. 6 Mod. 2. vide Cowp. 510.

declaration. And judgment was given for the plaintiff, unleſs cauſe ſhould be ſhewn to the contrary the firſt day of this *Hilary* term. At which day *Darnell* argued, as he had argued before, that this was an immaterial iſſue, and that upon a *repleader* they ought to begin where the firſt fault is made, and that is where the immaterial iſſue is tendered and not where it is taken. 21 *Hen.* 6. 14. 7 *Hen.* 7. 3. 22 *Hen.* 6. 19. *Long* 5 *Ed.* 4. 108. *Bro. Repleader* 18, 21, 31, 35. And he ſaid, that the difference is, that if the verdict paſſes againſt him who made the firſt fault in pleading, there no *repleader* ſhall be granted; but it is otherwiſe if it paſſes for him: which diſtinction is warranted by 15 *Hen.* 7. 4. *Bro. Repleader* 23, 24. 24 *Hen.* 6. 57. *Hob.* 112. *Taſker v. Salter.* Now in this caſe the plaintiff made the firſt fault in pleading, and the verdict paſſed for him, and therefore a *repleader* is grantable. And the reaſon, why it was denied in the caſe of *Colwell* and *Milnes*, might be becauſe the plaintiff perhaps prayed it himſelf, becauſe he did not think the damages good that were given by him; but here the defendant prays it. But it was adjudged by the whole court, that no *repleader* ſhould be awarded. For it is not totally an immaterial iſſue; for perhaps the defendant chaſed the cattle upon the land liable to his diſtreſs, and then levancy and couchancy is material; and the court will intend, that it was ſo after a verdict. And therefore judgment was given for the plaintiff.

A repleader ſhall never be granted in favour of the perſon who made the firſt fault in pleading. R. cont. Str. 994. Burr. 292. vide Dougl. 380. 719.

Bellaſis *verſ.* Burbriche.

S. C. Lutw. 214. Pleadings, Lutw. 213. Vol, 3. 177.

CASE for *reſcous*. The plaintiff declares, that he the 20th of *March*, 1692, demiſed a meſſuage and lands lying in *Holme*, *Berkley*, and *North B.* in *Yorkſhire*, to *Robinſon*, for one year, and ſo from year to year, *quamdiu ambabus partibus placuerit*, rendering 12*l. per annum* rent, ſo long as the leſſee ſhould occupy the premiſſes; that *Robinſon virtute dimiſſionis intravit, et fuit inde poſſeſſionatus*; and that the plaintiff the 20th of *November* 1694, ſeiſed five quarters of barley, *&c. in et ſuper præmiſſa dimiſſa nomine diſtrictionis*, for rent of one year and a half ending at *Michaelmas* 1694, and that the plaintiff impounded this corn *in quodam horreo præmiſſorum*, and had a deſign to ſell it according to the ſtatute; but the defendant the 26th of *November* at *Holme* aforeſaid the corn in the barn being did reſcue and carry away. Not guilty pleaded. Verdict for the plaintiff. And in *Michaelmas* term laſt paſt *Wright* ſerjeant moved in arreſt of judgment divers exceptions.

In caſe for the reſcue of a diſtreſs intended for ſale, the plaintiff need not ſtate that he gave notice of the diſtreſs. Nor if the rent became due upon a leaſe for years, aver occupation. Nor, tho' the rent was payable only during occupation, ſhew any thing more than the leſſee's entry. The venue may come from the vill where the reſcue was, without joining either the vill where the demiſe was made, or the diſtreſs taken. See now 24 G. 2. c. 18, ſ. 3. This is a penal action, See vide 2 Term Rep. 154. A leaſe for a year, and ſo from year to year quamdiu, &c. is a leaſe for two years, and afterwards at will. S. C. Salk. 413. pl. 2. R. acc. poſt. 280. D. acc. Co. Litt. 45. b. Sed vide Salk. 413. pl. 4. poſt. 708. Salk. 414. pl. 6. 1 Term Rep. 161, 162. 380, Bl. 535.

1, Exc.

1. Exc. That the plaintiff has not ſaid, that he gave notice of this diſtreſs, and without notice he could not ſell it by the ſtatute. *Sed non allocatur.* For the plaintiff does not ſay that he ſold it, for the reſcue prevented the ſale, but that he intended to ſell; ſo that if the defendant had not reſcued the corn, the plaintiff might have given notice ſufficient to make legal ſale within the intent of the act.

2. Exc. It appears that the plaintiff diſtrained for the rent of a year, after the year was determined, which he could not do, ſince it was but a leaſe at will. *Sed non allocatur.* For it was a good leaſe for two years, and after that at will.

3. Exc. It does not appear, when the tenant entred, or how long he occupied. *Sed non allocatur.* For in caſes of leaſes for years the rent becomes due from the leaſe, and not from the entry; and he has no need to aver occupation, becauſe the leſſee is liable to pay the rent, whether he occupies or not. But in caſe of leaſes at will occupation muſt be averred.

Upon a leaſe for years the rent is payable tho' the leſſee never occupies; contra upon a leaſe at will. S. C. Salk. 209. Holt. 199. cit. Dougl. 440.

4. Exc. In this very leaſe the words are, rendring rent ſo long as the leſſee ſhall occupy; and then *modus et conventio vincunt legem.* *Sed non allocatur.* For ſince it is ſaid, that the leſſee entered *virtute dimiſſionis et fuit poſſeſſionatus*, it ſhall be intended after verdict, that he occupied for ſo long time as the plaintiff has declared, that the rent was arrear.

5. Exc. That there is not here any good venue, for the demiſe is laid in three vills, *Holme*, *Berkley*, and *North B.* and the plaintiff ſays, that he took the corn *in et ſuper demiſſa præmiſſa*, which extends to all the three, and that he impounded it *in quadam horreo præmiſſorum* which alſo extends to all the three; and the whole is in iſſue, as well the demiſe, taking, &c. as the reſcue, and therefore the venue ought to come out of all three. And this is warranted by *Cro. Eliz.* 620, *Action v. Borham*, which is a caſe in point. And it is manifeſt that the demiſe, &c. are in iſſue, for if there is no demiſe then there cannot be any rent, if no rent no diſtreſs, if no diſtreſs no *reſcous*. 2. This is not aided by the verdict by 21 *Jac.* 1. *cap.* 13. becauſe it is a penal action, and penal actions are excepted out of that act. It is a penal action, becauſe treble damages are given in it by the new ſtatute, which were not recoverable by the common law. And it is ſuch a penal action as the ſtatute of jeofails has no deſign to aid, as appears by 15 & 17 *Car.* 2. *cap.* 8. where debt for tithes is excepted out of the proviſo, by which it appears, that the parliament was of opinion, that otherwiſe debt for tithes would

would have been within the proviſo, and thereby excluded from the benefit of that act, for the preventing of which they excepted it out of the proviſo. Now this action is not leſs penal than the action of debt, and conſequently is within the proviſo, ſince there is no exception to exempt it. And as to this point, the whole court was of opinion, that it was a penal action. But *Powell* juſtice ſaid, that it would be a queſtion, whether penal actions ſhould be conſtrued to extend to caſes where the party grieved brings the action, or whether it ſhould be extended only to common informers. It was adjudged in this court *Trinity* term laſt, that where the party grieved brings the action upon a penal law, he ſhall have coſts, if he recover, but *contra* if it be brought by a common informer. But as to the exception of the venue, *Lutwyche* ſerjeant argued, that the venue was well laid, for which he cited *Cro. Eliz.* 619. *Sydenham* v. *Robins*, caſe for obſtructing of a way; the plaintiff declares, that he was ſeiſed in fee of a houſe in *D.* and that he and all thoſe, *&c.* had a way over the defendant's cloſe in *B. &c.* Not guilty pleaded; the venue was from *B.* and objected, that it ought to have been from both vills; but adjudged good, for upon not guilty pleaded, the obſtruction was properly in iſſue; but if the iſſue had been upon the preſcription, it had been otherwiſe. And *Noy* 9 *Banning*'s caſe. But this *Hilary* term the court gave their opinion, that the venue was well enough. For though the demiſe, (which was of land in *Berkley*, *Holme*, and *North B.* rent, diſtreſs, &c. were in iſſue at the trial, and ought to be proved; yet the principal affair in queſtion, for which this action was brought, was the reſcue, which was at *Holme*, and from thence the venue came well enough. And they cited *Hob.* 305, *Strede v. Hartley*. *Hutt.* 39, *Clerk v. Wood*. *Cro. Jac.* 513, *Dalton v. Barnard*. *Cro. Eliz.* 751, *Leed*'s caſe. But *Treby* chief juſtice ſaid, that he had a manuſcript report of the caſe in *Cro. Eliz.* 619. 2 *Roll.* 614, and that by his report, which was much preferable to the printed books, that judgment was arreſted. But in the principal caſe judgment was given for the plaintiff for the reaſons aforeſaid.

The party grieved is intitled to coſts in an action on a penal law. Vide Burr. 1723 1 Term Rep. 71. Sed vide etiam, 2 Leon. 116. 1 Anderſ. 116. Cro. Eliz. 177. Salk. 30.

Hool *verſ.* Bell.

S. C. Lutw. 1230. Pleadings, Lutw. 1227. Vol. 3. 139.

REPLEVIN for horſes taken by the defendant in a place called *The ſtable* in *Yorkſhire*. The defendant made conuſance as bailiff to *Robert Knowles*; and ſhews, that the lord *Stafford* was ſeiſed of the manor of *Tinſley* in *Yorkſhire*, with the appurtenances in fee, whereof the place where, *&c.* is parcel, and being ſeiſed, the ſixth of *March* 22 *Car.* 2. granted to *Francis Knowles* a rent charge of 60*l. per annum* payable yearly,

Executor of any tenant for life of a rent charge may diſtrain for arrears incurred in the life of the teſtator. Vide 32 H. 8. c. 37. Co. Litt. 162 a 13th Ed. n. 4. 162. b. 13th Ed. n. 1. and ſee all the learning on this ſubject 18 Vin. 542.

yearly, with clauſes of diſtreſs, in the manor of *Tinſley*, for life, &c. that *Francis Knowles* made his will, and made his brother *Robert Knowles* his executor, and died; that *Robert Knowles* proved the will; and that for arrears of this rent-charge, incurred in the life of the teſtator, the defendant, as bailiff to *Robert Knowles*, took theſe horſes in the place where, &c. as a diſtreſs, as in parcel of the lands and tenements, *prædicto Roberto Knowles ut executori Franciſci Knowles ſecundum formam ſtatuti oneratorum et obligatorum*. The plaintiff demurred. And *Pemberton* ſerjeant for the plaintiff argued, that this avowry was ill; for the executor of tenant for life is not within the ſtatute of 32 *Hen.* 8. *cap.* 37. For the ſtatute recites, that, foraſmuch as executors had no remedy by the common law for arrears of rent: this act gives them a double remedy, *viz.* diſtreſs or debt. But the executors of tenant for life had debt at common law for rent incurred in the life of the teſtator. And therefore *Co. Lit.* 162. *a.* ſays, that tenant for life muſt be intended tenant *pur auter vie*, ſo long as *ceſtuy que vie* lives in this act. So *Cro. Car.* 339, *Turner* v. *Lee*, the judges laid down a rule, that where the executor, &c. had remedy by debt at common law, this ſtatute did not give him diſtreſs. Therefore in the principal caſe the executor having remedy by debt by the common law for the arrearages in the time of the teſtator, who was tenant for life, he has no remedy by diſtreſs given by this act. *Sed non allocatur*. For *per curiam*, this act of 32 *Hen.* 8. is a remedial law, and ſhall extend to the executors of all tenants for life; and the law has been taken ſo always ſince the ſtatute, and has never been queſtioned. And the words of the ſtatute are general enough to extend to all. And in *Cro. Eliz.* 332, *Lambert* v. *Auſtin*, this ſeems to be admitted, and therefore the rule in *Cro. Car.* 339. ſo generally taken, cannot be law.

In an avowry inde he need not aver that the locus in quo was in the ſeiſin of the plaintiff or any claiming under him when the arrears incurred. Particularly if he ſtates that the grantor was ſeiſed in fee.

2. Exc. The defendant has not averred, that the place where, &c. was in the ſeiſin of the plaintiff, before theſe arrearages incurred; nor that the plaintiff claims by, from, or under him, who was tenant, and ought to have paid the rent, and by failure of this averment he hath put himſelf out of the benefit of the act; for the act gives the diſtreſs only againſt him who was tenant of the land, when the rent incurred, or againſt thoſe who claim by from or under him; and that ſuch averment is neceſſary, *Cro. Eliz.* 547, *Miles* v. *Willoughby*, is expreſs, and the caſes of *Andrew Ognel*, 4 *Co.* 48. *b.* and *Edriche*, 5 *Co.* 118. *a.* muſt be ſuppoſed to have had ſpecial averments, though the pleadings do not appear in the books.

But as to this exception, *Lutwyche* ſerjeant argued, that the thing in its nature does not require a preciſe averment, becauſe it does not lie in the conuſance of the avowant, who

was

was tenant when the rent incurred, but more properly in the conuſance of the plaintiff. Beſides that the defendant has ſhewn, that the lord *Stafford* was ſeiſed in fee. Now an eſtate-tail ſhall be preſumed to continue, unleſs the contrary appear, *Plowd.* 193, 431. much more ſhall a fee be preſumed to continue. A preciſe averment is not neceſſary, as appears by the caſe of *Miles* and *Willoughby*, *Cro. Eliz.* 547. For there it being laid, that the heir of the deviſee was ſeiſed, *et adhuc ſeiſitus exiſtit*, it was held well enough. Now the defendant has ſaid, that the place where, *&c.* was *onerat, et obligat.* to the diſtreſs of the executor *ſecundum formam ſtatuti*, which neceſſarily implies continuance in the hands of ſome one who claims under the grantor. And this *Hilary* term, after ſeveral arguments at the bar, the court gave their opinion, that the avowant has no need to ſhew that the land was in the ſeiſin of the plaintiff; or that the plaintiff claims by, from, or under, him who was tenant when the arrearages incurred; but it is more natural, that the plaintiff (in caſe he is not liable) ſhew how he is not liable. The caſe of *Miles* and *Willoughby* is an authority, that a preciſe averment is not neceſſary; and as that caſe is reported 2 *Roll. Rep.* 370, in *Hungerford* and *Harriland*'s caſe, it is ſaid, that a general averment was adjudged good. Now a general averment is not traverſable by the plaintiff, for that would put ſuch an iſſue upon the avowant as he could not prove. Therefore in ſuch caſe the plaintiff ſhould have pleaded over, and ſhewn, what eſtate he had had; upon which the avowant might take iſſue. But the better way is, that the plaintiff, if he is not liable, ſhew how he is not liable as aforeſaid. And there is no precedent, that the avowant ought to make ſuch an averment. *Cro. Eliz.* 332. 8 *Co.* 64. *b. Foſter*'s caſe. *Winch. Entr.* 1015. And if the caſe of *Andrew Ognel* had ſuch averment, it was ſuppoſed by the counſel at the bar, (the record of which caſe cannot be found) yet it would be but one precedent againſt many. And therefore judgment was given by the whole court for the avowant.

An eſtate of inheritance ſhall be preſumed to continue. D. acc. T. Jones 182. Vide poſt. 1551.

A general averment is not traverſable.

Intr. Trin. 8 Will. Rot. 1761. C. B.

Grace Faux *verſ.* Barnes.

In Dower if the life of the baron is put in iſſue, it ſhall be tried by witneſſes. Vide Acc. 2 Roll. Abr. 577. 578. 21 Vin. 19, 20. 3 Bl. Com. 336.

DOWER. The tenant pleaded that the demandant's huſband was in life. And iſſue thereupon. And it was tried in court by witneſſes. And the court ſaid, that very ſmall evidence would be ſufficient in ſuch caſe.

Soper

Soper *verſ.* Dible.

ASSUMPSIT upon a bill of exchange. The plaintiff declares, that *ſecundum conſuetudinem et uſum mercatorum* the acceptor is bound to pay, *&c.* without ſhewing the cuſtom at large. And the defendant demurred. And it was adjudged for the plaintiff. And *per curiam*, it is a better way, than to ſhew the whole at large.

Pinkney *verſ.* Hall.

CASE. The plaintiff declares, *quod infra hoc regnum Angliæ* there is, and time, whereof, *&c.* hath been a cuſtom, that if two merchants are partners jointly merchandizing together, and the one of them ſubſcribes a bill for the payment of money by him and his partner mentioned there to another or his order, that then both the partners are bound by the ſubſcription of that ſingle perſon; and that if the perſon, to whom this bill is payable, indorſes it payable to any other perſon, that then thoſe partners ought to pay ſuch bill upon notice, to him to whom it is made payable; then the plaintiff ſhews, that *J. S.* and the defendant *Hall* were partners jointly merchandizing; and that *J. S.* ſubſcribed a bill of 100*l.* payable to *Hutchins* or his order by himſelf and his partner, and that *Hutchins indorſavit billam. prediftam ſolubilem* to the plaintiff, that the defendant had notice thereof, and upon demand did not pay, *&c.* The defendant demurred.

In a declaration upon a bill of exchange there is no occaſion to ſet forth the cuſtom at large. R. acc. poſt. 1542. In a declaration upon a bill of exchange the plaintiff may in ſetting forth the cuſtom deſcribe it as the cuſtom of England. And need not give it a venue. A bill of exchange drawn by one of ſeveral partners in the partnerſhip name and by the partnerſhip account will bind the partnerſhip. Vide 2 Vern. 277. 292. Sty. 370. Salk. 292. In a declaration inde there is no occaſion to aver that the bill was drawn on account of trade. An averment in a declaration on a bill of exchange that the payer indorſed it, *payable to the plaintiff*, is good.

1. Exc. That the declaration being *per conſuetudinem Angliæ, &c.* was ill, becauſe the cuſtom of *England* is the law of England, of which the judges ought to take notice without pleading. *Sed non allocatur.* For though heretofore this has been allowed, yet of late time it has always been overruled; and in an action againſt a carrier it is always laid *per conſuetudinem Angliæ, &c.*

2. Exc. Though *lex mercatoria* is part of the law of *England*, yet it is but a particular cuſtom among merchants; and therefore it ought to be ſhewn in *London* or ſome other particular place. *Sed non allocatur.* For the cuſtom is not reſtrained to any particular place. And *Hardr.* 485. it is laid as here.

3. Exc. It is not ſaid, that the ſaid *J. S.* promiſed for the defendant and himſelf upon the account of trade, and it may be, that it was for rent or ſome other thing, for which the partner is not liable. *Sed non allocatur.* For the plaintiff having

having declared ſo ſpecially upon the cuſtom, it ſhall be intended, this was for merchandizing, eſpecially ſince the defendant had demurred generally. And if the caſe had been otherwiſe, the defendant might have pleaded it.

4. Exc. That the declaration is, that *Hutchins indorſavit billam prædictam ſolubilem* to the plaintiff, which is nonſenſe, for it ought to be, that he indorſed the bill that the defendant ſhould pay, &c. *Sed non allocatur.* And judgment given for the plaintiff.

Cook *verſ.* Beal.

S. C. 3 Salk. 115.

In an action for a battery if the wound was viſible, and the damages are inadequate, the court will increaſe them either after verdict, vide 1 Leon. 139. A. Bendl. 158. Litt. 51. 1 Mod. 24. 1 Sid. 108. T. Jones 183. Sty. 310. 345. Latch. 223. 1 Wilſ. 5. Or writ of inquiry. 1 Roll. Abr. 573. l. 10. 2 Danv. 452. pl. 4. 7 Vin. 278. pl. 4. Tho' the wound was not technically deſcribed in the declaration as a maihem. Or even tho' in fact it was not one. R. acc. Sty. 310. D. acc. T. Jon. 183. Provided the declaration particularized it. Acc. Sty. 345. 1 Sid. 108. and vide 1 Mod. 24. Or the judge at niſi prius made a certificate of it. Acc. 1 Sid. 108. ſed vide Latch. 223. Either by indorſment on the poſtea. vide Latch. 223. Or (if a judge of the court) by word of mouth. But not unleſs the plaintiff appears in perſon. Vide 1 Leon. 139. A. Bendl. 158. Litt. 51. 1 Mod. 24. The judge at niſi prius cannot increaſe the damages. Acc. 1 Roll. Abr. 573. l. 29. 2 Danv. 453. M. 1 Vin. 279. M. pl. 1.

TRESPASS, aſſault and battery. The plaintiff declares, that the defendant *cum manu ſua ipſum Thomam Cook ſuper ſiniſtrum oculum percuſſit et violavit ita quod* the ſaid *Thomas Cook, viz.* the plaintiff *penitus inhabilis devenit ad ſcribendum vel legendum*, being an officer of the exciſe, &c. Not guilty pleaded. Verdict for the plaintiff. And *Birch* ſerjeant moved, that the court would increaſe the damages, upon affidavit, that the plaintiff had loſt his eye. But the court ordered the plaintiff to appear in court in perſon, for otherwiſe they ſaid, that they could not increaſe the damages; upon which the plaintiff was brought into court. And afterwards the court after ſeveral motions reſolved,

1. That if the word *mayhemiavit* is not in the declaration, yet if the declaration be particular, ſo that it appears by the deſcription, that the wound was a maim, it is ſufficient, and the court may increaſe damages. *Raſl. Ent.* 46. *a.* 8 *Hen.* 4. 21. *b.*

2. Reſolved, that the court may increaſe the damages if the wound be apparent, though it be not a maim. And ſo it was done in the caſe of lord *Foliot*, *Sty.* 310.. 1 *Roll. Abr.* 573. *l.* 13. 7 *Vin.* 278. *pl.* 4. 2 *Danv.* 452. *pl.* 4. Therefore in this caſe, becauſe the wound is viſible, though it be no maim (for it is not a maim becauſe the eye is not wholly out but the plaintiff only declares, *quod inhabilis ad legendum vel ſcribendum devenit* by the wound) yet damages may be increaſed. And *Powell* juſtice ſaid, that *Holt* chief juſtice was of that opinion. So (*per Powell* juſtice) though the loſs of a noſe is not a maim, to bring an action *felonice* for the loſs of it, yet the court may in ſuch caſe increaſe the damages. And he ſaid, that the court might increaſe the damages upon a writ of inquiry, becauſe that was but a bare inqueſt of office, (*a*) and a caſe between *Swalley* and *Babington* was cited, where in a general action of aſſault, battery, and wounding, upon view the damages were increaſed about four years ago, upon the motion of ſerjeant *Lovell.*

(*a*) Acc. Bro.. Tit. Abridgment pl. 7. 2 Roll. Abr. 673. l. 53. Str. 1159. 2 Wilſ. 248. 374. 3 Wilſ. 62. 2 Wilſ. 368.

2. Reſolved

Cooke *or for* Beadle.

3. Reſolved, That the juſtices of *niſi prius* could not increaſe the damages; but if evidence be given of a great wound, they may indorſe it upon the *poſtea*, and upon that certificate the court here will increaſe the damages. 8 *Hen.* 4. 23 *Latch* 223. *Hooper verſ. Pope*, where there was neither *mayhemiavit* in the declaration, nor the wound deſcribed eſpecially; yet it being indorſed upon the *poſtea*, that evidence was given of a wound, the damages were increaſed upon the view. 39 *Edw.* 3. 20. *b* 22 *Edw* 3. 11. *Hardr.* 408. But *per Powell* juſtice if the cauſe be tried before a judge of the ſame court, where the motion is made to increaſe the damages, there is no need to have any indorſement upon the *poſtea*. (Note, This cauſe was tried before himſelf) The damages in the principal caſe were increaſed to 40*l.*

Note, In the argument of this caſe *Darnell* ſerjeant ſaid, that *ſon aſſault demeſne* was adjudged a good plea in *mayhem*. But *per curiam*, a man cannot juſtify a maim for every aſſault, as if *A.* ſtrike *B. B.* cannot juſtify the drawing his ſword and cutting off his hand; but it muſt be ſuch an aſſault whereby in probability the life may be in danger. Afterwards 2 *Annæ*, in an action of *mayhem* brought by *Cockroft* attorney againſt *Smith*, *Salk.* 642 11 *Mod.* 43. the defendant pleaded, *ſon aſſault demeſne*, and iſſue being joined there upon, *Holt* chief juſtice directed a verdict for the defendant, (*a*) the firſt aſſault being tilting the ſorm upon which the defendant ſat, whereby he fell; the maim was, that the defendant bit off the plaintiff's finger,

Son aſſault demeſne is a good bar in an action for a mayhem. vide 1 Wilſ. 5. Rait. Ent. 45. a. b. But to warrant it the defendant ſhould prove that the aſſault was very violent.

(*a*) But the ground upon which the court according to 11 Mod. 43. conſidered the maihem warranted was that the plaintiff in the ſcuffle ran his finger towards the defendant's eyes.

Zouch *verſ.* Thompſon.

ACTION of deceit was brought by the plaintiff *Zouch* as lord of an ancient demeſne manor, upon a fine levied of land held of him as of the ſaid manor; in which he ſhews, that the manor of *Odiam* is ancient demeſne, and that the lands whereof the fine was levied, were at the time of levying of the fine held of the ſaid manor, and impleadable in the court of the lord of the ſaid manor, according to the cuſtom of the ſaid manor; that the plaintiff at the time of the levying of the fine was, and yet is, lord of the ſaid manor; that the conuſor and conuſee of the ſaid fine are both dead; and therefore he prays, that the fine may be annulled, and he reſtored, &c. Upon which a *venire facias* iſſued againſt the heir of the conuſee and the terretenant. The terretenant ſays nothing. But the heir of the conuſee comes in, and confeſſes, that the fine was as aforeſaid levied; but

Deceit lies to reverſe a fine of antient demeſne lands after the death of both conuſor and conuſee. S. C. Salk. 220. 3. Salk. 35. Lutw. 713. cit. Cruiſe on Fines, 2d Ed. 301. Vide 2 Wilſ. 17 and againſt a purchaſor. A fine cannot be reverſed as to one man and remain effectual againſt another. S. C. Lutw. 713.

Semb. acc. Cr. El. 471. 10 Co. 50. a. vide 1 Bac. Abr. 112. 1 Leon. 290. cont. Bro. Fines de terres 101. D. cont. T. Jones 182. Five years non-claim upon a fine with proclamations no bar to an action of deceit. S. C. Salk. 210. 3 Salk. 35. vide 2 Wilſ. 17. In deceit to reverſe a Fine of antient demeſne lands, ſufficient to aver that the plaintiff was when the fine was levied and ſtill is lord. S. C. Salk. 210. 3 Salk. 35. Lutw. 713.

ZOUCH *verſus* THOMPSON.

he farther ſaith, that 20 *Car.* 2. a leaſe was made of theſe lands (of which the fine was afterwards levied) to *J. S.* redeemable upon payment of 1000*l.* that in the leaſe there was a covenant to levy a fine; that this leaſe came to his anceſtor by ſeveral mean aſſignments; and that the fine was afterwards levied to corroborate the mortgage; and therefore he prayed, that he claiming as a purchaſer, this fine might ſtand in corroboration of his ſecurity. The plaintiff demurs. And in this term *Gould* King's ſerjeant for the defendant argued, that the conuſor and conuſee being both dead, the lord had ſuffered his time to elapſe; for the deceipt died with the perſons, and therefore ſuch action cannot be brought after the death of the parties. And all the precedents are of actions of deceipt brought in the life of the parties. *Raſt. Entr*, 100. *b. F. N. B.* 98. A. 8 *H.* 4. 22. And there is no caſe where it was brought againſt an heir; but the heir of the lord of the manor may bring ſuch action, becauſe it is in *exhaeredationem ſuam*. The ſame law of the reverſioner of a demeſne manor expectant upon an eſtate for life. *F. N. B.* 99. *E.* If in *præcipe quod reddat* the tenant loſes by default, deceipt lies not after the death of the ſummoners. 35 *Hen.* 6. 46. 6 *Edw.* 4. 5.

2. If the conuſee inſerts more lands than the agreement comprehends, he ſhall be committed to gaol, which cannot be after his death. *Co. Mag. Ch.* 216. The King had a fine for the deceipt. And in 8 *Hen.* 6. 2. *per Relfe*, it is ſaid, that the lord may have ſuch action after the death of the party, which the other juſtices denied.

But it was adjudged by the court, that deceipt will well lie in ſuch caſe againſt the heir of the conuſor or conuſee; for it is a real deceipt, and does not reſemble the perſonal deceipt of *non ſummons*. And if the law were otherwiſe, if the parties died the dext day after the fine levied, the lord of the manor muſt be barred of his right of inheritance for ever. But in the caſe of ſummoners the writ muſt of neceſſity fail, for default of trial, for the trial, muſt be by examination of the ſummoners. And *per Levinz* ſerjeant, it is a real action, and therefore no *capiatur* nor fine ſhall be in it; to which the judges gave no anſwer.

2. Serjeant *Gould* argued, that a fine may be avoided for part, and ſtand good for part; as where a fine is levied of lands gildable and of lands in ancient demeſne; and that as well in writ of deceipt as in writ of error. *Fitz. Deceit.* 44. reverſal as to part, and good as to other part. 7 *Hen.* 4. 44. 8 *Hen.* 4. 24. 17 *Edw.* 3. 31. So in this caſe, though the fine be reverſed as to the lord, yet it may remain good as to the tenant; becauſe if it ſhould be reverſed in the whole, the party would loſe his mortgage.

But

But it was adjudged by the court, that a fine may be reverſed as to part of the land, and remain good, as to the reſidue; but it cannot be reverſed *in toto* as to one man, and remain good *in toto* as to another; which muſt be in this caſe, if this fine remain good as to the tenant, and be reverſed *in toto* as to the lord.

A fine may be reverſed as to part of the lands, and ſtand good as to the reſt. Acc. Fitz. Diſceit. 44. 1 Roll. Abr. l. 43. D. acc. March. 127.

W. Jones 374. F. N. B. 98. P. 1 Leon. 290. Semb. Acc.

Zouch *verſus* Thompson.

3. *Gould* ſerjeant ſaid, that the fine was levied 24 *Car.* 2. then the fine with non-claim will bar the deceipt. But *per curiam* the law is contrary: for a fine may eſtabliſh the right of another, but cannot eſtabliſh its own defects.

4. *Gould* ſerjeant for the defendant argued, that it does not appear what intereſt this pretended lord of the manor had in the manor at the time of levying of the fine. For it is not enough to ſay, that he was *dominus*, &c. but he ought to ſhew what eſtate he then had, and that it has continued until this time. For no man but the lord himſelf can reverſe this fine, the heir of the conuſor cannot. *Co. Mag. Ch.* 216. Therefore the lord, to intitle himſelf to this action, ought to ſhew, what eſtate he then had, and not aver barely (as he has done here) that he was *dominus*, &c. *et adhuc eſt*. But *per curiam*, it is well enough; for if the lord has determined or aliened his eſtate, &c. the defendant ought to ſhew it, and abate his writ. And upon this point it was adjourned to be argued again. And after argument it was adjudged *Mich.* 9 *Will.* 3. that the fine ſhould be annulled.

Eaſter Term

9 Will. 3. C. B. 1697.

Sir George Treby *Chief Juſtice.*

Sir Edward Nevill
Sir John Powell } *Juſtices.*

Welles *verſ.* Needham.

S. C. Lutw. 995.

A foreign attachment may be given in evidence on non aſſumpſit, per Cur. Acc. Bl. 834. 3 Wilſ. 297. Vide Skin. 639. Salk. 280. 291.

RESOLVED by the whole court, That a foreign attachment may be given in evidence in *indebitatus aſſumpſit* upon *non aſſumpſit* pleaded, though heretofore it was uſual to plead it ſpecially. And *per Levinz* ſerjeant, the practice has been accordingly for more than twenty years laſt paſt.

Nicholſon *verſ.* Sedgwick.

S. C. 3 Salk. 67.

The bearer of a note payable to a particular perſon *or bearer*, cannot maintain an action thereon in his own name againſt the maker. R. Acc. 3 Lev. 299. Semb. Acc. Salk. 125. 12 Mod. 36. Skinn. 332. 346. Comb. 204. Sed. vid. e contra 2 Show. 160. 235. 2 Freem. 257. 3 & 4 Ann. c. 9. ſ. 1. Burr. 1516.

CASE. The plaintiff declares, *quod inter mercatores et alios negotiantes intra hoc regnum* there is, and time whereof, &c. hath been a cuſtom, that if any merchant or other trader make a bill or note in writing, by which he aſſumes, to pay to any other perſon or the bearer of the bill, ſuch a ſum of money, that then ſuch perſon, who makes ſuch note, is bound by it, to pay ſuch ſum to ſuch perſons to whom the note is made payable, or to the bearer thereof; then the plaintiff ſhews, that the defendant *Sedgwick* being a goldſmith, made a note in writing, by which he promiſed to pay to one *Maſon*, or to the bearer thereof 100*l.* that *Maſon* delivered the note to the plaintiff for 100*l.* in value received; and that for non-payment of this 100*l.* by the defendant to the plaintiff upon demand the plaintiff brought this action againſt the defendant. *Non aſſumpſit* pleaded, and verdict for the plaintiff. And it was moved in arreſt of judgment by ſerjeant *Wright*, that this action could not be brought in the name of the bearer, but it ought to be brought in the name of him to whom it was made payable.

Quod

Quod fuit conceſſum per curiam; for the difference is, where the note is made payable to the party or bearer, and where it is payable to the party or order; in the latter caſe the indorſee has been allowed to bring the action in his own name; for there can be no great inconvenience, becauſe the indorſement of the party muſt appear upon the back of the note, or ſome other thing ſufficiently intimating his aſſent; but where it is payable to the party or bearer, if the bearer be allowed to bring the action in his own name, it may be very inconvenient; for then (*a*) any one, who finds the note by accident, may bring the action. And though this laſt has been frequently attempted, it has never yet prevailed. And therefore in a caſe in this court between *Horton* and *Coggs*, the goldſmith, 3 *Lev.* 299. this difference was taken and agreed; and the judgment there (being the ſame caſe with this principal caſe) was arreſted. But the court ſaid that the bearer might bring the action in the name of him to whom the note was made payable. And judgment was arreſted, *niſi*, &c. And the ſame point was reſolved *in B. R.* between *Hodges and Stewart*, *Hil.* 4 & 5 *Will. & Mar. Salk.* 125.. 12 *Mod.* 36. *Skinn.* 332. 346. *Comb.* 204. But there it was reſolved, that the (*b*) indorſement to the bearer binds the party who immediately indorſes it to him. The principal point was alſo reſolved *Mich.* 6 *Will. & Mar. B. R.* between Sir *Thomas Eſcourt* and *Cudworth*.

NICHOLSON *verſus* SEDGWICK.

(*a*) Vide Burr. 452. 458. 1523, 2 Stra. 235. Dougl. 611.

(*b*) Acc. Poſt. 744.

Littlewood *verſ.* Smith.

The ſtatutes which limit the quantum of coſts where the damages are under 40s. do not extend to courts in which damages cannot be given to the amount of 40s, S. C. cit. 6 Vin. 350. Vide Poſt. 395. 3 Salk. 115. 2 Lev. 124. 1 Freem. 369.

FALSE judgment was brought upon a judgment given in the court baron of the honour of *Pomfret* in *Yorkſhire*. And ſerjeant *Lutwyche* moved for reverſal of the judgment. 1 Exception. That this action was an action upon the caſe for words, and upon iſſue joined the jury aſſeſſed 39s. 11*d.* damages, &c. and the court gave 3*l.* coſts *de incremento* which he ſaid was ill by 21 *Ja.* 1. *cap.* 16. *ſ.* 6. which enacts, that if in caſe for words the jury give leſs than 40s. damages, the plaintiff ſhall have no more coſts than damages. And he ſaid that this ſtatute extends to theſe inferior courts, for the words of the act are [any the courts of record at *Weſtminſter*, or any court whatſoever] which words are ſo general, that they comprehend all courts. But the court inclined ſtrongly, that this inferior court was not within the intent of the act; for if it were, this act would totally take away their power of giving coſts *de incremento* in ſuch caſes to more than 40s. for the jury there can in no caſes give damages beyond 39s. 11*d.* (for if they did ſo, the court would have no juriſdiction in the cauſe) and conſequently the court in no ſuch caſe could give coſts *de incremento* above 40s. which was never the intent of the act. But

No exception can be taken after verdict to the want of ſtating in a declaration the time when the cauſe of action accrued. Semb. Acc. Com. 12. Salk. 662. But the want of joining iſſue may be objected to after verdict. To a plea concluding to the country a replication, "quod quod the defendant hath tendered an iſſue; the plaintiff doth the like" is no joinder.

this

LITTLEWOOD *verſus* SMITH.

this act ought to be intended of courts, in which the jury may, if they pleaſe, give more than 40*s.* damages; but in courts baron they cannot. And by *Wright* ſerjeant (who was not concerned in the cauſe as counſel) coſts *de incremento*, according as the caſe requires, are given in all courts baron in *England*, notwithſtanding the act of *James* 1.

2 Exc. That no time is laid in the plaint, when theſe words were ſpoken, and therefore they might be ſpoken after the plaint entred. But *per curiam*, that ſhall never be intended after a verdict, but the contrary.

3. The third exception was to the joining of the iſſue, for the plaintiff comes and ſays, *quoad quod* the defendant has tendered an iſſue, *praedictus* the plaintiff *ſimiliter*, which is nonſenſe, and no iſſue joined. Of which opinion was the whole court, who ſaid, that it would be of ill conſequence to approve ſuch a precedent. And therefore for this reaſon judgment was reverſed.

Sale of timber growing upon land by parol, good within the 4th ſection of 29th Car. 2. c. 3.

TReby chief juſtice reported to the other juſtices, that it was a queſtion before him at a trial at *niſi prius* at *Guildhall*, whether the ſale of timber growing upon the land ought to be in writing by the ſtatute of frauds, or might be by *parol?* And he was of opinion, and gave the rule accordingly, that it might be by *parol*, becauſe it is but a bare chattel. And to this opinion *Powell* juſtice agreed.

Villars *verſ.* Parry and Moor.

S. C. Comb. 397.

A joint judgment againſt bail, upon a ſeveral ſcire facias, is erroneous. S. C. 2 Vin. 374. And after the term in which it is entered not amendable. S. C. 2 Vin. 374. Sed vide poſt. 548. Miniſterial errors may be amended at any time, per cur. acc. Str. 139. and vide poſt. 895. Str. 1132. 1156. Foſter v. Blackwell, Barnes 4to. edit. 118. Rex. v. Atkinſon, E. T. 24 G. 3. B. R. Judicial ones only during the term in which the judgment is entered. Per cur. acc. Str. 139. and vide Gilb. C. B. 2d edit. 142.

THE defendants were bail for *Clerk* in a ſuit brought by the plaintiff's teſtator, and were bound in recognizance jointly and ſeverally for 200*l.* Judgment was given againſt *Clerk*, who brought error in *B. R.* and the judgment was affirmed. Upon which the plaintiff's teſtator ſued a *ſcire facias* upon the recognizance againſt the bail *Parry* and *Moor*, who pleaded that no *capias ad ſatisfaciendum* iſſued againſt *Clerk*. The plaintiff replied, that there was a *capias ad ſatisfaciendum* ſued and returned, *&c.* and therefore prayed judgment to have execution of the ſeveral ſums mentioned in the recognizance againſt the defendants. The defendants demurred. And judgment was given for the plaintiff, and entred, that the plaintiff ſhould have execution *de praedictis ſeparalibus ſummis* 2000*l. et* 2000*l.* againſt the defendants jointly, whereas the *ſcire facias* was ſeveral. And *Birch* ſerjeant moved, that this might be amended, becauſe the *ſcire facias* is right, and that ought to govern all the proceedings.

VILLARS *verſus* PARRY.

ceedings. But *Levinz* ſerjeant *e contra* argued, that the judgment ought to have been that the plaintiff ſhould recover againſt the defendant *Parry* 2000*l.* and againſt the defendant *Moor* 2000*l.* But as the judgment is entered for 2000*l.* and 2000*l.* each of them is charged with 4000*l.* which is erroneous, but not amendable, becauſe it is an error in law. For if a record be right, and an ill judgment in ſubſtance is given, it is not amendable. Therefore if debt is brought againſt an executor, and judgment given againſt him *de bonis propriis*, this is not amendable. The ſame law if a *capiatur* is entred inſtead of a *miſericordia*, becauſe it is error in the judgment of the court in the law; which caſes the court agreed. And *Treby* chief juſtice ſaid, that if this had been upon a joint *lien*, the judgment muſt have been joint; but here the plaintiff by his ſeveral *ſcire facias* has made it a ſeveral *lien*, and therefore the judgment ought to be ſeveral. So it is plain error in law, and not amendable. But if it had been *John* for *Thomas*, this had been only *vitium clerici*, and amendable. Or if this motion had been made the ſame term in which the judgment was given, it might have been amended; becauſe the judgment in the eye of the law is, all the term in which it is pronounced in the breaſt of the court. But as the caſe is, all the juſtices agreed that it was not amendable. *Mich.* 10 *Will.* 3. *B. R.* the writ of error was quaſhed, and afterwards a new writ of error was brought upon the ſaid judgment. *Poſt.* 547.

Judgment againſt an executor *de bonis propriis*, where he is only reſponſible *de bonis teſtatoris* is not amendable R. cont. Burr. 2730.

A capiatur for a miſericordia not amendable ſed. vide 16 & 17 Car. 2. c. 8. ſ. 1. 4 Ann. c. 16. ſ. 2.

But a miſtake in the chriſtian name of one of the parties, is. ſed vide 2 Vin. 374. pl. 21.

Errington *verſ.* Thompſon,

S. C. 21 Vin. 102. pl. 23.

DEBT upon bond in *London*. The defendant pleads a releaſe dated at *Newcaſtle* upon *Tine*. The plaintiff demurs. And *Girdler* ſerjeant for the plaintiff argued, that this is a tranſitory action, and therefore the plaintiff might lay it where he pleaſed. Then the releaſe, which the defendant pleads, is alſo tranſitory; and when the defendant pleads tranſitory matter in bar, he ought to conform to the plaintiff's declaration. *Co. Lit.* 282. *a. b.* 1 *Saund.* 85. 6 *Co.* 47. Therefore *Mich.* 5 *Will. & Mar. C. B. rot.* 797, *Bare* v. *Caſe*, Debt was brought upon a bond in *London*; the defendant pleaded, that the contract was uſurious, made in *Surrey*; the plaintiff demurred generally; and adjudged, that although the plea in bar contained criminal matter, yet becauſe it was tranſitory, it was ill pleaded, and the plaintiff for that cauſe had judgment. So in a caſe between *Pyke* and *Pullen* the ſame term, in covenant upon a leaſe for life of land in *London*, the defendant pleaded (*a*) a releaſe at *Northampton*, and adjudged ill; for it ought to have been pleaded at *London*, where the plain-

The facts of a plea unleſs local, muſt be ſtated to have ariſen in the county in which the plaintiff has laid the venue. R. acc. 2 Leon. 79. 3 Leon. 97. Cro. Eliz. 174. 1 Sid. 234. 1 Lev. 149. 1 Keb. 186. Per cur. acc. Lutw. 1437, 1438. Poph. 101. See alſo. Cro. Eliz. 99. Yelv. 114. Str. 22. ante, 120.

A deed dated at a particular place in England is local. Per cur. acc.

6 Mod. 195. 228 Salk. 660. Poſt. 1043. 11 Mod. 57. Cowp. 177.

(*a*) According to the report of this caſe in Lutw. 343. the matter pleaded was the death of the leſſor, upon which event the leaſe determined.

tiff

Errington *verſus* Thompson.

tiff brought his action. And it is no objection, to ſay that this releaſe in the principal caſe bore date at *Newcaſtle*; for though it bears date there, it may have been delivered at *London*, and *traditio facit chartam*. And ſo it is held in *Dier* lately printed 167. *b. in margine*. The court agreed the caſes put by ſerjeant *Girdler*, becauſe the deeds there did not bear date at any particular place; and then they are altogether tranſitory, and muſt purſue the declaration of the plaintiff But where a deed bears date at a certain place, it is local, and muſt be pleaded there. So *Co. Lit. 6. a.* ſays, that it is diſadvantageous to the grantee, to have the deed bear date at any place certain, which is for the reaſon aforeſaid. And in the principal caſe if the plaintiff had replied *non eſt factum*, the venue muſt have come from *Newcaſtle*. And as to the ſuppoſition, that it might be dated at another place and delivered at *London*, the court anſwered, that *datum prima facie* ſignifies *deliberatum*. And *Powell* juſtice ſaid, that if a deed bears date at *Bourdeaux* in *France*, one may declare upon it, for neceſſity, to be made *in quodam loco vocato Bourdeaux in France in Iſlington in Middleſex*; but if it be pleaded in bar of an action, it ought to be conformable to the plaintiff's action, becauſe the place where it bears date is not in *England*. But if it be dated at *Bourdeaux in partibus tranſmarinis*, one cannot declare upon it here, (*a*) But *Treby* chief juſtice ſaid, that the old opinion in the old books was that if a bond bears date at *A. in regno Galliae*, it is not triable in *England*; but the new and better opinion is, that in ſuch caſe it may be laid in pleading to be made where the action is brought. But where a deed is dated at one place in *England*, it cannot be pleaded to be at another. Therefore the court adviſed the plaintiff to waive his demurrer, and take iſſue upon the plea; to which it was conſented.

If a deed is dated at any place abroad, it may be alledged under a viz to have been made at any place in England. Per cur. acc. poſt. 1043. 6 Mod. 228. Salk. 660. 10 Mod. 255. Cowp. 177.

But the place abroad muſt alſo be mentioned in it's deſcription. P. acc. poſt, 1043. 6 Mod. 228. Salk. 659. D. acc. Cowp. 177.

(*a*) R. acc Lutw. 950. ſed vide Lat. 4. 10 Mod. 225. Cowp. 178.

Shaw *verſ.* Simpſon.

S. C. 19 Vin. 195. pl. 7.

Bailiff of a liberty concluded by the ſheriff's return.

IN caſe againſt a bailiff for the falſe return of *nulla bona* upon a *fieri facias*, the queſtion was upon the evidence at the trial, whether the bailiff of a liberty ſhall be concluded in point of evidence by the return of the ſheriff? And *per curiam*, he is concluded. And if the ſheriff makes any other return than that which the bailiff makes to him, he may have his (*a*) action againſt the ſheriff. And it was ſaid, that *Holt* chief juſtice was of this opinion. See 36 *Hen.* 6.

(*a*) Vide 23 Ed. 3. c. 5.

Baker

Baker *verſ.* Wall.

Intr. Trin. 8 Will. 7. C. B. Rot. 1484.

alias 476.

EJectment for a houſe and land called *Dumſey* in——upon the demiſe of *Jane Wall*. Upon not guilty pleaded the jury find a ſpecial verdict; that *Daniel Wall ſenior* was ſeiſed of the lands in queſtion in fee, and had iſſue two ſons *Daniel* and *John*, and made his will in writing in this manner: "*Item*, "I deviſe to *Daniel* my eldeſt ſon, all that my farm called "*Dumſey* to him and his heirs male for ever, if a female, my "next heir ſhall allow and pay to her 200*l.* in money or "12*l.* a year out of the rents and profits of *Dumſey*, and ſhall "have all the reſt to himſelf, I mean my next heir, to him "and his heirs males for ever:" the jury find further, that the deviſor died, that *Daniel* the ſon entred, and died leaving iſſue but one daughter, the leſſor of the plaintiff; that the younger ſon *John* entred into the land in queſtion; that *Jane Wall* entred upon him, and leaſed to the plaintiff, who entred; that *John Wall* re-entred, and ejected him, upon which the plaintiff brought this ejectment; *et ſi &c.* And it was argued at ſeveral days by ſerjeant *Levinz* and ſerjeant *Wright* for the plaintiff, that the jury had found the leſſor the heir at law of the deviſor; then there muſt be either expreſs words, or the manifeſt intent of the party, conſiſtent with the rules of law, apparent, to diſinherit her; for it is a rule, that (*a*) an heir ſhall never be diſinherited by implication. As to the firſt, there are no expreſs words here, at leaſt not ſufficient; for as to the words [if a female then my next heir, *&c.*] now 1. Next heir by itſelf without addition of male or female is not a good name of purchaſe. But 2. admitting that it might be a good name of purchaſe, yet here the defendant is not next heir; for the plaintiff's leſſor is next heir to the deviſor: And one cannot make a man a purchaſer by the name heir, unleſs he be actually heir, as *Hobart* ſays in *Counden* and *Clerk*'s caſe. *Hob.* 31. And though it may be objected, that the defendant was deſigned by the deviſor, to be ſpecial heir; and that *Hale* chief juſtice was of opinion, 1 *Vent.* 381. 1 *Mod.* 161. 2 *Lev.* 79. (*b*) that one may make a ſpecial heir a purchaſer by the name of heir; yet that is but a new opinion, and not warranted by law. And as to the caſe that he cites, 1 *Ventr.* 381. where a man taking notice, that his brother (who was dead) had a ſon, and that he himſelf had three daughters, who were his heirs, he gave to them 2000*l.* and to his brother's ſon he gave his land, by the name of his heir male, provided that if his daughters diſturbed his heir, that then the deviſe to them of the 2000*l.* ſhould be void; and it was reſolved, that the deviſor taking notice that others were

An eſtate tail may be created by deviſe without words of procreation. D. acc. Co. Litt. 27. a. poſt. 630. 1146. 2 Bl. Com. 115. and ſee 3 Salk. 336. 11 Mod. 189. A ſpecial heir tho' he is not heir general may take by purchaſe under a will, if the deviſor expreſly excludes the heir general. S. C. 2 Eq. Abr. Deviſes D. pl. 8. 1ſt Ed. 307. R. acc. 2 Vern. 729. Prec. Chan. 442. 461. 1 Str. 35. Gilb. Eq. Rep. 116. 131. 1 Eq. Abr. Deviſes, M. 3. pl. 14. 4th Ed. 215. 5 Burr. 2615. Bl. 687. See alſo Nelſ. 121. 123. Co. Litt. 164. a. 13th Ed. n. 2. D. cont. 1 Co. 102. b. Co. Litt. 164. a. 24. b. and 13th Ed. n. 3. ſee alſo 2 P. Wms. 1. Prec. Chan. 589. 2 Eq. Abr. Deviſes. H. pl. 6. 1ſt Ed. 331. 8 Vin. 317. pl. 13.

(*a*) Vide Cowp. 657. Dougl. 730. Prec. Chan. 440. 452. 3 Wilſ. 418.

(*b*) The caſe in which Hale Ch. Juſtice delivered this opinion, was upon a covenant to ſtand ſeiſed to uſes, and in Burr. and Bl. ubi ſupra, the court of B. R. certified that they ſhould be of the ſame opinion in a caſe upon a deed.

his

BAKER *verſus* WALL.

his heirs, the limitation to the ſon of his brother by the name of heir male was by a good name of purchaſe: as to that caſe they ſaid, that the deviſor expreſsly took notice, that his three daughters were his heirs, and therefore it was altogether his deſign to exclude them. But in this caſe the deviſor did not take ſuch notice of the leſſor of the plaintiff, nor could he, becauſe ſhe was not then in being. But in the caſe in *Ventris* the daughters were *in eſſe* at the time of the deviſe. Beſides, they argued that no intent appeared here to exclude the daughters, becauſe the words (ſaid they) are ſenſeleſs, and ſuch as out of them no manifeſt ſignification can be collected. And for this reaſon the clauſe ſhall be void, and the leſſor of the plaintiff ſhall take as heir by deſcent.

But it was adjudged *per curiam*, upon great conſideration, that the defendant ought to have judgment. For 1. they ſaid, that it was very manifeſt, that the deviſe to *Daniel* the ſon was an eſtate-tail male. For though in a deed it had been fee, yet in a will, to gratify the intent of the deviſor, the law will ſupply the words (of his body) 2. It is apparent, that the deviſor had a deſign, that if *Daniel* had a daughter, ſhe ſhould not have the lands. For the words, [if a female then my next heir, &c.] muſt be intended as if he had ſaid, but if my ſon *Daniel* ſhall have only iſſue a female, then that perſon, who would be my next heir, if ſuch iſſue female of *Daniel* was out of the way, ſhall have the land. And farther to make his intent more manifeſt, he gives a rent to ſuch female out of the lands, which demonſtrates that he had no deſign that ſhe ſhould have the land; for ſhe could not have both the land and a rent iſſuing out of the land. Then the rule of law is, that where the intent of the deviſor is apparent, if it does not contradict the rules of law, it ought to be purſued. Then it ought to be conſidered here, how far the intent of the deviſor will conſiſt with the rules of law. If the deviſor had ſaid no more than, my next heir ſhall then have the land, that had not been a good name of purchaſe; becauſe it does not import either male or female ſpecially, but ſignifies the heir general. But if he had ſaid, next heir male, that had been a ſpecial heir, and good. 1 *Co.* 66. *b. Archer's* caſe. Then here, when the diviſor ſays, I mean my next heir to him, &c. by the words [to him] which are of the maſculine gender, it is apparent, that he intended male; and theſe words [to him] are tantamount to the word male; ſo that it is the ſame thing, as if he had ſaid, I mean my next heir male, which as before is ſaid, is a good name of purchaſe as ſpecial heir. Then it is clear, that the deviſor intended, that ſuch heir male ſhould be a purchaſer, becauſe he goes on, and limits it, and to his heirs males for ever; ſo that it is like 1 *Co.* 66 *b. Archer's* caſe.

The intent of a deviſor, if conſiſtent with the rules of law, ought to be purſued. D. acc. 1 Bro. C. C. 143. 173. 3 P. Wms. 259. 1 Term. Rep. 635. 597. 2 P. Wms. 741. Dougl. 327. and vide Burr. 2579.

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caſe. And as to the objection, that *John* is male, but not heir, for *Jane* the leſſor of the plaintiff is right heir to the deviſor; and *Hobart* ſays, that no man can take as purchaſer by the name of heir, but he who is right heir; the court anſwered, that this is generally true, where the deviſe is to the right heirs of *J. S. &c.* without ſaying more; but if the party takes notice, that he has a right heir, and ſpecially excludes him, and then deviſes it to another by the name of heir; this ſhall be a ſpecial heir to take, as 1 *Ventr.* 381. the caſe put by *Hale* chief juſtice. So in this caſe the deviſor, after having excluded all females who ſhould be his right heirs, gives it to his then next heir male, *&c.* which is a good ſpecial heir. And *Treby* chief juſtice ſaid, that the inſertion of one word, *viz. if*, in the firſt clauſe of the will, would put it beyond diſpute. As if it ſhould be read, I give to my eldeſt ſon *Daniel* and his heirs, *if* male, for ever, *if* female, then, *&c.* This will make it a very clear caſe, and make his intention very clear alſo, which is a thing very conſiderable in the caſe of wills. And therefore in a caſe lately referred by the lord chancellor to *Holt* chief juſtice and himſelf, between *Hodgkinſon* and *Star*, *A.* ſeiſed of lands in fee had iſſue two ſons *B.* and *C.* and made his will, and deviſed ſeveral lands to *B.* and that *B.* ſhould renounce all his right in *Bleakacre* (of which the deviſor was then ſeiſed) to *C.* and it was objected, that this was no deviſe of the land to *C.* 2. That if *B.* ſhould releaſe his right, this was intended to be only an eſtate for life; but becauſe the words were [all his right] it was apparent, that *A.* intended, that *C.* ſhould have fee; and accordingly they certified their opinions to the lord chancellor. He alſo cited another caſe lately adjudged *in C. B.* where *J. S.* having a remainder in fee deviſed all his remainder to *J. N.* and adjudged, that a fee was deviſed. Therefore in the principal caſe the intent of the deviſor being apparent, and not contrary to the rules of laws, it ought to be fulfilled. And therefore, *per totam curiam*, judgment was given for the defendant.

Where a deviſe is made by words expreſſing the deviſor's whole intereſt, his whole intereſt ſhall paſs. R. acc. Hob. 4. Cowp. 352. Poſt. 831. Lutw. 1. 2. 2 Lev. 91. 3 Mod. 45. Forr. 157. 2 P. Wms. 523. 2 Atk. 37. 2 Vez. 48. 1 Term. Rep. 414. 1 Roll Abr. 834. l. 26. Salk. 236. Prec. Chan. 264. Forr. 284. 3 P. Wms. 295.

poſt. 1324. 3 Atk. 486. Cowp. 299. D. acc. Dougl. 734. vide 1 Vez 226.

Shapcott *verſ.* Mugford.

Intr. Trin. 8 Will. 3. C. B. Rot. 1091. Cook

CASE. The plaintiff declares, that he was poſſeſſed of divers cloſes in *B.* which he ſowed with corn, and when it was ripe, he reaped it, and made it into ſheaves, and duly ſevered the tithes thereof from the other nine parts; that the defendant was proprietor of the tithes; that the plaintiff required the defendant to take away the tithes off his land, but that the defendant did not take them away in convenient time, but ſuffered them to continue there upon the land from

Caſe lies againſt the proprietor of tithes for not taking them away. Adm. Burr. 1891. Palm. 341. 381. Ley. 69. Godb. 329. D. acc. 3 Bulſtr. 337.

Latch. 8. Noy. 31. and the plaintiff may declare with a per quod the graſs did not grow where the tithes lay, and he could not put his cattle into the cloſe to depaſture the reſidue of the graſs, leſt they ſhould hurt the tithes.

the

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the fourth of *June 6 Will.* 3. until the ſuing of this action; *per quod per totum tempus prædictam* the graſs did not grow where the corn lay, and the plaintiff loſt the benefit of the reſidue of the graſs in that cloſe, becauſe he could not depaſture his cattle, for fear of doing damage to the corn. Not guilty pleaded. Verdict for the plaintiff and intire damages given. Serjeant *Gould* moved in arreſt of judgment, that the action will not lie, becauſe the plaintiff might have prevented any injury which this corn could do him. For as ſoon as the tithes are duly ſevered, the property of them is veſted in the parſon; then if upon notice he does not carry them away, they may be diſtrained as damage feaſant, or treſpaſs will lie againſt him. As where an executor does not remove the goods of the teſtator in convenient time after his death, the owner of the houſe, where they are, may have treſpaſs againſt him. *Cro. Jac.* 204, *Stodden* v. *Harvey*. Then when the law has preſcribed a remedy, the party muſt be content with it, and ſhall not have any other. And therefore in this court in a caſe between *Thornton* and *Auſten*, *intr. Hil.* 4 & 5 *Will. & Mar. C. B. Rot.* 1051. the plaintiff brought caſe againſt the defendant, and declared that he was poſſeſſed of a cloſe, and the defendant dug pits in it, &c. *per quod*, &c. and after verdict for the plaintiff it was adjudged, that the action will not lie; becauſe the cauſe of action was properly treſpaſs, for which the party might have an action of treſpaſs, but could not turn it into an action upon the caſe. But the court anſwered, that doubtleſs in the principal caſe the action would lie, and ſo they ſaid it had often been adjudged. See 1 *Roll. Ab.* 109. 1 *Danv.* 206. 2 *Vin.* 13. *pl.* 36, 37. And though it ſhould be admitted, that the plaintiff might have had treſpaſs againſt the defendant for not taking away the corn in convenient time, yet this was no argument, becauſe in many caſes the law allows a double remedy. But they held, as this caſe was, the plaintiff could not have treſpaſs, but only caſe. For he could not have treſpaſs *quare vi et armis* he did not take away his corn, which is but a *non feaſance*. But they agreed, that the caſe of *Thornton* v. *Auſten* was good law, for the plaintiff turned that, which was properly treſpaſs, into an action upon the caſe, only with the deſign to evade the ſtatute of 22 & 23 *Car.* 2. and to get full coſts, though the damages were under 40*s*. And that judgment of the caſe of *Thornton* and *Auſten* the judges of the King's Bench approved. [Note for this ſame reaſon this term between *Hills* and *Clerk* the plaintiff brought caſe againſt the defendant *quare amputavit et ſpoliavit* his corn, by which he loſt it: after verdict for the plaintiff upon the general iſſue pleaded judgment was arreſted.]

For an act immediately injurious, treſpaſs is the proper action, acc. poſt. 1402. 8 Mod. 275. Str. 635, 636. 3 Wilſ. 409. 412. Bl. 894. 899. Burr. 1114. 1559. 2 Wilſ. 313.

Treſpaſs lies not for a non feaſance. R. acc. 8 Co. 146. b. 2d. Reſ. D. acc. 2 Bulſtr. 312. 1 Roll. Rep. 130. 2 Wilſ. 314.

7 Term Rep. 33.

Then

SHAPCOTT *verſus* MUSGRAVE.

Then *Gould* took another exception, that the plaintiff has laid two ſeveral damages in his *per quod*, and intire damages are given, then if the action does not lie for the one part, the whole ſhall be arreſted; but (by him) the action does not lie for the loſs of the benefit of the graſs becauſe he could not depaſture his cattle, *&c.* for he might have put in his cattle without danger; for if the defendant did not take away his tithes in convenient time after notice, the plaintiff might put in his cattle; and though they eat the corn, yet it would be *damnum abſque injuria*. Then to ſuffer the plaintiff to bring an action upon a ſuppoſal that he could not put in his cattle when he might; is to ſuffer him to maintain an action for his own negligence, which the law will not permit. Againſt this *Birch* ſerjeant for the plaintiff anſwered, that the plaintiff could not have put in his cattle; no more than if leſſee for years at the end of his term leave corn upon the land, the leſſor might put in his cattle to eat it, which he cannot juſtify. For where a right is once veſted in a party, he who deſtroys it ſhall be a treſpaſſor. And he cited *Mich.* 22. *Car.* 2. *B. R. Rot.* 249. *Lutſtomb verſ. Porter*, the caſe *in terminis* with the preſent caſe; and after verdict, judgment there was given for the plaintiff. And it was adjudged *per curiam* in this principal caſe, that the plaintiff could not put in his cattle, and eat the corn; for if that ſhould be allowed it would ſubvert the foundation of this action for the other part, which hath often been adjudged maintainable. Beſides that it is unreaſonable, that the plaintiff himſelf ſhould be judge, what is convenient time. And to permit him, if the corn is not removed at the day, to put in his cattle, and eat all the corn, would be a much greater loſs to the parſon, than that which the plaintiff hath ſuſtained by the continuance of the corn upon the land. But it is much more reaſonable to permit the plaintiff to bring an action againſt the parſon, and ſo the court to be judge of the reaſonableneſs of the time, and that the recompenſe be proportionable to the loſs ſuſtained. And therefore judgment was given for the plaintiff.

Tho' the proprietor of tithes does not remove them in a convenient time, the owner of the land cannot put in his cattle and eat them.

Hamon *verſ.* Lord Jermyn.

In caſe for a falſe return to a writ againſt the bailiff of a liberty, if the declaration ſets out the ſubſtance of the writ, and avers that the ſheriff *for the execution thereof* made his man-

CASE againſt the defendant for a falſe return, he being bailiff of the liberty of St. *Edmundſbury*. And the plaintiff declared, that he recovered judgment in *C. B.* againſt *J. S.* for ſo much, upon which he ſued a *fieri facias* directed to the ſheriff of *Suffolk*, which was delivered to him, *qui virtute ejuſdem brevis, et pro executione inde, mandavit* to the defendant *adtunc capitali ſeneſchallo libertatis de Bury, qui virtute ejuſdem brevis* levied 20*l.* and made a falſe return, *&c.* Not guilty pleaded,

date to the defendant, it will after verdict at leaſt be good, tho'it does not ſtate ſpecifically the tenor of the mandate. The bailiff of a liberty cannot execute proceſs unleſs he has a warrant from the ſheriff, D. acc. Keilw. 86. b. Dalt. 459. Imp. 72. Such warrant muſt be in writing. But there is no occaſion for a ſeparate warrant upon every writ: a general warrant to execute all writs, is ſufficient. A declaration cannot be amended in ſubſtance after a verdict.

HAMMON verſus JERMYN.

pleaded, and the verdict for the plaintiff. And ſerjeant *Lutwyche* moved in arreſt of judgment, that here was no mandate to the bailiff; for it is ſaid, that the ſheriff commanded him, but it is not ſaid what to do. But the words *fieri facerei* ſhould have been inſerted, for want of which the declaration was ill For the mandate of the ſheriff in effect is the foundation of this action. For if there was no good mandate the defendant was not bound to execute the writ, and then all the proceedings afterwards will not prejudice him. Upon which at another day ſerjeant *Levinz* moved that the plaintiff might amend; for he ſaid, that this was but *vitium clerici*, and therefore amendable by the ſtatute of 8 *Hen.* 6. He therefore prayed, That upon attendance with the warrant the record might be amended by it. But it was denied by the whole court, for this is the ſubſtantial part of the declaration. And it has never been ſeen, that where attorney has miſtaken a deed in pleading, or the date of a releaſe, that this has been amended by the deed. No more can an amendment be granted in this caſe. But at another day ſerjeant *Levinz* moved that this declaration was good without amendment. For when it is ſaid, that *virtute ejus brevis et pro executione inde mandavit, &c.* it is a ſufficient command to levy the debt, for it is a command to execute the writ which commands to levy the debt. And *Raſt. Entr.* 275. *a.* is in point as the principal caſe is. And in caſes of return it is always ſaid, *mandavi ballivo, qui nullum dedit reſponſum*; without ſaying what to do. And he ſaid, that this exception was moved at a trial before *Holt* chief juſtice and he over-ruled it. And in fact, ſaid he, the ſheriffs make no warrants to the bailiffs of liberties, but they only ſend the writ to them; and they execute it upon ſome general warrant, which they have from the ſheriffs to execute all writs according to the agreement between the ſheriffs and bailiffs. But *(per curiam)* this general warrant ſerves for a warrant to every particular caſe, for there muſt be a warrant in writing, becauſe a command by *parol* to the bailiff of a liberty is not ſufficient. And the difference is between a return and pleading: for in caſe of a return it is generally *mandavi ballivo*, but in pleadings it muſt be ſhewn at large. But in this caſe the whole court held, that the *pro executione inde* was a ſufficient mandate, eſpecially after a verdict, and therefore judgment was given for the plaintiff.

Yabſley *verſ.* Doble.

S. C. 12 Vin. 95.

Confeſſion of an eſcape by the under-ſheriff is evidence againſt the ſheriff.

THE queſtion was, if the confeſſion of an under-ſheriff of an eſcape be any evidence againſt the high-ſheriff; and adjudged that it is. For though the ſheriff is ſuable, yet the under ſheriff gives him a bond to ſave him harmleſs, and therefore it will all fall upon him. And therefore his confeſſion is good evidence, becauſe in effect it charges himſelf.

Copleſton

Copleſton *verſ.* Piper.

Intr. Hil. 7 Wil. 3. C. B. Rot. 1231. Windford.

Treſpaſs for entering a meſſuage and tenement unexceptionable at leaſt after verdict.

But treſpaſs for taking away a parcel of barley, even after verdict, bad for the uncertainty.

Vide ante, 20 poſt. 991.

TReſpaſs *quare clauſum necnon meſuagium et tenementum fregit et quandam parcellam hordei aſportavit, &c.* Upon not guilty pleaded, verdict for the plaintiff, and intire damages given. And laſt *Eaſter* term *Gould* King's ſerjeant moved in arreſt of judgment, 1. That the word *tenementum* is too general and uncertain, for it ſignifies any thing that can be holden. But the *Powells* juſtices ſaid, that ejectment (*a*) *de uno tenemento* is ill for the uncertainty, becauſe in that action the thing itſelf muſt be recovered, and *tenementum* may ſignify a thing for which ejectment will not lie, as an advowſon, *&c.* but in treſpaſs, where damages only are recoverable, the word will ſerve well enough. But in this caſe, it being after verdict, they will intend that it ſignifies the ſame with *meſuagium*, and ſo ſurpluſage, and no damages given for it. To which *Treby* chief juſtice agreed. 2. *Gould* argued, that the declaration was too uncertain, for the jury could not know, for what quantity of barley the plaintiff declared, for the word parcel is very uncertain And therefore, *Cro. Eliz.* 865, 866. *trover* for *parcella piſcium Anglice* ling, judgment was arreſted for the uncertainty. 5 *Co.* 34. *b. Playter's* caſe. Beſides that, it does not appear, whether this parcel was ſevered from the ground, or growing upon it; in which caſes the defendant muſt have different pleas, for in the firſt caſe he might juſtify by diſtreſs, in the laſt he muſt make title to the land. And therefore the plaintiff ought to have declared for ſo many loads of barley, *&c.* But as to this the court ſaid, that after verdict they will intend, that it was ſevered from the land. But as to the other exception they ſaid, that this differs from *Playter's* caſe; for in that caſe there was neither quantity nor quality, but here there is quality. And *Treby* chief juſtice ſaid, that in the term before, treſpaſs *pro tribus ſtruibus foeni, Anglice* ricks of hay, was adjudged good after verdict. And *Powell junior* juſtice ſaid, that *trover pro una parcella fili* had been adjudged good in the King's Bench; and yet there it ſeems that there was uncertainty in the quantity and quality alſo, for there are ſeveral ſorts of thread. So that they ſeem to be of opinion that the principal caſe was well enough; but upon the importunity of the defendant's counſel it was ſtayed till the plaintiff ſhould move for his judgment. And now this term *Darnall* ſerjeant moved for judgment; and ſaid that it was good, after verdict at leaſt. And he cited *Stile* 199, 75, 224, 352, 353. *Cro. Jac.* 664, 665. *Paſch.* 1694. *B. R. Ethe-ick v. Calendar. Trover de tribus peciis vini branditati,*

Trover for a parcel of ling, bad after verdict. Vide Sty. 199.

Treſpaſs for ricks of hay, good after verdict. R. acc. 1 Mod. 289. 290.

Trover for a parcel of thread good after verdict, vide 1 Mod. 289, 296. 1 Vent. 53. 272, 329.

Trover for three pieces of brandy wine, good.

(*a*) R. acc. Str. 834. See 3 Wilſ. 23. Makepeace v. Hopwood, 1 Barnes 117. Cro. Eliz. 116. 186. Poph. 197, 203. Noy. 86. 1 Sid. 295. 2 Keb. 82. 3 Mod. 238. Sed vide Cowp. 350. & 1 Term Rep. 11.

Anglice

COPLESTON *versus* PIPER.

Anglice brandy wine; the defendant demurred generally; and exception there was taken, that *pecia* was a very uncertain word; but it was adjudged well enough after verdict. And in that case *Holt* cited a case between *Brasey* and *Roe*, *trover pro quatuor peciis tracti grasetti*, *Anglice* drawn grasett, which was adjudged good upon demurrer. But *Treby* chief justice said, that a piece of stuff was a quantity known to consist of so many yards; but a parcel of barley is no quantity known. And therefore last *Michaelmas* term in a case between *Smith* and *Theobald*, *trover de quadam parcella culmi*, after verdict judgment was arrested, *nisi*, &c. And in *Trin.* 22 *Car.* 2. *B. R. Rot.* 373. *trover de quadam parcella fili*, it was adjudged ill after verdict. And therefore he thought that judgment ought to be arrested, and it was arrested, *nisi*, &c.

Trover for four pieces of drawn grasett, good upon demurrer, Vide. Sty. 75.

Reynoldson *v.* Blake and the bishop of London.

Pleadings. Lev. Ent. 141. Post. Vol. 3. 238.

THE plaintiffs brought *quare impedit*, for hindring them to present to the church of St. *Andrew's Wardrobe* in *London*; and declare that by the great fire of *London* 2 *Sept.* 1666. the parish churches of St. *Anne Blackfriars* and St. *Andrew's Wardrobe* were burnt; and that by the act 22 *Car.* 2. *cap.* 11. it was enacted, that the parishes of St. *Anne Blackfriars* and St. *Andrew's Wardrobe*, should be united, and that the parish church of St. *Andrew's Wardrobe*, should be rebuilt, and should be the parish church of both parishes; that the several patrons of the respective parish churches should present by turns to this new church; and that the patron of that church, of which the indowments were of the greater annual value, should have the first presentation; then the plaintiffs aver, that the indowments of the rectory of the church of St. *Andrew's Wardrobe* were of greater annual value than the indowments *praedictae vicariae ecclesiae* of St. *Anne Blackfriars*; then the plaintiffs shew that Sir *Thomas Gage* was seised in fee of the rectory impropriate, to which the vicarage of St. *Anne Blackfriars adtunc pertinebat*, and being so seised of the rectory, and being *verus indubitatus patronus inde*, *dedit et concessit* by indenture the said rectory to the plaintiffs and divers others and their heirs, as survivors of whom the plaintiffs bring this *quare impedit*; and shew farther that *James Cade* incumbent at the time of the fire of the church of St. *Andrew's Wardrobe* died, whereby the church became void; that King *Charles* II. as patron of the church of St. *Andrew's Wardrobe* presented *Stoning*, who was admitted, instituted, and inducted, which was the first turn

Q. Whether all vicarages are indowed. Vide 15 R. 2. c. 6. 4 H. 4. c. 12. 1 Bl. Com. 387.

Q. Whether in an averment that one indowment is of greater value than another, the value of the major ought to be shewn under a videlicet.

Q. Whether in pleading the grant of a rectory by deed, the party ought not to shew the consideration and livery of seisin.

Prædictus where it has no antecedent surplusage tho' the word with which it is used is material, and had not been mentioned before. S. C. 3 Lev. 435. R. acc. post. 237. Vide 20 Vin. 214. 4 Bac. 94.

The appendancy of a vicarage to a rectory, is destroyed by an union. In quare impedit the plaintiff should shew a Presentation. S. C. 3 Lev. 435. R. acc. Str. 1006. D. acc. F. N. B. 33. H. Vaugh. 56. Watf. c. 22. 2d ed. 441, to 446. Vide 2 Roll. Abr. 376. Q. R. S. 17 Vin. 417. Q. c. R. c. S. c. 5 Co. 98. a. Or state specially why he cannot. Vide F. N. B. 33. H. Vaugh. 56. Str. 1008. Bl. 772. Watf. ubi supra. Bro. Qua. Imp. 138. Roll. Abr. & Vin. ubi supra. If upon an union the right of presentation is given by rotation to the several patrons of the united churches, in a quare impedit, for the first of any of the turns in the rota, the plaintiff must shew a presentation to the church in right of which he claims. R. acc. Bl. 770. 3 Wilf. 221.

REYNOLDSON verſus BLAKE.

after the fire; that *Stoning* died 6 *Will. & Mar.* whereby the church became void; and it pertained to the plaintiffs to preſent as the ſecond turn, &c. and the defendants diſturbed them, *ad damnum*, &c. the biſhop pleads his common plea as ordinary; and the defendant *Blake* demurs to the declaration.

This caſe was argued ſeveral times at the bar by *Gould* and *Wright* King's ſerjeants for the defendants, and by *Pemberton* and *Birch* ſerjeants for the plaintiffs. And ſeveral exceptions were taken to the declaration, to which the court gave no reſolution.

1 Exc. That the plaintiffs have declared ill, becauſe they ſay, that the indowment of the church of *St. Andrew's Wardrobe* was of greater value than the indowment *praedictae vicariae eccleſiae de St. Anne's Blackfriers*. Now if this had been two churches appropriate, this might have been well, becauſe every church is indowed of the tithes, glebe, &c. but all vicarages are not indowed; therefore the plaintiffs ſhould have ſhewed before, that the vicarage was indowed, which indowment the defendant might have traverſed.

2 Exc. The plaintiffs ſhould have ſaid, that the indowment of the one is of greater value than, *viz.* of ſuch a value. And though it is not obligatory, nor concluſive to the trial, yet for conformity in good pleading it ought to have been ſhewn. 6 *Co.* 47. *a.*

3 Exc. The plaintiffs have pleaded a grant by deed of the rectory, to which the vicarage of *St. Anne's Blackfriers* appertained, by Sir *Thomas Gouge*, and have not alledged any conſideration; ſo that the uſe will be to Sir *Thomas* and his heirs, and executed by the ſtatute, and ſo no title in the plaintiffs.

4 Exc. The plaintiffs have declared, that Sir *Thomas Gouge* by deed *dedit et conceſſit* the rectory to which the vicarage appertained. Now a rectory will not paſs by grant, becauſe it conſiſts of glebe land, &c. And the general practice is to make livery of ſeiſin, and the books compare it to a manor. 16 *Hen.* 7. 3. *b.* 3 *Hen.* 7. 14. *a.* 21 *Hen.* 7. 21. *b.* Leaſe for years of a rectory is good without deed, becauſe it contains glebe land. The ſame law of a parſonage. 19 *Hen.* 8. 12. If the plaintiff had ſaid generally that Sir *Thomas Gouge dedit et conceſſit*, the court would have intended livery; but not now, becauſe he has ſaid that it was by deed, which deſtroys the intendment. And ſo it was adjudged *Paſch.* 15 *Car.* 2. *C. B. George v. Burr*; a conveyance of lands was pleaded by *dedit et conceſſit per chartam feoffamenti*; and it was held ill, becauſe the word *chartam* deſtroyed the intendment of livery, which

Leaſe for years of a rectory or parſonage by parol good.

Intendment of livery is deſtroyed by ſhewing that the feoffment was by deed.

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the court would have had, if it had been pleaded by *dedit* generally.

But the court took no regard to theſe objections; and the judges, when they gave judgment, made but three points in their arguments.

1 Point. Whether the plaintiffs have ſufficiently averred, that the indowment of the church of *St. Andrew's Wardrobe* was of greater value than the indowment of the church of *St. Anne's Blackfriers*. For the act has appointed, that the patron of the church, whoſe indowment is of the greater value, ſhould have the firſt turn: ſo that the indowment of the churches is the meaſure by which the turns muſt be governed. And it was objected by the defendant's counſel, that the plaintiffs have not made a ſufficient averment as to this point; for (ſaid they) the plaintiffs have averred, that the indowment of the church of *St. Andrew's Wardrobe* is of greater value than the indowment *praedictae vicariae eccleſiae de St. Anne's Blackfriers*; whereas they have not made any mention of any vicarage before, to which this relative word *praedictae* can refer; and for this reaſon the averment is not ſufficient; and by this the indowment, which is a ſubſtantial part, is not traverſable. And *Gould* ſerjeant for the defendant argued, that the court could not reject this word *praedictae*; for (by him) the difference is, that where the matter appears once well upon the record, and then a *praedict'* or *ſcilicet* which is repugnant follows, there the court will reject the *praedict'* or *ſcilicet* becauſe there appears enough before to be a foundation of a judgment; but where that which follows the *praedict'* or *ſcilicet*, is material, and the point of the action, and not well ſhewn upon the record before, there it cannot be rejected nor amended. And upon this reaſon the caſes *Cro. Jac.* 149, *Jennings v. Markham*. *Yelv.* 110, *Mordant v. Walden*, *Cro. Jac.* 618, *Hanbury v. Ireland*, are grounded. There is alſo a difference when the caſe is after verdict, and when upon demurrer. As *Paſch.* 4 *Will. & Mar. C. B: Benjamin Dennis* brought treſpaſs againſt *Robert Earl* for breaking his cloſe; and the record was, *Robertus Earl attachiatus fuit ad reſpondendum Benjamino Dennis quare clauſum, &c. fregit, &c.* then comes the declaration and ſays, *et unde idem Benjaminns queritur quod praedictus Benjaminus, &c.* the defendant juſtified for a way, *&c.* and iſſue thereupon, and verdict for the plaintiff; and upon motion in arreſt of judgment, adjudged, that this being after verdict, and it appearing upon the record that the defendant broke the cloſe, it ſhould be amended. But this principal caſe is upon a demurrer, and the matter does not appear well laid before upon the record, becauſe no church is mentioned before; therefore for this reaſon the declaration

declaration is ill, and the word *praedict'* cannot be rejected. But the whole court resolved, that the averment was sufficient, for they would reject the word *praedictae* as surplusage. And *Powell* justice cited *Anon. Hardr.* 330. as a case of the same nature. REYNOLDSON *versus* BLAKE.

2. The second point was, whether by this union the appendancy of the vicarage of *St. Anne's Blackfriers* to the rectory was destroyed; for if it were, it would be fatal to the plaintiffs, because there were not sufficient words in the grant of Sir *Thomas Gouge* to convey an advowson in gross to the plaintiffs, and consequently the plaintiffs had no title.

3. The third point was, whether the declaration was good, notwithstanding that the plaintiffs had not shewn any presentation to the church of *St. Anne's Blackfriers?* And as to the second point, *Powell* justice was of opinion, that the appendancy was not destroyed, but that the right of presentation every second turn to the new church became appendant to the rectory, as the vicarage was before. For the better clearing of which opinion he said, that he would consider, 1. What an union was at common law. And (by him) at common law, the parson, patron, and ordinary, might make union of two weak churches, without the consent of the King. 50 *Ed.* 3. 26. 27. if they were very poor, because the King's concern was very small: but if they were of reasonable value, then the King's consent must concur; because an advowson was a thing which lay in tenure, and might be held *in capite*, and therefore the King might be prejudiced in his ward; and secondly, he might be barred of a casual profit, as a lapse, which in probability might happen sooner where there were two churches, than where there was but one; but yet the ordinary was the chief actor, and therefore if (*a*) the consent of the King was subsequent, it was sufficient.

Parson, patron, and ordinary, might make an union at common law, acc. Salk. 165. If the churches were very poor acc. Cro. Eliz. 501. Watf. c. 16. 2d ed. p. 326. if they were of reasonable value the king's concurrence was necessary acc. Cro. El. 501. (*a*) R. acc. Cro. El. 500. D. acc. Watf. c. 16. 2d. ed. p. 326.

Union was made *concurrentibus his quae in hac parte de jure requirebantur*; and exception was taken, that it was not said by whom the union was made; but it was answered, that this was the act of a spiritual judge, and the common law would not examine it, no more than sentences of the spiritual court. 11 *Hen.* 7. 8. 26. And at that time the law was very uncertain what churches were poor enough, which gave occasion to the making of the act 37 *Hen.* 8. *cap.* 21. the making of which act gave jurisdiction to the common law, to examine if unions were well made. As marriages, though they were originally *alterius fori*, yet when the act of parliament meddled with them, it gave jurisdiction to the temporal judge; and therefore 2 *Roll. Ab.* 778. 21. *Vin.* 594. *Mordant verf. Dobson.* the common law took so far notice of unions

Union of spiritual conusance until 37 Hen. 8. cap. 21. acc. Salk. 165.

At common law a prohibition lay to a suit in the spiritual court on a void union.

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after the act, that the judges granted a prohibition to the spiritual court, for suing the parishioners to come to a church upon a union, where the union was void. And it was a question, whether this act did not exclude all unions at common law? But it was held by three judges against *Popham*, that it did not. *Cro. Eliz.* 500. *Moor* 408. *pl.* 599. & 661, *pl.* 904. 2 *Roll. Abr.* 778, 21 *Vin.* 595. *pl.* 1. *Austed n. Twine.*

An union cannot be made to take effect immediately while the church to be suppressed is full, without the consent of the incumbent. Vide Watf. c. 16. 2d. ed. p. 330.

2. He said, that he would consider the operation of such a union.

After an union the ordinary may compel the parishioners of the suppressed church to come to that to which the union is made, and pay their tithes, &c. sed vide Skinn. 616.

And as to that he said, that it was generally made in time of vacancy of the church, for if the church was full, the act of the ordinary could not prejudice the incumbent, for by the union the incumbency would be destroyed; therefore if the church was full, the consent of the incumbent was necessary. But if the church was full, and the incumbent would not consent, the union could not be made *de verbis in praesenti*; but it might be made *de verbis in futuro, quando vocaverit, &c.* 6 *H.* 7. 14. And after the union the ordinary might compel the parishioners, to come to the church to which the union was made, and to pay their tithes, by process in his court, and no prohibition was grantable. And this was no prejudice to the parishioners, because their *modus*'s continued good; but the parish, as to taxes, duties, rates, reparations of the church, &c. continued distinct. *Hob.* 67. The reparations must be several, for otherwise it might be prejudicial to the parishioners, because the old church might be much less in proportion than the new. But the union made it but one church and one benefice, and it is the benefice to which the union is made. 10 *Co.* 136. *a.* Then if there is but one benefice the other is perfectly extinct. But *Hobart* 158. says, that if a man hath a benefice, with cure, of the value of eight pounds *per annum* and more, he cannot without qualification and dispensation procure another with cure to be united to it afterwards, although they make but one benefice. And it seemed to him, that the opinion of *Hobart* was good law. 2. What becomes of the advowson? The advowson, said he, is but the right of presenting an incumbent to the church or benefice; then if there is after the union but one church and one benefice (as is proved before) then there could be but one advowson, and that is of the church to which the union is made.

Notwithstanding an union the modus's of each parish continue. D. acc. Salk. 165. and each parish as to taxes, duties, rates, repairs of the church, &c. continues distinct vide Carth. 238 Watf. c. 16. 2d. ed. p. 332. 334. Skin. 588. 616. 16 and 17 Car. 2. c. 13. f. 2. sed vide also 4 W. & M. c. 12.

But the advowson of the suppressed church is extinct. D. acc. Salk. 165. Watf. c. 16. 2d. ed. p. 331.

3. He said, that he would consider the difference between tenants in common and coparceners of advowsons, and patrons of united churches.

No union can be made if either of the benefices is of the annual value of 8l. without qualification and dispensation. Vide 37 H. 8. c. 21. 16 & 17 Car. 2 c. 3. and Watf. c. 16 2d. ed. p. 328.

1. By

A writ of right advowſon muſt be brought by the perſon who has the right according to his right.

A quare impedit by the perſons in poſſeſſion according to their poſſeſſions.

Where a church has ſeveral incumbents and ſeveral advowſons, each patron has with reſpect to his

1. By tenants in common (he ſaid) he did not mean, where a man ſeiſed in fee of an advowſon accepts a fine of it, and grants and renders every ſecond turn; but where a man ſeiſed in fee of an advowſon grants a moiety of it. In ſuch caſes the writ of right muſt be *de medietate advocationis*. But where one church has two ſeveral incumbents, and two ſeveral advowſons, and each of them has a diſtinct moiety of the tithes, there the writ of right muſt be *de advocatione medietatis eccleſiae*, and the *quare impedit* in this laſt caſe *ad medietatem eccleſiae* or *eccleſiam*; but in the caſe of tenants in common they (*a*) muſt all join in *quare impedit* againſt a ſtranger; and ſo if the one uſurp upon the other, the other has no remedy; but if (*b*) they do not join in the preſentation, the biſhop may refuſe to admit the preſentee.

advowſon a ſeparate right, D. acc. Co. Lit. 18. a. & Co. 136. a. And a ſeparate poſſeſſion. R. acc. 10 Co. 135. b. 5 Co. 102. a. D. acc. F. N. B. 39. b. Co. Lit. 17. b. 18. a. and 13th Ed. n. 1. Tenants in common have ſeveral rights, but a joint poſſeſſion, Coparceners ſeveral rights, acc. Co. Litt. 18. a. and either a joint poſſeſſion, or ſeparate ſucceſſive poſſeſſions of the whole; acc. Co. Lit. 18. a. Patrons of united churches have ſeveral rights, and ſeveral ſucceſſive poſſeſſions of the whole. Vide Bl. 770.

2. In caſe of coparceners of an advowſon, their right is ſeveral, and therefore becauſe the advowſon is but one, the writ of right muſt be *de medietate advocationis*; but their poſſeſſion is partly joint and partly ſeveral; for if they all join in a preſentation, the biſhop is bound to accept their preſentee, and if they are diſturbed, they ſhall join in *quare impedit*; but (*c*) if they do not agree among themſelves, the biſhop may refuſe all their preſentees; but if the (*d*) eldeſt preſent alone, the biſhop is bound to accept her preſentee by particular privilege which ſhe hath, which (*e*) privilege goes to her aſſignee, &c. But if they make compoſition (which (*f*) may be by *parol*) if a ſtranger uſurp, the againſt whom the uſurpation is made may maintain a *quare impedit* againſt a ſtranger, whether the compoſition be according to common right or otherwiſe. But their poſſeſſions are ſo joint that they cannot uſurp one upon another, no more than tenants in common.

3. Patrons of united churches have alſo ſeveral rights, and therefore the writ of right ought to be *de medietate advocationis*; and their poſſeſſions are alſo ſeveral, ſo that one may uſurp upon the other, and drive him to his *quare impedit*; and each of them, if he be diſturbed, ſhall have his *quare impedit* againſt a ſtranger. So that tenants in common have ſeveral rights but joint poſſeſſions; coparceners ſeveral rights but poſſeſſions partly joint and partly ſeveral; but patrons of united churches have both rights and poſſeſſions ſeveral. To prove which diverſity he cited 33 *Hen.* 6. 11. 5 *Hen.* 7, 8. 14 *Hen.* 6. 15. *Co. Lit.* 186. *b.* *Cro. Eliz.* 688, *Windſor's* caſe. *Co. Ent.* 489. *a.* (*g*) which laſt books prove, that though in caſe of united churches there is but one advowſon in right, yet every patron has the whole ad-

(*a*) Acc. 5 H. 7, 8. Co. Litt. 197. b. (*b*) D. acc. Co. Litt. 186. b. (*c*) Vide Co. Litt. 186. b. (*d*) Watſ. c. 8. 2d Ed. 116. Co. Litt. 186. b. Keilw. 1. 2 Inſt. 365. 34 H. 6. 40. 6. 45. Ed. 3. 12. b. (*e*) R. acc. 1 Vez. 340. Cro. Eliz. 18 D. acc. Watſ. c. 8. 2d Ed. 116. Co. Litt. 186. b. 166. b. and 13th Ed. n. 2. 2 Inſt. 365. (*f*) D. acc. poſt. 537. Bro. Qua. Imp. 118. (*g*) And ſee 10 Co. 135. b.

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vowſon to his turn; but the writ of right muſt be according to the right. See *Windom* v. *Kempes*, *Moor* 867. *Dier* 299. *pl.* 32.

4. He ſaid he would conſider, what would deſtroy an appendancy. If an advowſon by act of the party be once ſevered from the manor to which it is appendant, though but for an inſtant, it becomes in groſs, and the appendancy is deſtroyed for ever. And therefore the difference is, if a man ſeiſed of a manor to which an advowſon is appendant, accepts a fine of the advowſon, and grant and renders every ſecond turn, by the alternate turn the appendancy continues. But if he levies a fine of the advowſon, and accepts a grant and render the appendancy is totally deſtroyed, becauſe there was an inſtantaneous ſeverance. So (*a*) if there be two coparceners of a manor, to which an advowſon is appendant, and they make partition of the manor, without taking notice of the advowſon, the advowſon at each turn continues appendant, (*b*) but if they make expreſs exception of the advowſon upon the partition, it becomes in groſs. If they make partition of the manor, and the demeſnes are allotted to the one, and the ſervices to the other, the manor is deſtroyed, (*c*) and the advowſon becomes in groſs. (*d*) But if the one dies without iſſue, ſo that the demeſne deſcend to her who has the ſervices, or *vice verſa*, the manor is revived, (*e*) and the advowſon becomes appendant again, becauſe it was by act of law. So that the diverſity is, where the ſeverance is by act in law, and where by the act of the party. 17 *Ed.* 3. 38. 12 *Hen.* 7. 5. The queſtion then will be, if the union be an act in law? And he was of opinion, that it was, becauſe it is made by the ſpiritual judge, who is the chief actor in it. And though the advowſon be deſtroyed by the union, yet when it is ſevered in turns, each turn becomes appendant ſtill, becauſe it is done by act in law, which does not alter the nature of the thing. And that union does not deſtroy the appendancy, he cited *Dier* 259. *b.* as an expreſs authority, and *Windſor*'s caſe is an authority in point. For that was a *quare impedit* for a church united as appendant, as appears by *Cro. Eliz.* 688. If then at common law union would not deſtroy the appendancy, much leſs will an act of parliament do it, which is an act of the higheſt law, which deſigns to do no wrong to any, but only to take away the incumbency, and give to each a ſecond turn inſtead of it, and in the ſame plight, as he had the advowſon before. Therefore he was of opinion in this caſe that this act of parliament had not deſtroyed the appendancy, but that the plaintiffs had good title to preſent every ſecond turn by the grant of the rectory.

But *Nevill* juſtice and *Treby* chief juſtice againſt this for the defendants argued, that the appendancy was deſtroyed by the union, and then nothing paſſed by the grant of Sir *Thomas*

An appendancy if ſevered by act of the party, is deſtroyed, vide poſt. 301, 302. If by act of law ſuſpended only.

(*a*) F. N. B. 62. F. poſt. 301. 537.

(*b*) 8 Co. 79. b. Co. Lit. 122. a. Fitz. Quar. Imp. 59.

(*c*) D. acc. 1 Leon. 204.

(*d*) Bro. Quar. Imp. 118.

(*e*) D. acc. 1 Leon. 204.

Thomas Gough to the plaintiffs. For the *ad quam*, &c. conveyed nothing, if there was no appendancy. And *Treby* chief justice said, that union was originally the subject of the canon law, concerning which there are many rules which have been received by the common law, and thereby became part of it, for the interpretation of which, regard might be had to the spiritual law, in which they were first used. *Cro. Eliz.* 501. And in foreign countries rights of advowson and patronage are determined in spiritual courts, but our common law admits of no such thing. *Qu?* 2 *Inst.* 273. *Doct. and Stud. Dial.* 2. *c.* 36. REYNOLDS *versus* BLAKE.

Linwood provinc. 159. *constitution Othonis* 35. says, that by union the church which is united is extinct, and of the two benefices the more worthy shall be retained; and all unions ought to be perpetual and unlimited, and by consent of all the parties concerned; but the patrons are more than consenters, for they extinguish an old interest; for the church united is a new thing created, and there is another patron and patronage created than were before; so that this church is not the ancient rectory nor vicarage, but *novum aliquid tertium* composed of both; and he who is made patron by the ordinary (for the patronage may be limited as well to one as to both) may have a *quare impedit*, though he has not had execution by presentment. 50 *Edw.* 3. 27. *a.* So that it must be a new advowson, which is created; and not the old, which continues. And this new advowson is not appendant, neither in respect of the one nor of the other; but it is like the case of an escheat; where *Blackacre* is held of the manor, and escheats, it is incorporated and become parcel of the manor. So that the vicarage here is extinct and the advowson also (and if the vicarage were not extinct, it would be against the plaintiff, for then the (*a*) *quare impedit* ought to be brought for the vicarage) and instead of the vicarage every second turn is given to present to this new church, which is in gross, and cannot be appendant. And it seemed to him, that the patronages of the distinct parishes were annihilated, and a new advowson created, which should go every second turn to the several former patrons, which is a new advowson in gross. And though it might be objected, that there was here the agreement of all parties, that the second turn should come instead of the vicarage, and in the same plight as that was. He confessed, that union was wholly by agreement; and the parties have power to appoint the turns, but not to make an appendancy, for no consent, but time immemorial only, can do that. Appendancy consists wholly in prescription, and passes in grants under the words *cum pertinentiis*. It is true, that in pleading there is no need to lay a prescription. 4 *Co.* 37. *a. Tirringham's* case. But it must be always taken that it was by prescription. Then

Where lands held of a manor escheat, they become parcel of the manor.

(*a*) D. acc. Com. 750. F. N. B. 32 H.

Appendancy consists wholly in prescription. Co. Lit. 121, b. Bl. 773.

But in pleading it there is no necessity to lay a prescription. Co. Lit. 122. b. and 13th Ed. n. a. 2.

there

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there cannot be here any appendancy, becauſe the beginning of this new church and advowſon is well known, and ſhewn in the declaration. Beſides, that it is impoſſible to make a new church appendant, for that would be in effect, to make that which is done at this day, to be done long ago. As to the caſe of *Dier* 259. which is the only caſe, where *quare impedit* is brought upon an united church; the words of the book are [*Et iſſint ſemble en l'autre caſe per l'opinion d'aſcuns*] which imply, that others were of a contrary opinion. 2. This point of appendancy is an unneceſſary queſtion there, as appears by reading the caſe.

Objection, *Windſor*'s caſe, *Cro. Eliz.* 688.

Anſwer. That was not a church united, nothing of it appears in any of the other reports of the caſe, nor in the record itſelf, but it ſeems to be an imaginary diſcourſe of *Croke*; but yet there were the words *adhuc pertinet*, which are wanting in this caſe; but there was no neceſſity there, to ſpeak of an union, for he would ſuppoſe (which is not at all improbable) that there were two lords of two adjoining manors, who contributed to the building of the church; the one contributed more by one part than the other, and ſo reſerved to himſelf two turns, and the other lord had the third turn; ſo that there was no neceſſity to reſort to *Croke*'s imagination of an union, to maintain the declaration in *Windſor*'s caſe; but this ſuppoſition is much more probable and agreeable to the rules of law, for *patronum faciunt dos, ædificatio, fundus*. Heretofore it was doubted, whether the advowſon of the vicarage was appendant to the rectory, 17 *Edw.* 2. 51. and it was long before a vicar obtained the repute of a corporation; but it is now ſettled, that it may be appendant to the rectory; and *Coke* ſays, that it may be appendant to a manor.

Advowſon of a vicarage may be appendant to the rectory, vide Moor 894. Or a manor. R. acc. 1 Roll. Rep. 235. Cro. Jac. 385. Moor. 894. 1 Roll. Abr. 231. 1 Danv. 501. 2 Vin. 596. pl. 14.

As to the diverſities taken by *Powell* juſtice between tenants in common, and coparceners of advowſons, and patrons of churches united, he ſaid that the books were clear, and he agreed with them. But compoſition, he ſaid, might make an advowſon appendant to become in groſs, but not *e contra*.

If a man brings *quare impedit* for an advowſon appendant to a manor, he has no neceſſity to ſhew preſcription for the appendancy, but may ſay generally, that he was ſeiſed of a manor, to which the advowſon is appendant. In the ſame manner in this caſe when the plaintiff has once executed his turn by preſentment in *quare impedit* afterwards he has nothing to do, but to ſhew, and ſay, that he was ſeiſed of every ſecond turn *ut in groſſo*, and has no need to derive his title higher. *Vaugh.* 2. *Cro. Eliz.* 811. 3 *Leon.* 163. *Cheverton*'s caſe.

Objection

Objection. This would do a wrong, to deſtroy the appendancy, and convert it into an advowſon in groſs.

Anſwer. An advowſon in groſs is as beneficial as an advowſon appendant, and this turn given by the act of parliament comes inſtead of the vicarage, but cannot be appendant, becauſe it is impoſſible, ſince all the world knows that it begun but by the act. And though the union is by act of parliament, it is not material; for when an act concerns a particular eſtate it is but a higher ſort of conveyance. And then if it makes uſe of the terms of the common law the court ought to make ſuch conſtruction as the commonlaw would have made. For which reaſons he was of opinion, that the appendancy was wholly deſtroyed.

A ſtatute concerning a particular eſtate is but a higher ſort of convey ance, and to be conſtrued as ſuch, vide ante 164.

As to the third point, whether the declaration was good notwithſtanding that no preſentation was laid to the church of St. *Anne's Blackfriers*, all the court was of opinion that the declaration for this fault was ill, and therefore that judgment ought to be given for the defendant.

Powell juſtice ſaid, that a preſentation to a church is the only poſſeſſion. A grant will veſt a title in the grantee, but nothing will give poſſeſſion but a preſentation. Then it would be abſurd to maintain a poſſeſſory action without a poſſeſſion. Therefore a preſentation is always neceſſary for the maintaining of a *quare impedit*, except in ſome ſpecial caſes; as if a man found a church, and before he preſents he is diſturbed, he ſhall maintain a *quare impedit* without ſhewing a preſentation, by ſhewing the ſpecial matter. So if a church has been appropriated time whereof, *&c.* ſo that none knows who was the laſt incumbent, if the appropriation be diſſolved, ſo that the church reverts to the heir of the firſt founder; if he be diſturbed he may ſhew the ſpecial matter, and maintain a *quare impedit* without ſhewing a preſentation. The ſame law if a man be diſturbed after recovery in a writ of right of advowſon, before he has preſented, though heretofore it was a queſtion. So where the King is intitled by office, that *J. S.* died ſeiſed of an advowſon, *&c.* though this does not give the King ſuch poſſeſſion, as the office gives of lands (for there before a man can controvert the King's title he muſt traverſe the office, but in the caſe of an advowſon if the King brings a *quare impedit* a man may controvert his title before he has traverſed the office); yet the King upon ſuch office may maintain a *quare impedit* before preſentation. But in this caſe a preſentation ſhould have been ſhewn, which the defendant might have traverſed. And though it was objected, that the act made uſe of this word patron as *deſignatio perſonae*

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perſonae, and therefore the averment that Sir *Thomas Gouge* was *verus et indubitatus patronus* was enough; the court anſwered, that if the act intended this word patron as *deſignatio perſonae*, then it muſt be an advowſon in groſs, and conſequently the plaintiffs would have no title, by the reſolution of the ſecond point. But it appears, that the act did not deſign it as a deſignation of the perſon, but refers it to the former right; and therefore the plaintiffs, to intitle themſelves, ought to make Sir *Thomas Gouge* compleat patron in law, which ſhould be by ſhewing a preſentation. For if there were an uſurpation upon Sir *Thomas Gouge*, and the ſecond turn had happened during the uſurpation, the uſurper muſt preſent, until he is removed. And *Powell* juſtice ſaid, that *Raſt. Entr.* 522. *a.* was a caſe almoſt in point, and gave great light to the matter of the union, and that in *quare impedit* a preſentation muſt be ſhewn before the union, and by reaſon of which defect alone *Powell* juſtice was of opinion, that judgment ought to be given for the defendant. *Treby* chief juſtice ſaid, that if the plaintiffs had claimed it as the old vicarage, that then a preſentation ought to be ſhewn as well in this as in all the other caſes of *quare impedit* put by *Powell* juſtice, for preſentment makes a title where there is none, and proves a title where there is one. *Vaugh.* 9, 10. *Str.* 1011. But as this caſe is, he doubted more of this than of the ſecond point; for the *quare impedit* is not brought for the vicarage which is deſtroyed, but for the new church; and therefore this title to the vicarage ſeems but inducement. But yet he ſaid, that he inclined to believe that the plaintiffs ſhould have laid a preſentation, becauſe general pleading is always diſallowed, as well in caſes upon ſtatutes as at common law. *Hob.* 295. *W. Jones* 6. 11 *Hen.* 7, 8. 5 *Ed.* 4. 5. *b.* And though it is objected, that the act ſays [the patron, &c.] and the plaintiffs have averred, that Sir *Thomas Gouge* was patron; yet they ſhould have ſhewn, how he was patron, for the reaſons aforeſaid given by *Powell* juſtice. And though it was objected, that iſſue might be taken, whether he was patron or not; he anſwered, it was difficult to traverſe ſo general a word as patron, or not; and there was but one precedent of ſuch a general iſſue, which is 28 *Aſſiſ.* 22. But one ought not to rely upon that book, becauſe pleading was not then arrived at any perfection. One cannot take iſſue upon the word heir, &c. For which reaſons he was of opinion, that the declaration was ill in this point alſo. Judgment was given for the defendant.

Where a perſon claims as patron or heir, he cannot aver generally that he is patron or heir, but ought to ſhew how he is ſo.

Note, *Powell* juſtice ſaid to *Treby* chief juſtice, that *Holt* chief juſtice agreed with him as to the ſecond point againſt the opinion of *Treby*. In error brought in *B. R.* the judgment was affirmed, but reverſed in parliament afterwards, as *Levinz* reports, 3 *Lev.* 437. *Lev. Ent.* 143.

Ludding-

Luddington *verſ.* Kime.

Intr. Trin. 5 Will. & Mar. C.B. Rot. 1561.

S. C. 3 Lev 431. Salk. 224. 3 Danv. Abr. 183. pl. 24. 1 Eq. Abr. Deviſes. D. pl. 23. 4th Ed. p. 182.

2 Kenn. 326.

REplevin of cattle taken in *Willoughby*, in a place called *Weſtfield*, 11 *Nov.* 3 *Will. & Mar.* The defendant makes conuſance as bailiff to *Syms*, and ſhews, that Sir *Thomas Barnardiſton* was ſeiſed in fee of the place where, &c. and being ſo ſeiſed 29 *Octob.* 3 *Will. & Mar.* demiſed it to *Syms*, to have and to hold from the 29th of *October* 3 *W. & Mar.* until the 25th of *March* following; and the defendant as bailiff to *Syms* took the cattle in the place where, &c. damage feaſant, &c. The plaintiff pleads in bar of the conuſance, that *Armyn Bellingham* was ſeiſed in fee of the place where, &c. and licenſed the plaintiff to put in his cattle, &c. and traverſes the ſeiſin in fee of Sir *Thomas Barnardiſton*. Upon which iſſue is joined. And the jury find a ſpecial verdict, that Sir *Michael Armyn* being ſeiſed in fee of the manor of *Willoughby*, whereof the place where, &c. *eſt et adtunc fuit parcella*, made his will, by which (after a deviſe of a rent-charge out of the ſaid manor) he deviſed the ſaid manor to *Evers Armyn* for life without impeachment of waſte, and in caſe that he ſhould have any iſſue male, then to ſuch iſſue male and his heirs for ever, and if he ſhould die without iſſue male, then to Sir *Thomas Barnardiſton*, nephew to the deviſor and his heirs for ever; the jury find, that Sir *Michael Armyn* died, that *Evers Armyn* entred, and was ſeiſed *prout lex poſtulat*; and being ſo ſeiſed ſuffered a common recovery to the uſe of himſelf and his heirs for ever; and deviſed this manor to *Armyn Bellingham* and his heirs for ever; and died without having any iſſue; that Sir *Thomas Barnardiſton* entred, and demiſed to *Syms*; that *Armyn Bellingham* entred upon him, and licenſed the plaintiff to put in his cattle, and that he did accordingly; and that the defendants as bailiffs to *Syms* took the cattle damage feaſant; *et ſi &c.* This caſe was argued ſeveral times by ſerjeant *Pemberton* for the plaintiff, and ſerjeant *Birch* for the defendant in *Eaſter* term 8 *Will.* 3. and by ſerjeant *Wright* for the plaintiff, and ſerjeant *Levinz* for the defendant in *Hilary* term 8 *Will.* 3. And now in this term the judges pronounced their opinions in ſolemn arguments on the bench.

The word iſſue in a will may, and where words of limitation are ingrafted upon it, ſhall, be a word of purchaſe. S. C. cit. Fearne 3d Ed. 107. R. acc. 8 Mod. 253, 382. Str. 798. Fitz. 7. 10 Mod. 181. Gilb. L. & Eq. 20, 129. Doe v. Reaſon, cit. 3 Wilſ. 242, 244. Vide 1 Vent. 232. Fearne, 3d Ed. 102 to 110. A limitation which may take effect as a contingent remainder ſhall never be conſtrued an executory deviſe R. acc. 2 Saund. 380. 1 Sid. 47. 1 Keb. 119. Com 372. D. acc. 1 Term. Rep. 632. Fearne 3d Ed. 295, 300. Dougl. 252. No eſtate limited after a contingent limitation in fee, can be veſted. S. C. cit. Fearne 3d Ed. 160. R. acc. 1 Sid. 47. 1 Lev. 11. 3 Wilſ. 237. D. acc. Fearne 3d Ed. 276, 277. 294, 295. See Fearne 3d Ed. 161. An eſtate may be limited to ſeveral perſons in fee upon concurrent

The firſt point that was made in this caſe was, whether the eſtate deviſed to *Evers Armyn* was an eſtate tail, or for life only. If it was an eſtate tail it would be clear for the plaintiff, for then it would be a common caſe; *Evers Armyn* tenant in tail, remainder to Sir *Thomas Barnardiſton* in fee, *Evers Armyn*

contingencies S. C. cit. Fearne 292. R. acc. 1 Sid. 47. 1 Lev. 11. 1 Keb. 119. 3 Wilſ. 237. Dougl. 251. vide Dougl. 486. n. 2. The deſtruction of the particular eſtate deſtroys the contingent remainders which depend upon it. S. C. cit. Fearne 3d Ed. 282. R. acc. 1 Co. 66. b. 1 Sid. 47. 1 Lev. 11. Raym. 28. 1 Keb. 119. 3 Wilſ. 237. Dougl. 251. D. acc. 1 Co. 130. b. 1 Keb. 753. vide Fearne 3d Ed. 241 to 262. A recovery ſuffered by the particular tenant gives him a good right againſt any perſon who claims under a contingent remainder S. C. cit. Fearne 3d Ed. 282.

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may well ſuffer a common recovery, and bar all remainders. But the whole court reſolved, that *Evers Armyn* had but an eſtate for life.

Powell juſtice ſaid, that he would conſider, 1. The caſe as if the deviſe to the iſſue male had been omitted, *viz.* as if the words had been, I deviſe to *Evers Armyn* for life without impeachment of waſte, and if he die without iſſue, then to Sir *Thomas Barnardiſton* in fee. 2. He ſaid, that he would conſider all the words collectively, as they are in the will.

1. As to the firſt he ſaid, that there were apt words to raiſe an eſtate tail by implication, as *Cro. Jac.* 415, 448. 9 *Co.* 127. *b.* But in all theſe caſes no expreſs eſtate for life was deviſed. But where there are words which convey an expreſs eſtate for life, as in this caſe, there ſubſequent words will not create another different eſtate in the ſame party by implication; for which he cited *Dier* 171. *a. pl.* 7. 330. *b. pl.* 20. *Cro. Eliz.* 248. *Moor* 593. 2 *Leon.* 226. *Cro. Eliz.* 15. 16. *Moor* 123. 3 *Leon.* 130. 4 *Leon.* 41. 1. *Mod.* 189. 2 *Roll. Rep.* 281. 1 *Bulſt.* 219. And though my lord chief juſtice *Hale* in 1 *Vent.* 230. was of a contrary opinion (to whom he bore a great deference) yet he could not concur with him; for the books cited by *Hale, viz.* 1 *Roll. Abr.* 837. *l.* 1. *Moor* 682. 2 *Roll. Abr.* 253. *l.* 46. *Styl.* 249, 273. depended upon particular reaſons. But *Plunket* v. *Holmes intr. Hil.* 1658. *B. R. Rot.* 521. 1 *Sid.* 47. 1 *Lev.* 11. *Raym.* 28, 1 *Keb.* 29. 119. is an expreſs authority for this opinion of his own; where *(a)* a man deviſes to his ſon *T.* for life, and after his deceaſe, if he die without iſſue living at his death, to *L. &c.* it was adjudged that *T.* had an eſtate for life only. But *Treby* chief juſtice in his argument ſaid, that if the deviſe had been to *Evers Armyn* for life, and if he died without iſſue male, then to Sir *Thomas Barnardiſton*, that this had been an expreſs eſtate tail in *Evers Armyn*; becauſe it could not be ſuppoſed, that the deviſor intended to make a breach in the eſtate, *viz.* that *Evers Armyn* ſhould have it for his life, and when he died it ſhould revert to the heir of the deviſor until the iſſue of *Evers Armyn* were dead, for it could not go to the iſſue of *Evers Armyn*, admitting that it was not an eſtate tail in *Evers Armyn*, becauſe there was no deviſe to the iſſue of *Evers Armyn*, and Sir *Thomas Barnardiſton* could not have it until *Evers Armyn* was dead without iſſue, and therefore in the *interim* it muſt revert to the heir of the deviſor, which was apparently againſt his intention. Beſides, that (by him) tenant in tail in many reſpects is but a bare tenant for life, as to charge, *&c.* And though the words without impeachment of waſte were added, that will not hinder it from being an eſtate tail. For which he cited *Old Bendl.* 31. *pl.* 126. as expreſs in point. Note, That is a limitation by fine.

Notwithſtanding an expreſs deviſe to a man for life, he may take an eſtate tail by implication. Per cur. acc. 1 P. Wms. 605. 8 Mod. 260. R. cont. 2 Vern. 427. 449. D. cont. 1 P. Wms. 154.

Tenant in tail has in many reſpects no more power than a bare tenant for life. D. acc. 1 Vent. 232. vide 2 Bl. Com. 115.

(a) The deviſe in Plunket v. Holmes was "to Thomas for life, and if he died without iſſue living at his death to a ſon by another venter and his heirs, but if Thomas had iſſue living at his death to Thomas and his heirs," which brings it in ſeveral particulars very near this caſe.

As

As to the ſecond, *Powell* juſtice ſaid, conſidering all the words collectively as they were in the will, that *Evers Armyn* had but an eſtate for life; and the whole court agreed with him. And they held farther, that the iſſue male of *Evers Armyn* (if there had been any) would have taken a fee by purchaſe. For, 1. They held, that though the word iſſue is ſometimes conſtrued as heirs, and a word of limitation, yet in a deviſe it may be a word of purchaſe as well as of limitation. When it is taken as a word of limitation, it is collective, and ſignifies all the deſcendants in all generations; but when it is taken as a word of purchaſe, it may denote a particular perſon, as *Cro. Eliz.* 40. *Savil.* 75. 1 *Anderſ.* 132. 2 *Leon.* 35. prove, that this word iſſue may be *deſignatio perſonæ*. And *Treby* chief juſtice ſaid, that words leſs apt had been uſed and allowed good, for words of purchaſe. 1 *Co.* 95. *b.* Feoffment (*a*) to the uſe of *A.* for life, and after his death to the uſe of his heirs, and the heirs females of their bodies; the word *heirs* was allowed for a good name of purchaſe. So 1 *Co.* 66. *b.* *Archer's* caſe. And yet heir is more naturally appropriated to limitation than to purchaſe; but becauſe it appeared that the intention of the parties was to uſe it as *deſignatio perſonæ*, and a word of purchaſe, it was allowed good. Much more ſhall the word *iſſue* be allowed a good word of purchaſe, where the party intends that it ſhall be ſo, and that intention is apparent. But the chief caſe upon which they relied, was the caſe of *Clerk v. Day*, 1 *Roll. Ab.* 839. *l.* 32. *Cro. Eliz.* 313. *Owen* 148. *Moor* 593. (*b*) the record of which they had ſeen; and though no judgment is entred upon the roll, yet *Moor* (who reports the caſe as depending more than a year after the time of which the other reporters make mention, and who probably reports it more exactly, for *Croke* was then but a young reporter, and *Rolle* reports it but by hearſay, for then he had not begun to ſtudy the law) reports, that judgment was given. And that caſe is a ſtronger caſe than this in queſtion; and *Hale* chief juſtice mentions the ſame caſe in 1 *Vent.* 232. and ſeems to allow it. The ſecond queſtion then will be, whether the intention of the teſtator appears in this caſe, that the word iſſue ſhould be *deſignatio perſonæ*, or whether he deſigned it to be a word of limitation? And they held, that the teſtator deſigned it to be a deſcription of the perſon, becauſe he added a farther limitation to the iſſue, *viz.* and to the heirs of ſuch iſſue for ever. In the caſe of *King v. Melling*, 3 *Keb.* 100. *Hale* chief juſtice ſaid, if the limitation had been, to the iſſue of the iſſue, or the heirs of the iſſue, in that caſe the word iſſue ſhould be taken as *deſignatio perſonæ*, and the iſſue had been a purchaſer. And *Treby* chief juſtice ſaid, that this caſe is diſtinguiſhable from all the other caſes: for the words are, if he ſhall have

The word "iſſue" when a word of limitation, is nomen collectivum.

When a word of purchaſe, not. D. acc. Str. 804. Fitzg. 321. vide 1 Bro. C. C. 220.

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(*a*) Vide 1 Ark. 413. 1 Bro. C. C. 220. Fearne 3d Ed. 141.

(*b*) See an accurate ſtate of this caſe as taken from the roll, and which differed from all the reports of it, Fitzg. 24. Fearne. 3d Ed. 102.

any

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any iſſue then to ſuch iſſue, &c. Now the words [ſhall have] are conditional, and have reſpect to the birth of a ſon not then in *eſſe*; and the word any is all the ſame as one. Then in common ſpeech when a man has a ſon, it is ſaid that he hath iſſue; ſo that it is almoſt the ſame thing as if he had ſaid, if *Evers Armyn* ſhall have any one ſon. And this is not a ſtrained conſtruction, conſidering all the circumſtances of the caſe, for in *Burchet* and *Durdant*'s caſe the court expounded the words [heir then living] to be all one as the word ſon. Then in this caſe, if it had been the word ſon, it had been without controverſy. And though it was objected, that iſſue is a collective word, and that if *Evers Armyn* had had two ſons, it had been uncertain which of them ſhould take; he agreed, that iſſue was a collective word, but ſometimes alſo it was taken ſimply; and when it ſhall be the one or the other, muſt be determined by the circumſtances of the caſe; and therefore in this caſe the firſt ſon ſhould have taken. But *Powell* juſtice ſaid, that if *Evers Armyn* had had two ſons, and then Sir *Michael Armyn* had deviſed to the iſſue of *Evers Armyn*, both the ſons of *Evers Armyn* would have taken; becauſe iſſue is a collective word, and it would not have been void for uncertainty, as is ſaid, *Cro. El.* 742. 2 *Anderſ.* 134. which caſe he denied to be law. And *Bridgman* chief juſtice of the common pleas had denied the ſame caſe heretofore, in the caſe of *Bate* and *Amherſt v. Norton. Raym.* 83. 2 The court ſaid, that if this ſhould be conſtrued an eſtate tail in *Evers Armyn*, ſome of the words in the will muſt be rejected, as, 1. The clauſe without impeachment of waſte, for every tenant in tail is diſpuniſhable of waſte. 2. The word heirs limited after iſſue male; which will apparently oppoſe the intent of the deviſor, for he intended that all the daughters of ſuch iſſue ſhonld inherit, for the words will convey a fee to the iſſue; but if it ſhould be made an eſtate tail in *Evers Armyn*, all the daughters of the iſſue would be excluded, becauſe it muſt be an intail male, if it is any intail.

Objection. It was objected at the bar, that it was the deviſor's intent, that every iſſue male of *Evers Armyn* ſhould take; but if the court conſtrue this a purchaſe in the iſſue male, then a poſthumous ſon of *Evers Armyn* cannot take. For if he could take, it muſt be, either by way of contingent remainder, or of executory deviſe. Not the firſt, becauſe the remainder will not veſt before the particular eſtate determines, *viz.* before the death of *Evers Armyn*. And executory deviſe it cannot be to ſuch a poſthumous ſon, becauſe it will not happen within the uſual time allowed for executory deviſes to take effect, which is but the ſpace of the life of one man then *in eſſe*; but this would be too long a time, being after the death of *Evers Armyn*.

An w.

Anſw. But to this objection *Powell* juſtice ſaid, that there were (*a*) two ſorts of executory deviſes; the one where the intire eſtate paſſes out of the deviſor, as *Cro. Jac.* 590. *Pell*'s and *Brown*'s caſe. 2 *Roll. Rep.* 217. (which *Treby* chief juſtice ſaid was properly the executory deviſe); the ſecond ſort is a ſort of future deviſe, in which in the mean while the land deſcends to the heir of the deviſor, as *Hainſworth* and *Prety*'s caſe, *Cro. Eliz.* 919. *Moor* 644. and the time allowed for ſuch to take effect, was no more than one life then *in eſſe*. But *Powell* juſtice ſaid, that if this had been a deviſe to *Evers Armyn* for life, and if after his death he ſhould have a poſthumous ſon born by his wife, then to ſuch ſon and his heirs, and if not, then to Sir *Thomas Barnardiſton* in fee, he was of opinion, that if *Evers Armyn* in ſuch caſe ſhould have a poſthumous ſon, he would have taken by way of executory deviſe; for though this would not happen within the life of *Evers Armyn*, yet happening ſo ſhort a time after the death of *Evers Armyn*, as it muſt be to be the ſon of *Evers Armyn*, he was of opinion, that this would have been a good executory deviſe. But *Treby* chief juſtice doubted much of that, and was of opinion, that the time allowed for executory deviſes to take effect ought not to be longer than the life of one perſon then *in eſſe*; and ſo it was held in *Snow* and *Cutler*'s caſe, 1 *Lev.* 136. But in this caſe the whole court was of opinion, that this was a contingent remainder to the iſſue of *Evers Armyn* in fee; and therefore a poſthumous ſon could never take for want of a particular eſtate to ſupport the remainder, until he came *in eſſe*. And if the limitation had been to the firſt ſon, it had been the ſame thing, for a poſthumous ſon there could not have taken; and though the intent of the deviſor might be otherwiſe, yet his intent could not controul a rule of law ſo ſtrongly eſtabliſhed, that a contingent remainder ought to veſt during the particular eſtate, or *eo inſtante* that it determines. And for theſe reaſons all the court held that *Evers Armyn* took an eſtate for life by this deviſe, remainder contingent to his iſſue male in fee.

(*a*) Vide Fearne 3d ed. 303. LUDDINGTON *verſus* KIME.

A limitation to the poſthumous ſon if, &c. of deviſee for life, is good by way of executory deviſe. See Burr. 2159. Fearne 3d ed. 421. and particularly Dougl. 478.

A contingent remainder muſt veſt during the exiſtence or at the very inſtant of the determination of the particular eſtate. R. acc. Salk, 227. 4 Mod. 282. Carth. 309. Camb. 252. 12 Mod. 53. Holt. 228. Skinn. 430. 3 Lev. 408. 2 Saund. 380. 3 Keb. 11. 2 Lev. 39. Semb. acc. poſt. 311. and vide Fearne 3d. ed. 233, to 262.

2. point. The ſecond point was, whether this eſtate limited to Sir *Thomas Barnardiſton* was a remainder veſted, or contingent, or an executory deviſe. If it was a remainder veſted, then *Evers Armyn* being but tenant for life, by his recovery had forfeited his eſtate, and Sir *Thomas Barnardiſton* might take advantage of it; or if it was an executory deviſe to Sir *Thomas Barnardiſton* the recovery will not bar it; but if it was a contingent remainder, then it was deſtroyed by the recovery ſuffered by *Evers Armyn*.

Nevill

Remainder vested or contingent.

LUDDINGTON *versus* KEMP.

Nevill justice was of opinion, that this was a remainder vested in Sir *Thomas Barnardiston*, for which he relied upon *Hutt.* 118, *Napper v. Sanders. Cro. Car.* 265. *Boreton v. Nichols.* And as to the case of *Plunket v. Holmes*, 1 *Sid.* 47. he said, that admitting it to be law, it differed from this case; for there it was one intire clause, but here there are intervening clauses between the devise to *Evers Armyn*, and that to Sir *Thomas Barnardiston*; wherefore he was of opinion, that the recovery was a forfeiture of the estate of *Evers Armyn*, and that Sir *Thomas Barnardiston* might take advantage of it, and consequently that the judgment ought to be for the defendant. But *Treby* chief justice and *Powell* justice held, that this was a plain contingent remainder; and though *Evers Armyn* forfeited his estate upon the recovery, yet it destroyed the contingency. For where a contingency is limited to depend upon an estate of freehold, which is capable to support a remainder, it shall never be construed an executory devise, but a contingent remainder. 2 *Saund.* 388. and *Reeve* and *Long*'s case adjudged *in C. B.* and affirmed *in B. R. Salk.* 227. 4 *Mod.* 282. *Comb.* 252. *Carth.* 309. 12 *Mod.* 53. *Holt.* 228. 3 *Lev.* 408. *Skinn.* 430. upon error brought; though the judgment was reversed in the house of lords, but (*a*), *&c.* For executory devises are only admitted in cases of necessity, with caution that they do not introduce any inconvenience, as perpetuities, *&c. Co. Lit.* 18. *a.* 1 *Co.* 85. *b. Vaugh.* 269. The first remainder therefore in this case was a contingent fee to the issue male of *Evers Armyn*; and this remainder to Sir *Thomas Barnardiston* is contingent also, not contrary to, but concurrent with the former, according to the notion in *Plunket* and *Holme*'s case and is a contingency with a double aspect. For if *Evers Armyn* had had issue male, then the remainder had vested in such issue male in fee; if he died without issue male (that is to say, said *Treby* chief justice, if he never had issue male) then to Sir *Thomas Barnardiston* in fee. And these are not remainders expectant, the one to take effect after the other, but are (*b*) contemporary. And as to the objection, that this differs from the case of *Plunket* and *Holmes*, because there were intervening clauses, they answered that that would make no difference.

(*b*) vide Dougl. 487. n. 2.

And as to the objection, that this remainder was vested in Sir *Thomas Barnardiston*.

They answer, that after a contingent fee is limited, no subsequent limitation can be vested. 10 *Co.* 85. *a. Leonard Loveis*'s case. But the devise here to the issue male is a fee, as before is said, and therefore the remainder to Sir *Thomas Barnardiston* could not vest, But where the mean estates are particular estates (whether they

(*a*) By this &c. is to be understood "contrary to the opinion of all the judges." Vide Salk. 228. 3 Lev. 404.

are veſted or not) a remainder limited over may veſt. And the caſes *Hutt.* 118. and *Cro. Car.* 363, are of mean particular eſtates, and therefore there the remainder might well veſt; for in the latter caſe (which is ill reported by *Croke*) it appears in *Littlet. Rep.* 159. 253. 285 315. 344 that the meſne eſtate was adjudged an eſtate tail; and therefore that will be no authority to govern this caſe. Therefore they concluded, that *Evers Armyn*, having deſtroyed the contingent remainder limited to Sir *Thomas Barnardiſton* by the recovery, gained a fee; and though it was tortious, yet it will be good againſt all perſons, but the right heirs of Sir *Michael Armyn* the deviſor. LUDDINGTON v. KITE.

Serjeant *Levinz* objected, that upon this verdict the plaintiff could not have judgment, for when *Evers Armyn* ſuffered the recovery, and entred, having forfeited his eſtate for life, he became a diſſeiſor; then when Sir *Thomas Barnardiſton* entred, he was a diſſeiſor; then when *Armyn Bellingham* entred, claiming by the deviſe of the diſſeiſor, he could not be in at a better condition than the diſſeiſor was, and therefore when he entred he was a diſſeiſor; ſo that Sir *Thomas Barnardiſton* was ſeiſed in fee at the time of the demiſe to *Sym*; and whether it was a rightful or a tortious ſeiſin, againſt a diſſeiſor, is not material. And therefore the iſſue is found for the defendant.

But to this objection the court anſwered, that *Armyn Bellingham* entred by title; for admitting that *Evers Armyn* was a diſſeiſor, yet he had right againſt all perſons except the diſſeiſee, and conſequently his deviſee has the ſame right: and then the ſeiſin of Sir *Thomas Barnardiſton*, which he had gained by abatement, was avoided; and ſo the iſſue for the plaintiff. And therefore (*a*) judgment was given, that the plaintiff ſhould have return, *&c.* For judgment is entred upon the record for the plaintiff. (*b*)

SERJEANT *Pemberton* moved to amend a fine, in which Sir *John Forth* was conuſee, and Sir —— *Manwaring*, conuſor, which was levied off the manor of *Ighfield*, where the deed, which declared the uſes, was of the manor of *Ightfield*, which was the true name. And it was amended. Fine amended by the deed to declare the uſes in the name of the manor of which it was levied. vide ante 134. Cruiſe c. 8. N. this is every day's practice in the C. B.

(*a*) Note in 3 Lev. 435. the parties are ſaid to have come to a compromiſe before any judgment given; but that ſuch compromiſe was not concluded upon until after judgment, is very clear from Salk. 225. 5th Ed. n. 2 Bro. P. C. 5 Str. 804. Fitz. 21. 22. 3 Wilſ. 240.

(*b*) This judgment was in effect affirmed in the Houſe of Lords in Barnardiſton and Carter, 2 Bro. P. C. 1. and ſee 1 P. Wms. 506.

Birt qui tam *verſ.* Rothwell.

Intr. H. 8 Will. 3. C. B. Rot. 1608.

The falſe deſcription of a public ſtatute, is even after verdict fatal, if the party expreſsly refers to the ſtatute he has deſcribed. S. C. cit. Lutw. 140. 19 Vin. 506. pl. 22. D. acc. poſt. 382.

Miſtaking the place of holding the parliament at which a ſtatute was made is a falſe deſcription of the ſtatute.

Where a parliament ſtated to be held *until* a particular day, ſuch day is included. S. C. cit. 19 Vin. 506. pl. 21.

The practice of entering recordaturs to prevent the alteration of records, is out of uſe.

THE plaintiff brought an action upon the ſtatute 21 *Hen.* 8. *cap.* 13. for 25*l.* for non-reſidency by the defendant for five months. The defendant pleaded a former action depending. The plaintiff replied, that it was brought by fraud, *&c.* And iſſue thereupon and verdict for the plaintiff. And *Jenner* ſerjeant moved in arreſt of judgment, that the plaintiff has miſrecited the ſtatute. For he ſays, that by a ſtatute made at the parliament held and begun the third of *November* 21 *H.* 8. at *Weſtminſter*, *&c.* whereas there is no ſuch ſtatute; for the parliament was held the third of *November* at *London*, and was adjourned afterwards to *Weſtminſter*, and he cited *Cro. Eliz.* 853. *Bond v. Tricket.* And ſerjeant *Wright* of the ſame ſide produced a copy of the writ of ſummons, which was to appear the third of *November* at *Bridewell* in *London*; and ſo is the title of the act upon the parliament rolls. *Levinz e contra* for the plaintiff, ſaid, that all the precedents are as the plaintiff has declared. *Raſt. Entr.* 599. *b. Robinſ. Entr.* 414. expreſs. And the (*a*) defendant in his plea, has pleaded the ſtatute, as the plaintiff has done in his declaration. And the parliament might meet the third of *November* at *London*, and be adjourned the ſame day to *Weſtminſter*. But he confeſſed, that the ſureſt way of pleading is to ſhew, that the parliament was held ſuch a year of the King, without taking notice of the commencement, which is good pleading. And as to the caſe in *Croke*, the exception was taken there, but what was done upon it *non conſtat*. But *Wright* anſwered, that it appeared by the printed ſtatute book, that the parliament was not held at all at *Weſtminſter* the third of *November*; for it is ſaid, that it was prorogued to *Weſtminſter*, and continued there forty-four days, *viz. uſque ad* the ſeventeenth of *December*. Now there are forty-four days excluſive of the third of *November*. For the *uſque ad* in ſuch caſes of acts of parliament always includes the day to which the *uſque ad* is applied; to which the court agreed, but in all other caſes the *uſque ad* is excluſive of the day; but in caſes of acts of parliament it is uſually ſaid, that the parliament was held *uſque ad* ſuch a day, *quo die* it was prorogued. And *Treby* chief juſtice ſaid, that the word *prorogation* was not found upon the rolls, until the time of *Edward* the Fourth. But as to the principal caſe, the court ſaid, that they ought to be very nice, how they proceeded in this caſe, ſince there are many precedents of the ſame nature, and therefore *curia adviſare vult*. Then it was moved

(*a*) Vide Cro. Jac. 139.

on the behalf of the defendant, that a *recordatur* might be entred, to hinder any alteration of the record. But *per curiam*, that practice is not now in uſe. But *Cook* chief prothonotary ſaid, that the uſe heretofore of entring a *recordatur* was, *recordatur*, that this record is without alteration or interlineation: and then if there were any alteration afterwards, it would appear upon the record, to have been made after the *recordatur* entred. But now the practice is, to make a rule of court, that all things ſhall continue *in ſtatu quo*; and then it ſhall be tried by *affidavit*, whether there has been an alteration or not. *Poſt.* 343.

BIRT v. ROTHWELL.

—— *v.* Lee.

FALSE judgment was brought, to reverſe a judgment of an inferior court, where the plaintiff declared, that the defendant being indebted to him in ſuch a ſum for money before to him lent, he aſſumed to pay him at ſuch a place *infra juriſdictionem curiae* The defendant pleaded, *non aſſumpſit infra ſex annos*. And upon iſſue joined, verdict for the plaintiff, and judgment. And exception was taken, that it is not ſaid, that the money was lent *infra juriſdictionem curiae*. And for this cauſe the judgment was reverſed. For, *per curiam*, though the debt is tranſitory, and is a debt in every part of *England*, yet it ought to be laid, to ariſe within the juriſdiction of the inferior court. But if the plaintiff had ſhewn, that the money had been lent *infra juriſdictionem curiae*, or if it had been for goods there ſold; the plaintiff would have had no need to ſay, that the defendant aſſumed to pay *infra juriſdictionem curiae*; becauſe the law creates the promiſe upon the creation of the debt; which debt being within the juriſdiction, the promiſe ſhall be intended there alſo.

An *indebitatus aſſumpſit* in an inferior court muſt ſtate the conſideration of the promiſe to have ariſen within the juriſdiction, otherwiſe it will be even after verdict, bad. R. acc. 1 Sid. 65. 1 Lev. 50. 1 Keb. 128. 190. 760. 1 Lev. 137. 156. 1 Keb. 842. 382. 1 Sid. 87. 2. Lev. 87. 1 Vent. 243. 3 Keb. 164. 1 Show. 395. T. Jon. 230. poſt. 1310. 2 Wilſ. 16. 1 Term.

Ict. D. acc. Cowp. 20. 1 Saund. 75. quod vide. See alſo 1 Keb. 481. 512. 522. Raym. 75. 1 Lev. 96. Str. 827. poſt. 795. 1040. But it need not ſtate the promiſe to have been made wit in it. D. cont. poſt. 1042.

Earl of Hereford *verſ.* Syly.

TRESPASS for taking of a boat. The defendant pleads, that it was wrecked, and caſt by the ſea upon the cloſe of the plaintiff, and that the defendant ſeiſed it as belonging to the King. The plaintiff replies, and preſcribes for wreck. The defendant demurs. And motion was made, that the defendant might waive his demurrer, becauſe the King was concerned, and take iſſue. But *per curiam*, that is, when the King is party to the record, he has ſuch a prerogative; but every perſon, who ſets up a title for the King has it not, as the defendant does in this caſe. But *adjournatur*.

The king when party to a ſuit may by his prerogative waive any of his pleadings and plead de novo. D. acc. 5 Rep. 104. a. 10 Mod. 200. Vaugh. 65. 1 Vent. 117. 2 Roll. Rep. 41. Bro. Prærog. pl. 64. D. arg. Hardr. 83. and vide Dy. 53.

But no other perſon though he may ſet up a title under the King, can.

Drinkwell *verſ.* Fowkes.

An averment that a writ iſſued after the teſte is inadmiſſible. R. cont. Skinn. 62. T. Jon. 149. 1 Vent. 363. Raym. 161. 2 Keb. 173. 189. Burr. 950. D. cont. poſt. 409. 486.

DEBT upon judgment. The defendant pleaded in abatement, that a writ of error was ſued ſuch a day upon the judgment, which writ of error is ſtill depending undetermined, *&c.* The plaintiff replies, that the original in debt was ſued, before the writ of error was ſued, as appears by the *teſte* of the original. The defendant rejoins, that the original bore *teſte* ſuch a day, which was before the writ of error was ſued: but that in fact the original was not ſued out until ſuch a day, which was after the writ of error was ſued. The plaintiff demurs, ſuppoſing that the defendant was eſtopped by the *teſte* of the original. And of that opinion was *Treby* chief juſtice, who cited this caſe as adjudged; debt was brought upon a penal law, which by the ſtatute ought to be ſued within a year; the defendant pleaded the ſtatute, and that one year was elapſed before the ſuing of the action, *&c.* the plaintiff replied, that he ſued an original *teſte* ſuch a day, which was within the year; the defendant rejoined, that though the writ bore teſte within the year; yet it was ſued after the year; the plaintiff demurred; and adjudged by the whole court, that none ſhall be admitted, to aver, that an original was ſued at any time contrary to the *teſte*. But *Powell* juſtice was of the contrary opinion, and ſaid, that if a man is arreſted, and afterwards a writ is ſued with a *teſte* antedated; in (*a*) falſe impriſonment this may be avoided by pleading. *Adjournatur.*

(*a*) Vide Raym. and 2 Keb. ubi ſupra.

Braithwait *verſ.* Matthews. C. B.

A ſuit cannot be maintained in the ſpiritual court for words which are actionable at common law. D. acc. poſt 243. vide Com. Dig. Prohibition G. 14. edit. 1780. vol. 4. p. 507, 508. Words charging a man with cheating, are actionable. R. acc. Burr. 1088.

MATTHEWS libelled againſt *Braithwait* in the ſpiritual court, for having ſaid, *Matthews* is a rogue, a cheating rogue, and keeps rogues company. Prohibition was granted.

Hilliard *verſ.* Jeffreſon.

The ſpiritual court has no juriſdiction where the right to freehold comes in queſtion, R. acc. Str. 1013. 1 Wilſ. 17. D. acc. poſt. 543. vide Com. Dig. Prohibition F. 2. 2d. edit. 1780. vol. 4. p. 492.

A Parſon libelled againſt the defendant in the ſpiritual court of *York*, for having cut elms in the church-yard. Prohibition was granted, upon ſuggeſtion, that they grew on his freehold.

Eaſter Term

9 Will. 3. B. R. 1697.

Sir John Holt *Chief Juſtice.*

Sir Thomas Rokeby
Sir John Turton
Sir Samuel Eyre
} *Juſtices.*

Dr. Groenvelt's caſe.

15 Jenk Ins 130 — 7 Mod 653

DR. *Groenvelt* being committed laſt vacation by the cenſors of the college of phyſicians, was this term brought into the King's Bench by *habeas corpus*, upon which the gaoler returned, that the ſaid doctor being examined laſt vacation, and convict, by the cenſors of the college of phyſicians for his ill practice upon the body of *J. S.* in the year 1692, by which the ſaid *J. S.* died, was fined by the ſaid cenſors 20*l.* and committed to gaol, until he ſhould be delivered by the ſaid college, or otherwiſe by due courſe of law. Upon which return the court reſolved ſeveral points.

Where a man is fined and committed for an offence, it ought to appear upon the ſentence, whether the commitment is to inforce the payment of the fine only, or by way of diſtinct puniſhment.

R. acc. Skinn. 676. All fines for offences belong de jure to the king. S. C. 3 Salk. 265. 12 Mod. 119. But he may grant them over. S. C. 3 Salk. 265. 12 Mod. 119. Vide 1. W. & M. Seſs. 2. c. 2. ſ. 1. 2 Inſt. 48. His power however of pardoning any offence, and thereby preventing the fine, continues notwithſtanding. S. C. 3 Salk. 265. 12 Mod. 119. R. acc. Skinn. 676. and vide 2 Hawk. 391. c. 37. ſ. 33. The king cannot transfer or extinguiſh his right to pardon offences. S. C. 3 Salk. 265. 12 Mod. 119. 1 Show. 284. 27 H. 8. c. 24. Mala praxis in a phyſician is an offence at common law. S. C. 3 Salk. 265. 12 Mod. 119. The proceedings of the college of phyſicians againſt perſons for mala praxis are in the nature of criminal proſecutions. S. C. 3 Salk. 265. 12 Mod. 119. And therefore prevented by a pardon of the offence. S. C. 3 Salk. 265. 12 Mod. 119.

1. Reſ. That the ſentence or judgment was too general, for the cauſe of commitment ought to be certain, to the end that the party may know for what he ſuffers, and how he may regain his liberty; if he was committed for the fine, it ought to be until he pay the fine; but if the intent of the cenſors was to puniſh him, not only by fine, but alſo by impriſonment, they ought to have made them two diſtinct parts of the judgment, by condemning him to priſon ſo long, and from thence alſo until he ſhould pay the fine.

2. Reſ. That the King is *creditor pœnæ* (as *Rokeby* juſtice termed it) and that all fines for offences *de jure* belonging to him; becauſe it is his correction, and the public revenge is in his hands; but yet the king may grant them, as in this

Dr. Groenvelt's Case.

case he has done to the college of physicians; and in like manner many lords of liberties have the fines for offences committed within their lordships.

3. Resolved, That although the fine belongs to a subject by the King's grant, as in this case to the college of physicians; yet the King by pardon of the offence before the fine is set, may in like manner pardon the fine. And as to the objection, that by this means the King may make his own grant ineffectual; the court answered and resolved, that the King neither by grant nor otherwise can pass his power, or extinguish that power which he hath to pardon offences. For *per Holt* chief justice it is a personal trust and prerogative in him, for a fountain of grace and bounty to his subjects, as he observes them deserving or useful to the public. And *per Roke-by* justice, as he cannot but have the administration of public revenge, so he cannot but have a power to remit it by his pardons, when he judges it proper. Of necessity then, when the offence is pardoned, the fine is destroyed, to whomsoever it may belong; because the fine is the penalty of an offence; and as there is no offence where the crime is pardoned, so there cannot be any penalty imposed for the offence.

4. The fourth point, if the *mala praxis* of the doctor in the year 1692 was not pardoned by the several acts of grace which have been made since; for then the commitment was illegal, tho' imposed only for a punishment, and not for the fine. And it was argued, that this power of correction in the hands of the college was in nature of a private judicature; instituted for the redress and reparation of those persons, who lose their friends by such prejudicial means; that it is their satisfaction and right, as an appeal is; for this male practice has injured a private person, and the law allows him satisfaction by this punishment; the name of the King is not used in the proceedings, as in an indictment or information; therefore the offence ought to be regarded, not as an injury to him but to the party, for which this punishment is *quasi* a recompence, and therefore cannot be pardoned, no more than an appeal.

But the court resolved, that *mala praxis* is a great misdemeanor and offence at common law (whether it be for curiosity and experiment or by neglect) because it breaks the trust which the party has placed in the physician, tending directly to his destruction. But yet the King may pardon it, as he pardons greater crimes. And the proceedings against the doctor in this case were not, as was objected, for reparation to the party, for that ought to be by action upon the case, nor is it a civil prosecution as an appeal is; but a sort of criminal proceeding for the correction of the doctor; and that therefore it could not be at this time (after so many general pardons) imposed upon him. And the doctor was discharged.

Rex

Rex *verſ.* Ingram et al'.

To the record of a riot on view under 13 H. 4. c. 7. f. 1. the ſheriff or under-ſheriff must be a party. S. C. 12 Mod. 123 Salk. 539. Carth. 383. Comb. 423 D. acc. Comb. 173. vide Raym. 386. But to an inquiſition after the riot he need not. S. C. 12 Mod. 123. Salk. 593. Carth 383. Comb. 423. R. acc. Comb. 173 vide 1 Hawk. c. 65. f. 33. ſuch inquiſition ſhould import to be taken for the king only, Vide 12 Mod Salk. & Carth. ubi ſupra. But it will not be bad tho' it import to be taken pro corpore comitatus alſo. It may be taken after the expiration of a month from the time of the riot. S. C. 12 Mod. 123. Salk. 593. Carth. 383. Comb. 423. Semb. acc. Comb 173. Vide 1 Hawk. c. 65. f. 31. 6 Mod. 141. 1 Sid. 186. See now the ſtat. 1 Geo. 1. cap. 5.

Ingram and a hundred others being found guilty of a riot upon two inquiſitions taken before juſtices of peace according to 13 *Hen.* 4. *cap.* 7. (*a*) now moved in arreſt of judgment. Upon which theſe points were reſolved by the court.

1. When a riot is ſuppreſſed by the juſtices together with the ſheriff, having the *poſſe comitatus* with them for that purpoſe, and they convict the rioters by a record of the force upon their proper view, the ſheriff ought to be a party to ſuch inquiſition, and ſo he ought by the 13 *Hen.* 7. *c.* 13. But if the rioters diſperſe of themſelves, and after they are parted, an inquiſition is made of it by two juſtices of peace; there is no need that it appear by the inquiſition, that the ſheriff was party to the inquiry; becauſe the juſtices may make the inquiſition without him.

2. When the conviction of a riot is by inquiſition taken before two juſtices of peace, the inquiſition has no need to be, as taken *pro domino rege et corpore comitatus*, but *pro domino rege* is ſufficient, or rather better; for their inquiry is not for the county, but for the King, and ſo is the conſtant form of ſuch inqueſts. But when an inquiſition is by the grand jury, then it ought to be *pro domino rege et corpore comitatus*. Sir *William Williams* objected that *et corpore comitatus* was ill, becauſe their authority was not divided, or derived partly from the King and partly from the county, but from the King only, and executed only for him; and therefore (by him) it ought not to be *pro corpore comitatus*. But this nicety was not regarded, and the court ſeemed to be of opinion that they were the ſame.

3. That tho' the words of the ſtatute are, that the juſtices, *&c.* ſhall make inquiry within one month after the riot, *&c.* yet an inquiry by them after the month is good. For the ſtatute intended only to haſten their proceedings, by ſubjecting them to the penalty in caſe they did not make enquiry within the month, and not to reſtrain their authority to the month, ſo as it could not be executed afterwards; for the lapſe of the month makes them incur the penalty, but does not determine their power.

(*a*) By 13 H. 4. c. 7. f. 1. If any riot aſſembly or rout of people againſt the law be made in parties of the realm, the juſtices of peace, three or two of them at the leaſt, and the ſheriff or under-ſheriff of the county where ſuch riot, aſſembly, or rout ſhall be made, hereafter ſhall come with the power of the county, (if need be) to arreſt, and ſhall arreſt them; and the ſame juſtices and ſheriff or under-ſheriff, ſhall have power to record that which they ſhall find ſo done in their preſence againſt the law; and that by the record of the ſame juſtices and ſheriff, or under-ſheriff, ſuch treſpaſſers and offenders, ſhall be convict in the ſame manner and form as is contained in the ſtatute of forcible entries. And if it happens that ſuch treſpaſſers and offenders be departed before the coming of the ſaid juſtices, and ſheriff, or under-ſheriff, that the ſame juſtices, three or two of them, ſhall diligently inquire within a month after ſuch riot, aſſembly, or rout of people ſo made, and thereof ſhall hear and determine according to the law of the land.

Guilliam *verſ.* Hardy.

To a ſci. fa. againſt bail a plea of payment by the principal muſt ſhew that it was made before the return of the firſt ſci. fa. S. C. 3. Vin. 505. pl. 6. R. acc. 12 Mod. 112. D. acc. ante 157. B. R. may award a certiorari to remove a record from an inferior court. S. C. 4 Vin. 331 pl. 6. in marg. The ſame law in C. B. ſo held by all the judges Hil. 8 & 9 W. 3. C. B. 1696. Bro. certiorari. pl. 11. 4 Vin. 331. pl. 6. A ſcire facias in B. R. upon the judgment of an inferior court muſt ſhew how it was removed into B. R. S. C. Salk. 320. Carth. 390. On a removal by certiorari, the plaintiff can only have execution within the inferior juriſdiction. S. C. 3. Salk. 320. R. acc. Hutt. 117. Litt. 357. 360. 363. D. acc. 1 Lev. 134. Vide 1 Sid. 213. 1 Keb. 749. Cro. Car. 23. See alſo 2 Inſt. 23. F. N. B. 246. & 19 G. 3. c. 70. ſ. 4. Secus on a removal by writ of error. S. C. 3 Salk. 320. R. acc. 1 Sid. 213. 1 Lev. 134. 1 Keb. 735. 749. D. acc. Hutt. 117.

GUILLIAM brought a *ſcire facias* againſt the defendant as bail to *J. S.* in an action brought by the plaintiff *Guilliam* againſt him in the palace court, in which action the plaintiff obtained judgment; and this *ſcire facias* was to ſhew cauſe, why the plaintiff ſhould not have execution generally, *&c.* The defendant pleads payment by the principal before the return of the ſecond *ſcire facias*; which was agreed to be a bad plea, becauſe the recognizance was forfeited by the return of the firſt *ſcire facias*. The plaintiff demurs, and adjudged that the *ſcire facias* ought to abate. And reſolved,

That a record may be removed into the King's Bench, as well by *certiorari* out of the King's Bench, as by *certiorari* out of the Chancery and removal hither by *mittimus*.

If the judgment of an inferior court is removed into *B. R.* by *certiorari*, and the party ſues a *ſcire facias* to have execution upon ſuch judgment; he ought to ſhew in his *ſcire facias* that it is the judgment of ſuch an inferior court removed hither by *certiorari*, and ought to ſhew the particular limits of the inferior juriſdiction, and pray execution within the particular limits. But if the judgment be removed into *B. R.* by writ of error, and affirmed, the party may have execution in any part of *England*, for by the affirmance it is become the judgment of the King's Bench. But in a *ſcire facias* upon ſuch a judgment affirmed here the plaintiff ought to alledge, that it was removed hither by writ of error. And with this agrees 1 *Sid.* 213. 1 *Lev.* 134. 1 *Keb.* 735, 749. *& Riſam verſ. Godwin. Hutt.* 117. *Litt.* 357. 360, 363. And therefore becauſe in the principal caſe the *ſcire facias* did not expreſs by what means the judgment was removed into the King's Bench, and general execution is prayed, where it does not appear to the court, that they can grant ſuch general execution, for perhaps the record was removed by *certiorari*. For this reaſon the court adjudged, that the *ſcire facias* ought to be abated.

A reference to a record by "ſicut per inſpectionem recordi nobis conſtat," bad. S. C. 3 Salk. 320. 18 Vin. 185. pl. 3. in marg. Vide Raym. 50. & 18 Vin. 185. pl. 3. vide 4 Ann. c. 16. ſ. 1. ante 93.

The *ſcire facias* was ill, becauſe it recited the judgment of the inferior court, *ſicut per inſpectionem recordi nobis conſtat*; for if the defendant pleads *nul tiel record*, it ought to be tried by the record itſelf, and not *per inſpectionem recordi*. But it ought to have been *prout patet per recordum*. And therefore for theſe reaſons the *ſcire facias* was abated. *Jacob.*

Parker

Parker *verſ.* Mellor.

S. C. Carth. 398. 12 Mod. 122. 19 Vin. 25. pl. 3.

REPLEVIN. The defendant pleads property in *J. S.* and prays *retorno habendo*. And exception was taken to the plea, that the defendant could not have return, becauſe he confeſſed the property in a ſtranger. And Mr. *Carthew* for the defendant cited a caſe between *Butcher* and *Porter*, *Hil.* 4 *Will. & Mar.* where property was pleaded in bar as in this caſe, and return was granted. And he took this difference, that where the plea goes to the point of the writ, ſo that you can never have ſuch a writ, there you can never keep the cattle; otherwiſe where the plea goes in bar of the action. And he cited *Cro. Jac.* 519. And *Holt* chief juſtice remembred the caſe between *Butcher* and *Porter*, *Salk.* 94. *Carth.* 243. 1 *Show.* 400. and return was granted there, becauſe the plaintiff had not any right to the cattle. And he cited 39 *Hen.* 6. 35. where though the avowry was ill, yet the plaintiff having no right a return was granted, And therefore in this caſe judgment was given for the avowant, and a return granted. *Jacob.* The ſame point reſolved *Paſch.* 10 *Will.* 3. *B. R.* between *Parrel* and *Scrimſhaw*.

In replevin upon a plea which goes to the point of the action the defendant ſhall have a return without an avowry. R. acc. Cro. Jac. 519. 2 Roll. Rep. 64. 2 Lev. 93. 3 Keb. 232. Salk. 94. Carth. 244. 1 Show. 401. 6 Mod. 81. poſt. 985. D. acc. 1 Vent. 249. 6 Mod. 103.

Brown *verſ.* Corniſh.

S. C. Salk. 516.

INdebitatus aſſumpſit. The defendant pleads payment according to the promiſes, *&c.* The plaintiff demurs ſpecially, 1. Becauſe the plea, as he conceived, amounted to the general iſſue. *Sed non allocatur*. For *per Holt* chief juſtice it is generally true, that no plea which admits, that there was once a cauſe of action, amounts to the general iſſue. 2. The ſecond exception was, that the defendant does not pray judgment of the plaintiff's action, but ſays, *quod onerari non*, *&c.* And *per Holt* chief juſtice the defendant ſhould not plead in this caſe, *onerari non*, *&c.* becauſe the diſcharge is by matter *ex poſt facto*, and there was once good cauſe of action. But in debt upon bond if the defendant pleads *non eſt factum*; or if it be brought againſt an heir, and he pleads *riens per deſcent*, the defendant may plead *onerari non*, becauſe he does not admit any cauſe of action; but in this caſe it could not be pleaded. And therefore judgment was given for the plaintiff. *Jacob.*

A. drew a bill of exchange upon *B.* payable to *C.* or order; *B.* accepts it; *B.* pays the money to *C.* *C* indorſes the bill payable to *D*; *D.* brings caſe againſt *B.* who pleads payment to *C.* before the indorſement, *D.* demurs ſpecially; and adjudged, that this amounts to the general iſſue *non*

Matter which might be given in evidence on the general iſſue, may be pleaded ſpecially if it admits the plaintiff had once a cauſe of action. R. acc. poſt. 566. 787. A plea which admits the plaintiff had once a cauſe of action ought not to begin with an onerari non.

Brown v. Corkish.

non assumpsit. Adjudged *Mich.* 8 *Will.* 3. *B. R. Tercera Dimater* and *Hooper.* Reported to me by Mr. *Place.*

Hallet *verſ.* Birt.

S. C. Skinner 674. Carth. 380. 5 Mod. 252. 12 Mod. 121. Pleadings 5 Mod. 248.

A juſtification muſt admit a cauſe of action in the plaintiff. R. acc. ante 38. In treſpaſs for taking goods a juſtification which denies the plaintiff's right of property, muſt ſhew that he was poſſeſſed. S. C. 1 Salk. 394. 3 Salk. 272. Acc. Br. treſpaſs pl. 70. 4 Vin. 554. pl. 2. 10 Rep. 89. a. See alſo 10 Rep. 90. b. 91. a. A hundred court cannot preſcribe to grant replevins out of court. S. C. Salk. 580.

TRESPASS for taking of three cows in a place called *B.* The defendant juſtifies, that the biſhop of *Saliſbury* was ſeiſed of the hundred of *A.* in fee, in right of his biſhoprick; and then he pleads preſcription for a hundred court, to be held from three weeks to three weeks; and that upon plaints levied in the ſaid court, or before the ſteward out of court, replevins time whereof, *&c.* have been granted to him who levied the plaint, of the taking of cattle, *&c.* that the plaintiff *cepit et imparcavit* theſe three cows, being the cows of *J. S.* in the place where, *&c.* within the hundred; that *J. S.* levied a plaint of this before the ſteward out of the court; upon which the ſteward granted replevin, *&c.* by virtue whereof the defendant as bailiff of the ſaid hundred court replevied the ſaid cows, *&c.* The plaintiff dumurred. And exception was taken to the plea, that the defendant ſhould have given colourable property at leaſt to the plaintiff; for the poſſeſſion given by the plea is not ſufficient colour. 5 *Hen.* 7. 18. *a.* *Bro. Colour* 43. *Cro Eliz.* 262. And for default of this, the plea amounted but to the general iſſue. For the effect of the plea is, that theſe cows belong to *J. S.* Now a plea of property in a ſtranger amounts to the general iſſue, and is ill. 27 *Hen.* 8. 21. *a.*

But ſerjeant *Gould* for the defendant argued, that the defendant has confeſſed poſſeſſion in the plaintiff, which is ſufficient colour in treſpaſs. 7 *Hen.* 6. 35. *a.* 14 *Hen.* 4. 25. *a.* *Fitzh. Colour* 243. And though it is objected, that the defendant has alledged, that the plaintiff *imparcavit* the cows (which is impounded) ſo that the cows were in the cuſtody of the law, and not in the poſſeſſion of the plaintiff; he anſwered, that *imparcare* ſignifies but to incloſe, whereby the plaintiff might the better keep the cows in his poſſeſſion. 2. By him, it is not neceſſary in this caſe, that the plaintiff give colour; for where the defendant by his plea makes title to himſelf, he ought to give colour; but not where he alledges property in a ſtranger, eſpecially in the caſe of an officer, who might juſtify by reaſon of a proceſs out of the King's court. Beſides, that ſometimes it is (*a*) ſufficient for the defendant to lay the whole matter before the court by ſpecial pleading, though he might have given the ſame matter in evidence upon the general iſſue. 2 *Vent.* 295. *Hob.* 127. *Fitzh. Colour* 15.

(*a*) Vide ante 87. poſt. 566.

But *per Holt* chief juſtice, *et totam curiam*, the defendant has not confeſſed here any poſſeſſion in the plaintiff; for the

the defendant having pleaded, that the plaintiff *cepit et impariavit* the cows of *J. S.* who is a ſtranger, though *impariare* ſignifies to incloſe only, yet that will not aid it; for whether the pound be private or publick, he who puts them in, has diveſted himſelf of the poſſeſſion and property of the cattle. Then ſince the defendant has alledged the property to be in *J. S.* before and until the impounding, and at the time of the impounding they became in cuſtody of the law, the defendant has not given any good colour to the plaintiff, becauſe it is not continued. But the defendant ought to have pleaded, that the plaintiff *cepit et detinuit* the cows; and then he had given ſufficient poſſeſſion to the plaintiff. 2. After ſeveral arguments at the bar it was reſolved, that the ſubſtance of the plea was ill; for the ſheriff could not replevy by plaint at common law but by writ only, and that in his county court. But by the ſtatute he might replevy by plaint out of court. Then ſince the ſheriff could not have done this at common law, the hundred court, which derives its authority from the county court, cannot do it by preſcription. And the ſtatute of *Marlb.* 52. *H.* 3. *c.* 21. does not extend to the hundred court. Therefore this replevin granted out of this court is ill, eſpecially being granted by the ſteward, who is not a judge of the court. And the uſage in ſuch caſe will not after the law. Therefore judgment was entred for the plaintiff. See *Fitzh. N. B.* 73. *B. C.* 2 *Inſt.* 140, 141. *Co. Lit.* 145. *b.* Mr. *Shelley.*

HALLET v. BIRT.

(a) Hundred court cannot preſcribe to grant replevins by plaint.

(a) The different Reports do not agree as to the opinion of the court upon this point. See extracts from each. 19 Vin. 20. under pl. 8.

Breedon *verſ.* Gill.

Entry 5 Mod. 269. vol. 3. 179.

UPON appeal from the commiſſioners of exciſe to the commiſſioners of appeals, according to 12 *Car.* 2. *cap.* 24. *ſ.* 45. the commiſſioners of appeals offered to proceed in the examination of the former ſentence, upon the depoſitions taken at the former trial. Upon which a motion was made *in B. R. Mich.* 8 *Will.* 3. for a prohibition, upon ſuggeſtion that all iſſues ought to be tried by examination of witneſſes *viva voce*; but that the commiſſioners of appeals proceeded upon ſhort notes taken by the clerk of the commiſſioners of exciſe, who had no authority; which was not examination by the oath of credible witneſſes, as the ſtatute directs. And it was argued at bar for the prohibition by Sir *Thomas Powys*, Sir *Bartholomew Shower* and Mr. *Northey*, and againſt the prohibition by the attorney general, the ſolicitor general, and Mr. *Cowper*, the ſame term. And being moved the laſt day of the term, Mr. *Howell* the clerk of the commiſſioners of exciſe informed the court that the ſuggeſtion was falſe, for the examination of the witneſſes was not by the clerk, but by the commiſſioners of exciſe, for they were examined in the preſence of the commiſſioners, and upon an oath adminiſtred.

No prohibition ſhall be granted upon a ſuggeſtion, any part of which is falſe D. acc. Poſt. 587. & vide 1 Term Rep. 555. The commiſſioners of appeals from the commiſſioners of exciſe muſt examine the witneſſes de novo, they cannot proceed upon the evidence given before the commiſſioners of exciſe. S. C. Salk. 555. Comb. 414. 5 Mod 721.

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ſtred by their order. Upon which the court taking the ſuggeſtion to be falſe, denied to grant a prohibition, upon the authority of *Hob.* 66, The pariſh of *Aſton's* caſe. And afterwards in *Hilary* term 8 *Will.* 3. the ſuggeſtion was amended, and framed in this manner, *viz.* that the commiſſioners ought not to admit the depoſitions, taken before the commiſſioners of exciſe to be evidence, but ought to proceed upon evidence of witneſſes examined before themſelves *viva voce* upon oath adminiſtred by themſelves, or by confeſſion of the party. And then it was argued by the counſel for the prohibition, that the proceeding is irregular, becauſe it does not purſue the direction of the ſtatute; for all examinations ought to be upon oath by the letter of the act; and the act impowers them to adminiſter an oath, which argues, that it was the intent of the parliament that they ſhould proceed upon evidence given before themſelves. And if the act had not preſcribed this method, the common law would have ſupplied it, which ſays, that all proceedings ought to be by examination of witneſſes *viva voce.* Beſides, that this proceeding upon the depoſitions before taken cannot be a ſufficient ground for the commiſſioners of appeal to found their judgment; for the evidence (notwithſtanding) may be miſrepreſented, or evidence taken of the one ſide only. If ſentence be given againſt a man before the commiſſioners of exciſe by default, if the commiſſioners of appeals upon appeal to them try the matter only by depoſitions, the party condemned will loſe the benefit of croſs-examining the witneſſes. Depoſitions taken before juſtices of peace cannot be read upon appeal to the quarter ſeſſions, nor can depoſitions taken before commiſſioners of bankrupts be uſed at a trial at common law. And therefore theſe proceedings being irregular, they pray the aid of this court, which ought to controul all inferior juriſdictions, and correct them in their irregular proceedings. And Mr. *Northey* cited a caſe in the time of King *Charles* the Second, where the mayor of *Lndon* eſpouſed the cauſe of a plaintiff ſo vigorouſly in a court of the city, that no attorney durſt appear for the defendant, until *Hale* chief juſtice by menace of a mandatory writ out of the King's Bench allayed the heat of the mayor. He cited alſo a caſe between *Shorter* and *Friend, intr. Hill.* 1 *Will. & Mar. B. R. rot.* 39. 3 *Mod.* 283. *Salk.* 547. *Carth.* 142. *Holt.* 752. 1 *Show.* 158. 172. where the caſe was thus: *John Friend* by his will gave 10*l.* to *Martha Friend*, and made *Shorter* his executor, and died; *Shorter* paid the legacy to *Martha Friend*; and afterwards *Martha Friend* made *Friend* the defendant her executor, and died; *Friend* ſued *Shorter* for the legacy deviſed by *John Friend* to *Martha Friend* his teſtatrix in the ſpiritual court, where *Shorter* pleaded payment and produced one witneſs to prove it; and becauſe the ſpiritual court refuſed to admit

Depoſitions taken before juſtices of peace are not evidence upon appeal to the quarter ſeſſions. Nor depoſitions before commiſſioners of bankrupts upon a trial at law. Sed vide 5 G. 2. c. 30. ſ. 41. Dougl. 244.

admit the proof of one witneſs, prohibition was granted out of the King's bench; and *Shorter* declared upon the prohibition, and after ſolemn debate conſultation was denied by the whole court.

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But *e contra* it was argued againſt the prohibition, that ſince the ſtatute has given the commiſſioners of appeals juriſdiction in the principal matter, by implication it impowers them to proceed to the determination of the principal matter by means the moſt proper, and which ſhould ſeem convenient in their diſcretions; and they have choſen means agreeable to reaſon, purſuant to the ſtatute, and commodious to the parties; for the witneſſes are examined and croſs-examined before the commiſſioners of exciſe, and their depoſitions entered by the clerk in court, and ſubſcribed by the witneſſes themſelves. How can it appear to the commiſſioners of appeals, that the party was oppreſſed in the former ſentence, if they be not allowed the ſame evidence, upon which it was founded? Trial of the cauſe *de novo* will not be trial by appeal. When therefore theſe depoſitions are tranſmitted to the commiſſioners of appeals, and they proceed upon them, is not this proceeding upon oath? Without doubt examination upon oath in writing is examination upon oath within the intent of the ſtatute, and more beneficial to the King and to the party; for by this the evidence, if the witneſſes die, is preſerved, and the proceedings upon the appeal are more expeditious, and the preſence of the witneſſes is not required, when their attendance is requiſite in another place. In appeal to parliament no evidence is admitted, but that which was given at the former trial. And the reaſon why the evidence given before the commiſſioners of bankrupts cannot be allowed at a trial at common law is, becauſe ſuch matter does not come into the King's bench, &c. by way of appeal. And the reaſon of the proceedings of the juſtices at the quarter-ſeſſions (as is mentioned by the plaintiff's counſel) is, becauſe their ancient method of proceeding was ſo. And in the ſame manner this new juriſdiction follows their proper rules, for where original matter is given to original juriſdiction, they may chuſe their methods of proceeding, and no other court can over-rule them. *Holt* chief juſtice ſaid, that this caſe ſeems to differ from all the caſes of prohibitions which have been granted, but the caſe of *Shorter* and *Friend* ſeems to have the moſt reſemblance. But yet no prohibition ought to be granted to the ſpiritual court, for having allowed evidence, which the common law does not allow. But as to the courſe of granting prohibitions for not allowing evidence which would be good at common law, the difference is thus: When the eccleſiaſtical courts are poſſeſſed of a cauſe, which is merely of ſpiritual conuſance, the courts

In matters merely of ſpiritual cognizance the ſpiritual courts may proceed according to their own rules. Semb. acc. Yelv. 92. But in matters properly of temporal cognizance, they muſt adhere to the rules of the common law vide Ante, 73.

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common law allow them to pursue their own methods in the determination of it; but when in such cause collateral matter arises which is not of their conusance properly, there the courts of common law enforce them to admit such evidence as the common law would allow. Therefore if the spiritual court require more than one witness to prove the revocation of a nuncupative will, the King's Bench, &c. does not intermeddle. But if in a suit for a legacy payment or a release be pleaded, if they do not admit proof by one witness, the King's Bench grants a prohibition. In appeal in the ecclesiastical court they examine the witnesses *de novo* upon a new allegation, but that allegation may be composed of the same fact; and the appellant does not begin to shew his *gravamen*, but the other ought to maintain his sentence. And it seemed to him, that it was reasonable, that the commissioners of appeals should have power to proceed by these depositions. But yet he could not be of opinion, that it was discretionary in the commissioners of appeals. *Et adjournatur.* And afterwards in *term. Pasch.* 9 *Will.* 3. the court pronounced their opinion, that the commissioners of appeals ought to administer new oaths upon the appeal; because the act of parliament is express, and has given them power to administer oaths for the same purpose. And therefore a prohibition was granted *quoad* the admitting of the depositions taken in writing before the commissioners of excise. But *Holt* chief justice said, that his private opinion was, that if the witnesses were dead, or could not be found, then the commissioners of appeals might make use of these depositions; but that not being before him judicially, he would not give a judicial opinion.

Upon appeals in the spiritual court, there are new allegations, and the witnesses are examined de novo.

Reynolds *verf.* Gray.

S. C. Salk. 70. 12 Mod. 120.

The election of an umpire (unless conditionally) determines the authority of the arbitrators, though he refuses the umpirage, S. C. cit. 3 Vin. 96. pl. 12. in mar. R. cont. 5 Mod. 457. 2 Vent. 113. 3 Lev. 263.

PER Holt chief justice, if arbitrators have authority to chuse an umpire, and they chuse *A.* accordingly; they have executed their authority, and cannot make another election, though *A.* does not accept of the umpirage. *Contra*, if they elect upon express condition; for then he is no umpire, until the condition be performed. But *Rokeby* justice doubted of this, for it seems implied in the election, if the party elected will accept it. *Ex relatione m'ri Jacob.* In the same case it was said also by *Holt* chief justice, that if the arbitrators chuse an umpire, before the time for them to make their award be expired, it is void, though they are resolved to make no award themselves. *Ex relatione m'ri Jacob.*

Election of an umpire before the time for making the award expired, void. *(a)* R. cont. post. 671. Lutw. 541. Say 221. 2 Barnard B. R. 154. Semb. cont. T. Jon. 167. D. cont. Cro. Car. 191. 2 Saund. 133.

(a) This can at most only be where a farther day is given for making the umpirage, than was allowed for the award.

Rex

Rex *verſ.* magorem, &c. Exeter.

Trin. 9 Will. 3. B. R.

S. C. 12 Mod. 126. 15 Vin. 324.

LINDSTONE ſued a writ of *mandamus* directed to the mayor, *&c.* of *Exeter*, to command them to admit him to be an alderman of the city being duly elected. To which *mandamus* return was made, that *Lindſtone* was never elected. And it was moved, that this was an inſufficient return, becauſe it was not under the hand of the mayor, or ſeal of the corporation; and therefore it is uncertain, againſt whom *Lindſtone* ſhall have an action for this falſe return. But *per Holt* chief juſtice, *et totam curiam*, the return of a *mandamus* is matter of record, and acts done by corporations upon record have no need to be under hand or ſeal, for in ſuch caſe an action lies againſt the body politick, or the perſons who procure the falſe return. And a return by ſheriffs had no need to be under hand and ſeal before the ſtatute of *York* (*a*) *Ex relatione m'ri Shelley.*

The return of a corporation to a mandamus need neither be ſigned or ſealed. R. acc. Comb. 324.

(*a*) 12 Ed. 2. ſt. 1. c. 5.

Lambert *verſ.* Aeretree.

S. C. 20 Vin. 338. pl. 12.

SEVERAL part-owners of a ſhip. Some of them were deſirous that the ſhip ſhould go to ſea, and others of them would not conſent. Upon which they procure the ſhip to be arreſted by proceſs out of the admiralty, and compelled thoſe who intended to ſend the ſhip a voyage, to enter into recognizance in the admiralty, conditioned that the ſhip ſhould ſafely return. After which the ſhip began a voyage, in which ſhe was loſt. And upon this the perſons, who were bound for the ſafe return of the ſhip, were ſued in the admiralty. Upon which a motion was made, that the King's Bench would grant a prohibition. 1. Becauſe the recogniſance not being in nature of a ſtipulation, the admiralty had not power to compel the party to enter into it. 2. Becauſe this ſuit being in nature of debt upon a recogniſance, the admiralty had not cogniſance of it. But the prohibition was denied by the court (*abſente Holt* chief juſtice) becauſe this ſuit is between the part-owners of the ſhip, and the property is admitted; and therefore it is properly conuſable there. 2. If the admiralty had not power to take ſuch recognizances all navigation muſt be obſtructed, if one obſtinate part-owner would not conſent, that the ſhip ſhould make a voyage; and *e contra* it is very reaſonable, that he have ſecurity, that the ſhip ſhall return in ſafety, ſince he does not conſent to the voyage. *Ex relatione m'ri Shelley.*

If one of ſeveral part owners of a ſhip objects to a voyage the others propoſe making, he may by proceſs out of the admiralty arreſt the ſhip and compel the other part owners to give ſecurity for her ſafe return. R. acc. poſt. 235. Str. 890. Fitzg. 197. 1 Will. 101. Raym. 78. Semb. acc. 6 Mod. 162. Adm. Com. Dig. admiralty. T. 1. Ed. 1780. vol. 1. p. 276. vide Raym. 15. 1 Keb. 38. 1 Lev. 29. Litt. ſect. 323. Co. Litt. 200. a. A ſuit may be maintained in the admiralty on ſuch ſecurity. R. poſt. 235. Raym. 78. Semb. acc. 6 Mod. 162. vide poſt. 1285. 1 Barnard. B. R. 415. R. cont. Carth. 26, Comb. 109. Holt 647.

Watkins

A promise to see a man paid for goods to be sold to or work to be done for a third person, is not binding unless in writing, a promise to pay is. vide post. 1085. Cowp. 227. 2 Term Rep. 80.

Watkins *verf.* Perkins at Guildhall.

PER Holt chief justice, if *A.* promise *B.* being a surgeon, that if *B.* cure *D.* of a wound, he will see him paid; this is only a promise to pay if *D.* does not, and therefore it ought to be in writing by the (*a*) statute of frauds. But if *A.* promise in such case, that he will be *B.*'s paymaster, whatever he shall deserve; it is immediately the debt of *A.* and he is liable without writing.

(*a*) 29 Car. 2. c. 3. f. 4.

Granby *verf.* Allen at Guildhall.

S. C. Comb. 450

A husband may recover back money laid out by his wife in the purchase of lands. vide Co. Litt. 3. a. 356. b. Dougl. 435. Bl. 873. unless he was privy to her bargain, or consented to it.

TROVER brought by the husband for money paid by the plaintiff's wife to the defendant for land conveyed by the defendant to the plaintiff's wife by bargain and sale without the husband's knowledge. And *per Holt* chief justice, if articles of agreement are made by a *feme covert* by the order and appointment of her husband, and the money is paid by the wife in pursuance of such agreement; or if the husband (though not privy at the time of the purchase) afterwards consents to it, the property of the money is altered; and the husband cannot maintain *trover*. But if he is not privy to such purchase, nor agrees to it, *trover* will lie for him against the vendor, who receives his money of his wife.

Bolton *verf.* Hillersden at Guildhall.

S. C. 3 Salk. 234. Holt 641. Vide Comb. 450. 15 Vin. 310. pl. 11. 15

Master liable for the contracts of his servant, where the consideration comes to his use, and he has not paid an equivalent for it. Semb. acc. 1 Brownl. 64. Plowd. 11. b. 2 Vern. 643. sed vide 2 Show. 95. Dr. & Stud. dial. 2. c. 42. 17th Ed. p. 236. 3 Bl. Com. 430.

THE defendant being a merchant, his apprentice delivered a note to the plaintiff obliging his master to pay 100*l.* to the plaintiff or his order, according to the custom of merchants. Upon this note *assumpsit* was sued against the defendant. And upon evidence at the trial, the plaintiff proved this note to be the writing of the apprentice, and that the apprentice had once given such a note to Mr. *Monpesson* for money received by the apprentice of Mr. *Monpesson*, which money was applied to the master's use, and that Mr. *Monpesson* had recovered the money of the master. The proof for the defendant was, that he did not trust his apprentice to give such notes; and that was proved by several, who had been his apprentices. The apprentice himself swore that he had lost 100*l.* of his master's money at play, and that the day following a foreign bill was drawn upon his master, which he could not pay, and the money which he had lost at play both; therefore he resorted to the plaintiff *Bolton*, with whom *Hillersden* usually had dealings: and because the person who brought the foreign bill, would

would not receive *guineas*, being the only money that he had, he perſuaded the plaintiff, to receive the *guineas*, and pay the foreign bill, which the plaintiff did; and that the apprentice gave this note to the plaintiff for money received of him to pay the 100*l.* which he had loſt at gaming. And *per Holt* chief juſtice, in *Stowell*'s caſe it was reſolved, that though *Stowell* gave ready money to his ſervant to buy proviſions, yet the ſervant took them upon tick, and becauſe they came to the uſe of *Stowell*, he was adjudged liable, but he doubted of it. So in the caſe of Sir *Robert Wylands*, 3 *Keb.* 625, 626. Sir *Robert Wylands* every *Saturday* gave the ſervant money, to diſcharge the expences of the week; the ſervant did not pay the money due for ſeveral weeks together, though he received it of his maſter; yet the vender recovered againſt *Wylands* for goods delivered to the ſervant; becauſe every man ought to take care what ſervant he makes uſe of; and if the maſter happened to have a bad ſervant, it is more reaſonable, that he ſhould ſuffer for the negligence or villainy of his ſervant, than a mere ſtranger. 2. By *Holt* chief juſtice, if a maſter has never intruſted a ſervant, to charge him by ſigning of notes in the maſter's name; yet if the money for which ſuch note is ſigned, comes to the uſe of the maſter; or if in this preſent caſe the ſervant gave the note to raiſe money to pay the foreign bills charged to his maſter, which is for the benefit of his maſter; ſuch note will bind the maſter, though he never permitted the ſervant to ſign ſuch notes before. But if in this caſe the note was given for the money which the apprentice had loſt at gaming, and which did not come to the maſter's uſe, the maſter ought not to be bound by it. But the jury gave a verdict for the plaintiff, which *Holt* well approved.

BOLTON *v.* HILLERSDEN.

Rex *verſ.* Chalke.

Hil. 3 Will. 3. B. R.

S. C. more at large. 5 Mod. 257. Mandamus and Return. 5 Mod. 254.

UPON a *mandamus* directed to the corporation of *Wilton*, to command them to reſtore an alderman, they make return, that he being mayor ſuch a year, miſemployed the revenue of the corporation, *&c.* to ſuch uſe, *&c.* and that he raſed one of the books of the corporation, *&c.* and that being charged with theſe crimes, he had been heard what he could ſay in his defence, and therefore they removed him, *&c.* And Mr. *Northey* took exception to the return, becauſe it does not appear, that the party was ſummoned; and the rule in *Glide*'s caſe in this court, *Trin.* 4 *Will. & Mar.* 4 *Mod.* 33. 1 *Show.* 258, 364. *Comb.* 197. *Holt.* 369, 435. 12 *Mod.* 27. 26 *Vin.* 50. *pl.* 2. was, that ſummons was neceſſary in all caſes of diſfranchiſement, except where the

Diſfranchiſement of a corporator good, if he was heard in his defence, tho' he was not ſummoned to make it. S. C. Salk. 428. 1 Vin. 190. pl. 12 vide Sty. 447. 453. 1 Sid. 14. 11 Co. 99. a. 4 Mod. 37. Burr. 731. A corporator appointed by patent under the common ſeal cannot be diſfranchiſed except by order under ſuch ſeal. A corporator conſtituted by election, may. Miſapplication of corporation money no cauſe to diſfranchiſe a corporator. Semb. acc. Rex v. Mayor, &c. of London. B. R. T. 25 G. 3. and vide poſt. 1233. Sty. 151. nor altering the corporation books in immaterial reſpects. S. C. Comb. 396. and vide 11 Co. 99. a.

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party does not live within the corporation, but in ſome diſtant place. And though it is ſaid, that he was heard; that might be without ſummons, and therefore unprepared. But *per Holt* chief juſtice, a man ought not to be diſfranchiſed until he has been heard in his defence, upon notice and preparation; and ſummons is only neceſſary for that purpoſe. Therefore if a man be charged *in plenis comitiis*, and ordered to prepare by ſuch a time, this will be good, though there be no actual ſummons; for ſummons is only to give the party opportunity to make his defence, and if he be heard, *&c.* it is enough. And he ſaid, that he remembred a caſe, where the return was, that the party diſfranchiſed being in common council, was examined touching ſuch affairs; and not being able to give ſufficient anſwer to it, was diſfranchiſed. 2. The ſecond exception was, that it is not ſaid that the order to remove him was under the common ſeal of the corporation. But *per Holt* chief juſtice, if a burgeſs be conſtituted by patent under the common ſeal, he ought to be diſcharged in like manner; but if by election, there it is only entred in the book, and an order is ſufficient to diſcharge him, ſo that they may diſfranchiſe him without any inſtrument under their common ſeal. And (by him) a common council is incident to all corporations of common right, unleſs it be otherwiſe provided by the patent of creation. 3. The third exception was, that the offences were not ſufficient cauſes of diſfranchiſement: for as to the miſemploying of non-payment of the money, that is no cauſe of forfeiture, becauſe the corporation may have their action for it: beſides, that it is not ſaid, that he was required to give any account for it. And as to the raſing of the books, it may be, that the entry was wrong, and he only made it as it ought to be; for it is not averred that it was as it ought to be, nor is the raſure averred to be to the detriment of the corporation. And of this opinion was the whole court, and therefore a peremptory *mandamus* was granted. *Ex relatione m'ri Jacob.*

Common council incident to corporations. Unleſs otherwiſe provided by the charter. Vide Com. Franchiſes. F. 25. ed. 1780. vol. 3. p. 405.

Trinity

Trinity Term

9 Will. 3. C. B. 1697.

Sir George Treby *Chief Juſtice.*

Sir Edward Nevill
Sir John Powell } *Juſtices.*

Memorandum, *Sir* John Somers *knight, keeper of the great ſeal, was created baron of* Eveſham, *and lord high chancellor of* England.

Williams *verſ.* Lacy.

S. C Comb. 425.

EJECTMENT for lands in *Somerſetſhire*, upon the demiſe of *Suſannah Lacy*. Special verdict, that *William Lacy* ſeiſed of the lands in queſtion in fee, by leaſe and releaſe bearing date 1 *Apr.* 1675, conveyed theſe lands to the uſe of himſelf for life, remainder to *William* his ſon and the heirs male of his body, remainder to the heirs males of his own body, remainder to his own right heirs; the jury find, that *William* the father died; *William Lacy* the ſon entred, and was ſeiſed in tail male; that 2 *Will. & Mar. John Kite* ſued a *praecipe* bearing *teſte* the ſeventh of *November* againſt *Miles Corbet* for theſe lands, which writ was returnable *quinden. Martini*, at which day *Miles Corbet* appeared, and vouched *William Lacy* the ſon, who was not preſent in court, upon which a *ſummoneas ad warrantizandum* iſſued, returnable *octabis Hilarii* following; that in the mean while between the *teſte* of the *ſummoneas ad warrantizandum* and the return of it, *viz.* the ſecond day of *January*, *William Lacy* the ſon by leaſe and releaſe conveyed the lands to *Miles Corbet*, to make him complete tenant to the *praecipe*; that afterwards the recovery paſſed, which was to the uſe of *William Lacy* and his heirs; that *William Lacy* died ſeiſed

Recovery good, though the tenant to the praecipe had no freehold at the return of the writ ſo long as it is conveyed to him before judgment. *(a)* R. acc. 1 Show. 347. Semb. acc. 1 Mod. 218. D. acc. Noy. 126. Pig. 29, 30. Cruiſe 18 to 21.

(a) And now by the 14 G. 2. c. 20. ſ. 6. it is ſufficient if the freehold be conveyed to the tenant to the praecipe by the end of the term, Great Seſſion, Seſſion or Aſſizes, in which the recovery is ſuffered.

WILLIAMS v. LACY.

without iſſue male, leaving the leſſor of the plaintiff his daughter and heir; that the defendant was brother to *William Lacy*, and claimed by virtue of the intail to *William Lacy* the father and the heirs male of his body, *et ſi*, &c. The ſingle queſtion was, if a common recovery, in which there is no tenant to the *præcipe* at the return of the writ, but the perſon againſt whom the *præcipe* is ſued is made good tenant before the return of the *ſummoneas ad warrantizandum*, and afterwards the recovery paſſes, be good or not. *Gould* King's ſerjeant for the plaintiff argued, that in all caſes of adverſary writs it is clear, though the party was not tenant at the time of the *teſte*, but was made a good tenant before the return, it ſhall be well enough. But ſuppoſe that he was not tenant at the return, then by plea of non-tenure he might abate the writ, but if he vouch over, as to himſelf he admits the writ good, but the vouchee may counterplead the tenancy; but if he does not do it, the recovery will be good againſt all by eſtoppel; but in ſuch caſe the tenant will not recover in value, becauſe he has loſt nothing. But if he become tenant after the voucher, and judgment is given (which is not given upon the *præcipe*, but upon the laſt voucher) this judgment binds the land; ſo that when the recoverer takes execution, the tenant cannot avoid it for this ſubſequent purchaſe; ſo that then the tenant loſes the land, and then he will recover in value againſt the vouchee, and the vouchee over. But if it be but a recompence by eſtoppel, yet it will conclude all parties and privies and be a good bar to bar them. *Stile* 319. 26 *Hen.* 6. 49. *Bro. Recovery in value*, 27. 30. If the law be ſo in adverſary writs, as (ſaid he) it is, much more ought it to be ſo in caſe of a common recovery, of which the law takes notice as a common conveyance; and therefore the court will make it good, if it be poſſible. And for an authority in point he cited a caſe between *Samburn* and *Belt*, 1 *Show.* 347. *Hil.* 3 *Will. & Mar. B. R.* where in error to reverſe a common recovery it was adjudged by the whole court, that if there is a good tenant to the *præcipe* at any time before the recovery paſſes, the recovery ſhall be good; but there the writ of error abated for another reaſon.

Wright king's ſerjeant for the defendant argued, that there muſt be a good tenant to the *præcipe* at the return of the writ, or otherwiſe the tenant might abate the writ by the plea of non-tenure (for he cannot render the land, as the writ commands, if he has it not) but if he does not plead it, it ſhall be good by eſtoppel only, and bind the tenant and his heirs. And all the books cited on the other ſide are of tenants in fee. Then this being good only by eſtoppel, it ſhall not bind the iſſue in tail, becauſe he does not claim as heir only, but alſo *per formam doni*. Then in this caſe although the recovery be good by eſtoppel as to the parties,

yet

yet it will not bind the defendant, who (*a*) claims as iſſue in tail. And as to the caſe of *Samburn* and *Belt* it was adjudged upon other points.

(*a*) Vide 3 Co. 3 Co. Lit. 349. b.

But the whole court was of opinion for the plaintiff. For it is a clear point, that a man may be tenant to the *præcipe* at any time before judgment given. And the difference is, if the tenant comes to the land by his own act, as purchaſe, after the *teſte* of the writ, he can never plead it to abate the demandant's writ, for by this he has made the writ good: but if he comes to the land by act in law pending the writ, he may abate the writ by pleading non-tenure. Therefore, if a *præcipe* be brought againſt the ſon in the life of the father, and after the return of the writ the father dies; though he is tenant, yet ſince it is by act in law, he may notwithſtanding plead non-tenure. The ſame law if a *præcipe* be ſued againſt the reverſioner, living the tenant for life, and tenant for life dies before judgment, yet the reverſioner may plead as above. But if the reverſioner had accepted a ſurrender of the tenant for life pending the writ, this would have made the writ good, becauſe it was his own act. 1 *Hen.* 6. 1, 2. 8 *Edw.* 3. 82. 37 *Hen.* 6. 16. 3 *Hen.* 7, 8. And the caſe in 41 *Edw.* 3. 5. is a ſtrong caſe, for there a *præcipe* was ſued againſt *A.* who pleaded that he was not tenant of the land at the time of the writ purchaſed, but that *B.* was tenant, againſt whom he ſued a formedon upon a giſt in tail made to his grandfather, to whom he is heir in tail, and that he recovered upon the formedon, and ſued execution by *ſcire facias*, &c. and it was objected that *A.* was now in by deſcent, which was an act in law: but *Kirton* there ſaid, ſince he hath ſued execution by *ſcire facias*, he has affirmed the demandant's writ good, becauſe it was his own act; to which *Finchden* chief juſtice agreed. And 5 *Hen.* 5. 9. and *Noy* 126. agree this diverſity. And therefore for theſe reaſons the court were clear of opinion, that the recovery was good; but upon the importunity of the defendant's counſel they gave them time till *Michaelmas* term, to ſearch for ſomething more to ſay for the defendant. And after arguments at the bar in *Michaelmas* and *Hilary* terms following, in *Eaſter* term 10 *Will.* 3. *C. B.* judgment was given for the plaintiff by *Nevill*, *Powell*, and *Blencowe* juſtices, *Treby dubitante*. And this judgment was afterwards affirmed in *B. R.* *vide poſt.* 475.

Tho' the tenant in a real action had no eſtate in the land at the teſte of the writ, yet if he afterwards acquires one by his own act, he ſhall not plead nontenure in abatement. D. acc. 1 Mod. 218. Noy 126. Pig. 30, 31. Otherwiſe if the eſtate comes to him by act in law. D. acc. 1 Mod. 218. Noy 126.

Truſcott *verſ.* Carpenter and Man.

THE Plaintiff brought an action of treſpaſs, aſſault, battery, wounding and impriſonment, againſt the defendants; and declares, that the defendants at ſuch a day at *St. Ree* in *Cornwall*, aſſaulted, beat, wounded, and impriſoned

Treſpaſs will not lie either againſt the party or the officer for an arreſt upon proceſs out of an inferior court in an action the cauſe of which aroſe out of the juriſdiction of the inferior court, R. acc. Lutw. 937, 1560. ſed vide 2 Mod. 195, 2 Rol. Rep. 109. 3 Lev. 243. Com. 574. 2 Will. 382. Cowp. 18. 1 Vent. 369. T. Jon. 214, 2 Mod. 29. See alſo Str. 993. If the defendant after juſtifying a treſpaſs adds a traverſe of his being guilty before or after a particular time, unleſs the juſtification comprehends all the intermediate time, the traverſe is bad. An officer cannot juſtify an expreſs battery under proceſs for an arreſt, without ſhewing a reſiſtance in the party. R. acc. Str. 1049. and vide Lutw. 939. 3 Lev. 403. Cro. Eliz. 93.

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him, and detained him in prison until he paid a fine of 3*l.* 16*s.* and 8d. &c. The defendants to the wounding plead not guilty; and *quoad totum residuum transgressionis insultus, et imprisonamenti*, they plead, that the defendant *Carpenter* entred a plaint in debt against the plaintiff in the court of *Launceston* in *Cornwall* for a debt due to him *infra jurisdictionem curiæ*; that a summons issued thereupon against the plaintiff, and *nihil* was returned thereupon; then a *capias* issued directed to the defendant *Man*, to seize the plaintiff, which was awarded the 27th of *January* 7 *Will.* 3. returnable the 10th of *April* following, that this *capias* was delivered to the defendant *Man*, and he by virtue thereof, before the return of the writ, *viz.* the 9th of *March* at *Launceston* aforesaid, at the request and instance of the defendant *Carpenter* took and arrested the plaintiff, and detained him in custody for want of sureties until the 10th of *March*, at which day the plaintiff paid the debt, which was the 3*l.* 16*s.* 8*d.* &c. and the defendant *Man* then and there by consent of the defendant *Carpenter* let the plaintiff go at large; which is the residue of the said trespass, assault, and imprisonment, whereof the plaintiff complains; and they traverse *absque hoc* that they are guilty of any other trespass, assault, or imprisonment, before the *teste* of the *writ*, or after the return, or at *St. Ree*, or any other place out of the jurisdiction of the court of *Launceston*. The plaintiff replies, that the cause of action arose at *St. Neots absque hoc* that it arose within the jurisdiction of the court of *Launceston*. The defendants demur. And *Lutwyche* and *Girdler* serjeants for the plaintiff argued, that the replication has avoided the defendant's plea; that the defendant by his demurrer has confessed, that the cause of action arose out of the jurisdiction of the court of *Launceston*, and then the officer who executes any process is punishable. *Contra*, if the court has jurisdiction, but the process is erroneous. And for this they cited 10 *Co.* 76. (*a*) the case of the *Marshalsea*. 1 *Roll. Abr.* 547. *l.* 3. 809. *l.* 45. 10 *Vin.* 95. *pl.* 3. *March* 8. *pl.* 20. and *Mich.* 25 *Car.* 2. *C. B. Rot.* 516. *Higgen ver. Martin.* An action was brought as here against the plaintiff who recovered in the inferior court, and the officer for false imprisonment; the defendants justified as in this case; and the plaintiff replied that the cause of action arose out of the jurisdiction of the court; and upon demurrer it was adjudged for the plaintiff upon the reason and authority of the case of the *Marshalsea*. So *Hill.* 33 & 34 *Car.* 2. *C. B. Rot.* 458. or 1629, *Gelder v. Pratt*, the same case and the same resolution. *Sed non allocatur.* For, *per curiam*, neither the officer nor the party are bound to take notice, whether the cause of action arise out of the jurisdiction of the court; and therefore the resolution of the case of the *Marshalsea* was a hard resolution, and warranted by none of the books there cited. But if the cause of action arose out of the jurisdiction of the court, the defendant in the inferior court ought to plead it; and if he does

does not, the (a) affair of the jurisdiction is over, and he shall not take advantage of it in any collateral action against the plaintiff, or the officer who executes the process. And so it was resolved in the Exchequer since the Revolution, between *Pool* and *Gwinn*, *Lutw.* 937. 1560, upon solemn debate and examination of all the precedents, where the action of false imprisonment was brought against the judge, officer, and plaintiff in the inferior court; and the case was adjudged, when *Powell* justice was a baron of the Exchequer; and he said, that *Holt* chief justice approved of the judgment in the case of *Pool* and *Gwinn*, it being reported to him. 2. It was argued for the plaintiff, that notwithstanding his replication was not good, yet the defendants plea was ill; for the defendants justify under a *capias teste* the 27th of *January*, and returnable the 10th of *April* following, and say, that by virtue thereof they took the plaintiff the 9th of *March*, and discharged him the 10th, and traverse, *absque hoc* that they were guilty at any time before the *teste* and after the return of the writ; so that there is a time not traversed, in which the defendants may be guilty, notwithstanding any thing that appears to the contrary, *viz.* between the 10th of *March*, which was the day of the discharge of the plaintiff, and the 10th of *April*, which was the return day of the writ. And they cited *Carter* 84. *Atkins v. Cleaver.* And of this opinion was the whole court.

(a) Vide 1 Roll. Abr. 782. l. 34. 10 Vin. 2 pl. 5. 1 Vent. 236. But see also 1 Vent. 369.

A second exception was taken to the plea, that the plaintiff has declared of an express battery; therefore though the justification of the imprisonment impliedly justifies a battery, yet when an express battery is laid it ought to be justified also. 1 *Roll. Rep.* 176, *Wilson v. Dod:* and there it was adjudged a discontinuance, because there was no answer to the battery. But there is here an answer, such as it is, for the defendants say, *quoad totum residuum transgressionis, &c.* which the defendants intended to be a justification for the whole, and so to comprehend the battery, and therefore no discontinuance. But it is an insufficient justification, because they justify by implication only a battery which is included in the imprisonment, where an express battery ought to be justified, Besides, that if an officer has a legal process to arrest a man, yet he cannot beat him, unless he resists; but no such thing appears here, and therefore for this reason also the plea is ill. And so it was adjudged, *Pasch.* 1691. *C. B. intr. Hil.* 2 *Will. & Mar. Rot.* 759, *Stony v. Calvert*, and 2 *Vent.* 193, *Carre v. Donne.* And of this opinion was the whole court; for where an express battery is laid it is not enough to justify the imprisonment upon legal process, which includes a battery; but the defendant ought to go on, and shew that

When a plea imports to answer a part only of the plaintiff's charge, though in law the matter contained in it is an answer to the whole, if the plaintiff replies without taking judgment for the part which the plea does not import to answer, the proceedings are discontinued. R. acc. 4 Co. 62. a. post. 716. 841. Vide Salk. 179. and Com. Pleader E. 1 ed. 1780. vol. 5. p. 64. and Q. 3. ed. 1780. vol. 5. p. 137. W. ed. 1780. vol. 5. p. 180. Gilb. H. C. B. 62. 155. 158. But it is otherwise where the plea imports to answer the whole, and is in law an answer to part only. R. acc. 1 Str. 302. D. acc. Salk. 179. Gilb. H. B. C. 157.

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he arrested the plaintiff, and the plaintiff offered to rescue himself, and so the defendant was compelled to beat him. For otherwise if it be not upon some such occasion, a man cannot justify a battery in an arrest. And therefore for these two defects in the plea judgment was given by the whole court for the plaintiff.

Wainford *verf.* Barker.

S. C. 11. Vin. 279. pl. 47. in marg. & 358. pl. 9.

A debt upon which the statute of limitations has attached, will enable the creditor to compel an administrator to account in the spiritual court. Vide ante 153, and the cases there cited. 2 Vern. 141. Salk. 154. 3 P. Wms. 84.

UPON motion for a prohibition to the spiritual court of *Norwich* (where the plaintiff was cited as administrator to *J. S.* to account, *&c.* at the instance and prosecution of the defendant) upon a suggestion, that the defendant was not a creditor, nor next of blood, to the intestate. The question was, whether the defendant, who had a debt due to him from the intestate by simple contract, but more than six years were elapsed, whether he should be accounted a creditor within the statute of 1 *Jac.* 2. *c.* 17. *f.* 6. to be enabled to compel the administrator to account. And adjudged, that he is a creditor within the act; for it is a debt, tho' barrable by pleading of the statute of limitations; and therefore the prohibition was denied.

Pechey *verf.* Harrison.

Admittance of a guardian for an infant plaintiff must be entered of record. Vide Imp. C.B. 2d ed. 475. Crompt. Pr. 2d. ed. 103. Com. Pleader 2 C. 1. ed. 1780. vol. 5. p. 197. Vide Str. 304. Otherwise the judgment will be erroneous, though not arrestable. A judgment cannot be arrested, but upon objections on the record. S. C. Salk. 77. D. acc. 3 Bl. Com. 393. Burr. 2287. Semb. acc. post. 264,

THE plaintiff being an infant brought an action by guardian. And after verdict for him, it was moved in arrest of judgment, that there was no warrant for him to appear by guardian entred upon record. And it was resolved by the whole court, that the admittance of a guardian ought to be upon record, because it is the act of the court; for the court takes care of infants, that none shall sue for them, but those that are responsible; for if the infant be prejudiced he may have his action against him. But judgment cannot be arrested for this cause, no more than if no warrant of attorney be filed. But upon error brought, and diminution alledged and certified *in B. R.* it will be ill, for which the judgment may be reversed. But judgment can never be arrested, but for that which appears upon the record itself; but this admittance ought not to appear upon this record, but upon the remembrance of the prothonotary. In the same manner if a record begins, that *A. B. summonitus fuit*, which presupposes a writ; yet if there be no writ judgment cannot be arrested for this reason, but the party may have a writ of error. So in this case it is said upon the plea roll, that he appears *per guardianum suum ad hoc specialiter admissum per curiam*, which supposes that there is a regular admittance upon the prothonotary's remembrance; but if there is none, it is not examinable here. Therefore judgment was given for the plaintiff.

Harrison

Harriſon *verſ.* Britton.

The authority of a bailiff to diſtrain is traverſable in treſpaſs not in replevin. vide poſt. 310. and the caſes there cited.

REPLEVIN. The defendant makes conuſance as bailiff to *J. S.* The plaintiff traverſes, *abſque hoc* that he is bailiff. The defendant demurs: And judgment for him. For the difference is between treſpaſs and replevin. In the former ſuch a traverſe may be taken, but not in the latter.

Llewellyn *verſ.* Pinock.

The ſignification of Welſh words need not be explained in a court in which that language is underſtood.

MOTION was made by ſerjeant *Geers* for a prohibition to be directed to the court of the biſhop of *Llandaff*, where a libel was againſt the plaintiff for *Welſh* words, and no *Anglice* was laid in the libel; ſo that he urged, that the court could not underſtand them. But the motion was denied, for *(per curiam)* in *Wales* they underſtand the words, and therefore there is no need to lay an averment of the ſignification with an *Anglice*. But in an action brought for *Welſh* words in *England*, an averment of their ſignification ought to be laid.

Sir William Duncombe *v.* Church, *the warden of the Fleet.*

The mode of ſequeſtering the office of marſhall or warden for an eſcape is by commiſſion.

SIR *William Duncombe* obtained judgment againſt *Church* for 4000*l.* for an eſcape, and upon affidavit made, that it is a juſt debt, it was moved that he might have a rule for ſequeſtration of the office, according to the late act of parliament. (*a*) And the queſtion was, how this act ſhall be put in execution? And *per curiam*, a commiſſion of ſequeſtration ought to be granted to commiſſioners appointed by the court, under the ſeal of the court. And a commiſſion was granted accordingly.

(*a*) 8 & 9 W. 3. c. 27. ſ. 2.

Roſſe *verſ.* Hodges.

A rejoinder excuſing the breach or non-performance of a condition is a departure from a plea inſiſting upon performance. R. acc. poſt. 1449. Com. 553. 1 Saund. 116. 1 Mod. 43. 2 Keb. 612. 619. See alſo poſt. 1259. 1 Wilſ. 334. Str. 422. & 1 Vin. 538. A deed may be delivered in the abſence of the party who is to take under it. A direction to re-aſſign a mortgaged eſtate neceſſarily extends to the whole intereſt mortgaged.

DEBT upon bond dated the 19th of *March* 1695, conditioned to perform the award of *A.* and *B.* of all actions, demands, &c. *ita quod* the award be made, and delivered in writing, before the firſt of *April* next following; and in caſe the arbitrators make no award within that time, then to perform the umpirage of *John Clerk*, *ita quod* he make his umpirage before the twelfth following. The defendant pleads, that the arbitrators made no award, but that the umpire

Rosse v. Hodges.

pire made an umpirage within the time limited; which recited, that whereas the defendant *Hodges* had lent to *Roſſe* the plaintiff 30*l.* for ſecuring whereof the plaintiff *Roſſe* had mortgaged certain lands to the defendant, and whereas there was a controverſy between the plaintiff and defendant concerning that matter, he awarded that the plaintiff *Roſſe* ſhould pay to the defendant *Hodges* 35*l.* before the —— of *June* next following, and that in the mean time he ſhould permit the defendant to enjoy the poſſeſſion of the mortgaged lands; and that upon payment of the ſaid 35*l.* to the defendant, the defendant *Hodges* ſhould account to *Roſſe* the plaintiff for the mean profits, and deliver over to him the mortgage deed, and re-aſſign to the plaintiff the mortgaged land; and then awards mutual releaſes until the day of the date of the bond: and the defendant pleads performance generally. The plaintiff replies, that he paid the 35*l.* before the day appointed, but that the defendant has not re-aſſigned. The defendant rejoins, that he delivered the mortgage deed to the plaintiff, and was ready to re-aſſign, but the plaintiff had not requeſted him. The plaintiff demurs. And reſolved. 1. That the rejoinder is without doubt a departure from the bar; for in the bar the defendant pleads general performance, and in the rejoinder he ſhews a ſpecial performance. Then *Wright* ſerjeant for the defendant took exception to the replication, that it is not ſaid, that the plaintiff requeſted the defendant to re-aſſign. Now before the requeſt, this being an act to be done with the concurrence of both parties, the defendant has time during his life. *Co. Lit.* 208. *b. Sed non allocatur.* For *per curiam*, the re-aſſignment might be made without the preſence of both parties; for a deed delivered to the uſe of the party, though abſent will be good, and the intereſt will veſt in him. But if it had been to re-infeoff, it had been otherwiſe; becauſe there the party muſt have been preſent to take the livery. Beſides, that it is manifeſt, that the umpire intended that at the ſame time upon the receipt of the money the defendant ſhould re-aſſign. And if it had been a fee, it might have been done by leaſe and releaſe. Then *Wright* for the defendant ſaid, that if any part of the award is void, and the non-performance of *that* is aſſigned for breach of the bond, the plaintiff cannot recover. Now here the non-reaſſignment is aſſigned for breach; but the award, as to *that*, is void for the uncertainty, for *non conſtat* by the award for how long time this re-aſſignment ought to have been for years, life or in fee. Then this part of the award being void, the breach of it will ſignify nothing. *Sed non allocatur.* For *per curiam*, the word re-aſſignment imports, that it was but a chattel; but however it ought to be extended to the whole intereſt mortgaged. And therefore judgment was given for the plaintiff.

Blackett

Blacket *verſ.* Anſley.

S. C. 20 Vin, 338. pl. 12. in marg.

THIRTY-ſeven part-owners of a ſhip would ſend her a voyage, but two or three of the other part-owners would not conſent. Upon which the admiralty took ſtipulation in nature of a recognizance of the thirty-ſeven for ſecurity for the ſafe bringing back of the ſhip. And the ſhip being loſt, the two or three part-owners, who oppoſed the voyage libelled upon this ſtipulation againſt the thirty-ſeven. Upon which they moved for a prohibition. But it was denied; for *per curiam*, though by the law of *England* two or three part-owners may hinder the others from ſending the ſhip a voyage without their conſent, yet the law of the admiralty is otherwiſe. For there, for the encouragement of navigation, the court of admiralty will permit the ſhip to make the voyage, upon ſecurity given to bring her back ſafe. For it is reaſonable that the others, who oppoſe the voyage, ſhould have ſome ſecurity for their ſhip. Then if the ſhip be loſt, it is at the peril of the adventurers, and they ſhall be ſuable upon their ſtipulation by the others in the admiralty; for now it is not doubted, but the admiralty may take ſtipulations.

If one of ſeveral part-owners of a ſhip, objects to a voyage the others propoſe making, he may by proceſs out of the admiralty arreſt the ſhip, and ſtop her until the other part-owners will give ſecurity for her ſafe return. Vide ante, 223. A ſuit may be maintained in the admiralty on ſuch ſecurity. Vide ante, 223.

John Thorpe *verſ.* Rich. Thorpe.

Intr. Hil. 8 Will. 3. C. B. Rot. 1667.

S. C. Lutw. 249. Holt 28. 18 Vin. 341. pl. 1. in marg. 4 Bac. 290. Pleadings Lutw. 245. poſt. vol. 3. 341.

THE plaintiff brings *aſſumpſit* againſt the defendant for 7*l.* and declares, that whereas he had mortgaged to the defendant certain copyhold lands, redeemable upon the payment of ſuch a ſum of money, the defendant, in conſideration that the plaintiff would releaſe to the defendant his equity of redemption, aſſumed to pay to the plaintiff 7*l.* the plaintiff avers, that he did releaſe his equity of redemption; but that the defendant has not paid the 7*l.* The defendant pleads this releaſe in bar of the action, becauſe after the words [equity of redemption] the ſcrivener had added [and all actions, duties and demands.] The plaintiff demurs. And the queſtion was, whether this 7*l.* was releaſed by theſe general words? And *per curiam* adjudged, that this duty of the 7*l.* was not extinct. For where there are general words only in a releaſe they ſhall be taken moſt ſtrongly againſt the releaſor; as where a releaſe is made to *A. B.* of all actions, it releaſes all ſeveral actions which the releaſor has againſt them, as well as all joint actions. So if an executor releaſes all actions, it will extend to all actions that he hath in both rights. 39 *Ed.* 3. 26. *b.* 2 *Rol. Abr.* 409. *A.* 1. 18 *Vin.* 341. *pl.* 1. But where there is a particular recital

If a deed relates to a particular ſubject only, general words in it ſhall be confined to that ſubject. Semb. acc. 1 Anderſ. 64. D. acc. 3 Mod. 277. 279. Carth. 119. 120. 1. Show. 151. 154. and vide 2 Saund. 411. 3 Keb. 45, 59. otherwiſe they muſt be taken in their general ſenſe.

A releaſe by an executor of all actions, will extend to all actions he is intitled to

either in his own right or as executor. Sed vide Carth. 120. Holt 620. 3 Lev. 274. 1 Show. 173.

in

THORPE v. THORPE.

in a deed, and then general words follow, the general words ſhall be qualified by the ſpecial words. And *Powell* juſtice cited a caſe between *Knight* and *Cole*, 1 *Show.* 150. 3 *Mod.* 277. *Carth.* 118. 3 *Lev.* 273. *Holt* 620. 18 *Vin.* 342. *pl.* 1. in *mar.* adjudged *Trin.* 2 *Will. & Mar. B. R.* in which caſe he was counſel. The caſe was thus: *A.* recovered againſt *B.* a judgment for 6000*l.* and made *J. S.* and *J. D.* his executors, and died; *B.* made *C.* his executor, and deviſed a legacy of 5*l.* to *J. D.* and died; *J. D.* by deed acknowledged the receipt of the 5*l.* of *C.* and thereby releaſed the ſaid legacy, and all actions, ſuits and demands, which he had againſt *C.* as executor to *B.* and after argument *in B. R.* it was adjudged, that nothing was releaſed but the 5*l.* And therefore in the principal caſe judgment was given for the plaintiff. A writ of error was afterwards brought upon this judgment, vide poſt. 662.

Oſborn *verſ.* Poole.

Pleadings Lutw. 1053. poſt. vol. 3. 184.

Pimping puniſhable in the ſpiritual court. Semb. acc. Noy 85 Latch. 155. Palm. 521. Vide 17 Vin. 588. Com. Prohibition. G. 14. ed. 1780. vol. 4. p. 507.

MOTION was made laſt *Eaſter* term for a prohibition to be directed to the ſpiritual court of *Coventry*, where a libel was preferred againſt the plaintiff, being a parſon, for theſe words; *Poole* is a pitiful pimping raſcal, *et alia verba turpiſſima*. And a rule was made, that the other ſide ſhould ſhew cauſe why a prohibition ſhould not be granted. And now the laſt day of this term, upon motion to grant the prohibition abſolutely, the court held, that nothing ſhould be more defamatory of a parſon than of a layman, unleſs it concerned his ſpiritual function, and imported ſome crime puniſhable in the ſpiritual court. Therefore (*a*) knave or rogue is not puniſhable there; but if it is ſaid, that he is a knave in his preaching (the ſpeaking being of a parſon) no prohibition ſhall be granted, becauſe it defames him in his function. But the word pimp is puniſhable there, whether it be ſpoken of a clergyman or a layman; for the crime which it imports, is puniſhable there. Then if the party makes uſe of an adjective word, the difference is, where the adjective word imports an act done or a habit, and where it imports only an inclination; as to ſay, that *J. S.* is a bribing attorney, or murdering villain, or pimping raſcal, theſe import an act done, and are puniſhable at common law, or puniſhable in the ſpiritual court, being taken diſtributively. But to ſay, that *J. S.* is a murderous villain, or pimperly raſcal; the law is otherwiſe, becauſe theſe import only an inclination. And of this opinion was the whole court. But then *Treby* chief juſtice ſaid, that the queſtion would be, in what ſenſe the court would underſtand theſe words, for the pronunciation of the words added much to their ſignification; then it may

Scandalous words uſed adjectively, if they import an act done, are actionable. R. acc. 4 Rep. 19. a. Latch. 47. 1 Sid. 373. Vide 1 Vin. 428. pl. 11. if they import an inclination only, not. D. acc. 1 Sid. 373. Sed vide 4 Rep. 19. a. b. 1 Vin. 428. pl. 12.

(*a*) R. acc. 1 Sid. 393. 1 Vent. 2. 12 Mod. 104. Salk. 548. Com. 25. D. acc. 2 Inſt. 493. Noy 85. W. Jon. 246. Vide 17 Vin. 589. pl. 6. 8.

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be that the words were ſpoken in jeſt, &c. and for this reaſon he inclined to grant a prohibition. But the other juſtices ſaid, that they could not intend any ſuch thing, and therefore they oppoſed the granting the prohibition; and if the plaintiff had any thing to excuſe himſelf, he might plead it in the ſpiritual court, and if they refuſed to admit it, then a prohibition ſhould be granted. But in the mean while the prohibition was denied as to the words pimping raſcal; and a prohibition was granted as to the other uncertain words, *alia verba turpiſſima*.

OSBORN v. POOLE.

Lambert *verſ.* Cook.

TRESPASS for the taking of cattle at *D. parvum prædict.* &c. The defendant juſtifies, that *J. S.* was ſeiſed in fee of *Blackacre*, and being ſo ſeiſed demiſed it to the defendant for three years to commence from *Lady-day* 8 *Will.* 3. that the defendant by virtue thereof entred, and took the cattle there *damage feaſant*, &c. The plaintiff replies, that before the demiſe made to the defendant *J. S.* demiſed this *Blackacre* to him, to hold *de anno in annum quamdiu ambabus partibus placuerit*, and that he entred and put in his cattle, and that the defendant took them within the two years; *abſque hoc*, that *J. S.* demiſed to the defendant *modo et forma*, &c. The defendant demurs, and ſhews for cauſe, that the plaintiff *non traverſet* the laſt leaſe, &c. And *Lovell* ſerjeant for the defendant argued, that the declaration was ill, becauſe it is for taking of cattle at *D. parvum prædict.* where no mention is made of *D. parvum* before; and therefore it is a declaration of a treſpaſs in no place. But the court ſaid, that they would have no regard to this exception, for they would reject the *prædict.* as ſurpluſage. Then *Lovell* took exception to the replication, that it was ill by reaſon of the traverſe of the laſt leaſe of the defendant, for the plaintiff had ſufficiently avoided it before; for leaſes for years being by grant, where two ſeveral perſons derive two ſeveral leaſes from the ſame perſon, he who has the prior leaſe ſhall not traverſe the ſubſequent leaſe, but the ſubſequent ſhall traverſe the former. But in feoffments the law is otherwiſe, for there the laſt feoffment muſt be confeſſed and avoided; becauſe a diſſeiſor may gain a fee, but none can gain an eſtate for years but by lawful conveyance. And ſuch traverſe is ill upon a general demurrer. And only *Cro. Eliz.* 754, *Covert*'s caſe, is to the contrary, which cannot oppoſe the current of ſo many books. 2. Admit that it is good upon a general demurrer, yet in this caſe the defendant has demurred ſpecially, and ſhewn this for cauſe; and therefore

Prædictus, where it has no antecedent, ſurpluſage S. C. cit. 20 Vin. 118. R. acc. ante 192.

A traverſe of a fact confeſſed and avoided, bad, R. acc. 6 Co. 24. b. Moor 551. 557. Yelv. 151. 2 Saund. 23. D. acc. 1 Brownl. 148. Carth. 165. poſt. 354. Yelv. 221. 2 Bulſtr. 2. 1 Saund. 22. Vide Str. 837.

Even on a general demurrer. R. cont. 2. Vent. 212. D. cont. Carth. 166.

A right under a paramount conveyance is no anſwer to the claim of an eſtate by feoffment. D. acc. Ow. 142. 6 Co. 25. a. 5 H. 7. 13. a. But it is to a claim by any other man. R. acc. Cro. El. 650. 6 Co. 24. b. Moor 551. 557. Cro. Car. 323. 419. 1 Brownl. 147. Yelv. 221.

2 Bulſtr. 1. Cro. Jac. 299. Bro. confeſs and avoid. pl. 65. 3 Salk. 3. R. cont. Ow. 141.

A word inſerted unintentionally in a ſpecial demurrer which makes the cauſe aſſigned contrary to the record is ſurpluſage. S. C. cit. Vin. 118. If a leſſor ouſts his leſſee and makes another leaſe commencing in poſſeſſion, the re-entry of the firſt leſſee will make the ſecond leaſe void.

without

LAMBERT v. COOK.

without doubt it is ill, for it is at leaſt matter of form, whereof the defendant ſhall take advantage by his ſpecial demurrer. Againſt this it was argued by ſerjeant *Wright* for the plaintiff. 1. That the defendant's demurrer is general and not ſpecial, for it ſhews for cauſe that the plaintiff has not traverſed, &c. where in fact he has traverſed; ſo that the cauſe ſhewn is repugnant to and confuted by the very record. Then there not being any cauſe ſhewn it ſhall be a general demurrer. Then if this traverſe is but matter of form, it will be aided by the general demurrer. And for authority in this point, that it is but form, he relied upon 2 *Ventr.* 212, *Denny* v. *Mazey*. The firſt caſe of this nature was 26 *Hen.* 8. 4. *pl.* 16. whereof *Hobart* 102. takes notice. Then comes *Helier*'s caſe, 6 *Co.* 24, *b.* which ſeems to be the foundation of all the latter judgments. And *Moor* in reporting this caſe ſeems to inſinuate, that the judgment was given for another reaſon than that which *Coke* mentions. But yet admitting *Helier*'s caſe to be law, it does not appear, that it was upon ſpecial demurrer, for the record cannot be found. 2. This caſe differs from *Helier*'s caſe, for there the plaintiff and defendant claimed the ſame intereſt, and there cannot be two aſſignments of one term for years; but here there might be two leaſes, for it might be, that *J. S.* after he had leaſed to the plaintiff, entred upon him, and ouſted him, and leaſed to the defendant; ſo that there is here a poſſibility of two leaſes ſuch as they are; but there cannot be two aſſignments of one term. The want of a traverſe is aided by a general demurrer. *Cro. Car.* 323. much more where there is a traverſe too much.

Traverſe of matter not alledged, can only be objected to on a ſpecial demurrer. Semb. acc. ante 122.

But after ſeveral arguments at the bar the court was of opinion, that *Helier*'s caſe was good law upon a general demurrer; for where a traverſe is taken of a matter not alledged, it is but form; but where the plea is fully confeſſed and avoided, and then a traverſe moreover is taken, this traverſe vitiates the whole plea. *Bro. Confeſs and Avoid.* 65. 20 *Vin.* 399. *pl.* 6. 33 *Hen.* 6. 28. Then here when the firſt termor (admitting that the leſſor had ouſted him and made a ſubſequent leaſe) re-enters, the ſecond leaſe is become void. Then to traverſe the ſecond leaſe is to traverſe a void leaſe, which would be ill upon a general demurrer. But the court reſolved, that this demurrer was a ſpecial demurrer; for as to the [*non*] ſince it is contrary to the record, they ſaid they would reject it as ſurpluſage. And therefore judgment was given for the defendant. Note, the court ſaid, that the caſe of *Denny* v. *Mazey* 2 *Vent.* 212. was a blind caſe.

Fontleroy

Fontleroy *verſ.* Aylmer.

A declaration for taking away chattels muſt in general expreſsly ſhew that they belong to the plaintiff. R. acc. Yelv. 36. 1 Brownl. 192. Cro. Jac. 46. Raym. 395. 3 Keb. 524. 2 Lev. 156. 3 Bulſtr. 303. poſt. 890. vide 2 Roll. Abr. 250. pl. 7. 16 Vin. 207. Ann. 118. Str. 1023. 2 Lutw. 1509. See alſo 5 Bac. Abr. 189. Bl. 980. 1 Term Rep. 480.

TReſpaſs *quare clauſum ſuum fregit et intravit et viginti perticas ſepium ſuarum proſternavit et herbam ſuam cum averiis conſumpſit et conculcavit et quare in ſeparali ſua piſcaria piſcatus fuit et piſces cepit*, with a *continuando* as to the *proſternation* of the fences and conſuming of the graſs for two years. Not guilty pleaded. Verdict for the plaintiff. Serjeant *Rotherham* moved in arreſt of judgment, 1. That the plaintiff has brought his action for fiſhing in his ſeveral fiſhery and taking of the fiſh; but he has not ſaid *piſces ſuos*; ſo that the plaintiff has not intituled himſelf to the action, for he has not laid any property of the fiſh in him. And therefore in the caſe of *Holland*, 2 *Lev.* 156. 3 *Keb.* 524. 1 *Vent* 278. in the time of lord *Hale* treſpaſs was brought, *quare clauſum ſuum fregit et avenas cepit*, and the plaintiff did not ſay *ſuas avenas*, and after verdict for the plaintiff this was moved in arreſt of judgment, and *Hale* chief juſtice then ſaid, that if it had been a new point, he would not have arreſted judgment for this cauſe; for ſince the plaintiff has ſaid, that it was his cloſe, the corn there ſhould be intended *prima facie* his corn; but he ſaid that there were ſo many precedents to the contrary, that becauſe he would not over-rule them, he arreſted the judgment for this cauſe. But the court ſeemed to incline ſtrongly, that this exception was not very conſiderable, for the reaſons that *Hale* chief juſtice gave againſt his own judgment in *Holland*'s caſe. Then ſerjeant *Rotherham* took another exception to the declaration, that the plaintiff had laid the overthrowing of the fences with a *continuando* for two years, which is ill, for every proſternation is a tranſient act, and the fact of every day was a new diſtinct treſpaſs. And therefore 31 *Car.* 2. *B. R. Ovell v. Langden*, treſpaſs for taking of oyſters with a *continuando* from ſuch a day to ſuch a day, and after verdict for the plaintiff judgment was arreſted becauſe this *continuando* was ill, for the taking of every day was a new treſpaſs. Then in this principal caſe, the damages being intire, ſo that damages are given as well for the treſpaſs which is ill laid as for thoſe which are well laid, judgment ought to be arreſted. Againſt which it was argued by the plaintiff's counſel, that ſince it is after verdict, the damages ſhall be intended to be given only for the treſpaſſes which might be laid with a *continuando*, and not for thoſe which could not be laid with a *continuando*. But *Powell* juſtice anſwered, that the difference was, that where ſeveral treſpaſſes are laid in one declaration, *continuando tranſgreſſionem praedictam*, and ſome of the treſ-

But if ſuch chattels are from their nature likely to be appropriated or annexed to any particular place, it will be ſufficient after verdict if ſuch place appears to be the plaintiff's.

No act which terminates in itſelf, and cannot be repeated, can be laid with a continuando. vide poſt. 975. 1 Sid. 319. 2 Roll. Abr. 549. 20 Vin. 443. Com. Pleader. 3M. 10. Ed. 1780. vol. 5. p. 352. 5 Bac. Abr. 192.

If one of ſeveral charges in a count is inſufficiently ſtated, it ſhall be intended after verdict, that no damages were given for

it. R. acc. Str. 1094. vide 10 Co. 130. a. Cro. Jac. 664. 1 Sid. 319. ante 146. Bl. 790. Where a continuando is ſubjoined generally to ſeveral acts, and is properly applicable to ſome only, it ſhall after verdict be confined to thoſe.

paſſes

FONTLEROY v. AYLMER.

paſſes may be laid with a *continuando*, and ſome not, after verdict the *continuando* ſhall be extended only to the treſpaſſes which may be laid with a *continuando*, and not to thoſe which cannot be laid with a *continuando*. But if any treſpaſs is laid ſpecially with a *continuando*, which ought not to be laid with a *continuando*, though there are other treſpaſſes in the declaration, which might be put with a *continuando*, if the damages are intire, judgment ſhall be arreſted for the whole; becauſe the declaration cannot be aided by extending the *continuando* to the treſpaſſes only which might be laid with a *continuando*, for the plaintiff has confined the *continuando* to that particular treſpaſs, which could not be laid with a *continuando*. Therefore in this principal caſe the declaration cannot be aided by any ſuch intendment.

But after ſeveral arguments, at another day the court reſolved, 1. That where the treſpaſs may be laid with a *continuando*, depends much upon the conſideration of good ſenſe; therefore where treſpaſs is brought for breaking of a houſe or hedge, this may well be laid with a *continuando*, for the pulling away of every brick is a breach, which may be done one one day and another another, ſo one ſtick may be pulled out of a hedge one day and another another; but treſpaſs cannot be laid with a *continuando* the proſternation of a houſe, for when the houſe is once thrown down it cannot be thrown down again. The ſame law of the throwing down of a hedge, *per Treby* and *Nevill*. But *Powell* juſtice was of opinion, that a man may bring treſpaſs for throwing down of a houſe with a *continuando*, becauſe the one part may be thrown down at one day, and another at another. The ſame law of a hedge. But he ſaid that here the declaration is, that the defendant threw down twenty perches of the hedges, *continuando*, &c. which muſt be intended of a proſternation done at the firſt day, and therefore the *continuando* afterwards is ill.

In an action for injuries done on one day, evidence cannot be given of injuries done on ſeveral. D. acc. poſt. 976, 977.

2. Reſolved that treſpaſs cannot be laid of looſe chattels with a *continuando*, as a hundred load of wheat with a *continuando* from ſuch a day to ſuch a day. And therefore *per Powell* juſtice, no evidence can be given, but of the taking at one day; and therefore (by him) though it is the practice in treſpaſs for the mean profits, to lay a treſpaſs at one day, and give damages in evidence done at ſeveral days; that is not law, and ought not to be allowed: but in ſuch caſe it ought to be laid *diverſis diebus et vicibus*, and then ſeveral treſpaſſes may be given in evidence.

3. Reſolved, that though in this principal caſe this *continuando* had been ill upon a demurrer, or judgment by default; yet it is aided by the verdict; for they will intend, that the jury gave

gave damages for this *continuando*. And *Treby* chief juſtice ſaid, that this was in nature of a *bis petitum*, but that is aided by a verdict, but ill upon a demurrer. Therefore judgment for the plaintiff by the whole court.

Bis petitum had on demurrer, but unobjectionable after verdict. Vide Bur. 630.

Holdroid *verſ.* Liddel.

DEBT for 20*l.* againſt the defendant for eſcape. The plaintiff declares, that he recovered a judgment in—— againſt *Clerk*, and ſued a writ of execution, *viz.* a *capias ad ſatisfaciendum*, directed to the defendant ſheriff of *Eſſex*, to take *Clerk*, which was delivered to the defendant, and that the defendant took him in execution the 16th of *July*, and let him eſcape the 25th of *July* at *London* in *Cheapſide*. The defendant pleads, that before the 25th of *July*, *viz.* the 17th a *habeas corpus* iſſued out of the common pleas, to bring the body of *Clerk* to the common pleas *ad tres Michaelis* next following, that this writ was delivered to him, and that he by virtue thereof brought *Clerk* the 18th of *July* from *Chelmsford* by *London* the ſhorteſt way; and at *tres Michaelis* delivered him at the common bench, to be committed in execution. The plaintiff *proteſtando* that the defendant did not bring *Clerk* by *London*, ſaid that the *habeas corpus* was delivered to him the firſt of *October* and not before. The defendant rejoins that the *habeas corpus* was delivered to him before the firſt of *October*. And the plaintiff demurs. And adjudged for him for an apparent fault in the rejoinder, becauſe the defendant ought to have ſaid, that the writ of *habeas corpus* was delivered to him, before he brought *Clerk* out of priſon; for it ſignifies nothing to ſay, that it was delivered before the firſt of *October*, becauſe that appears to be ſubſequent to the time of the eſcape. But *per Powell* juſtice, the matter of law is with the plaintiff; for if a *habeas corpus* is delivered to the ſheriff in *July*, to bring a man in execution to the common pleas next *Michaelmas* term, the ſheriff may take a reaſonable time, of which the court will judge according to the circumſtances; but he cannot bring him out of priſon, and keep him out of priſon all the vacation. But *Treby* chief juſtice ſaid that he would not determine that point. And therefore for another reaſon judgment was given for the plaintiff.

In debt for an eſcape, if the defendant pleads a removal by habeas corpus, and the plaintiff replies that the habeas corpus was not delivered to defendant until a day ſubſequent to the eſcape, a rejoinder that it was delivered before ſuch day, is bad. Upon an habeas corpus delivered in the beginning of a vacation, and returnable the next term, the ſheriff cannot bring the party out of priſon immediately, and keep him out the whole vacation. S. C. 10 Vin. 79. pl. 14. D. acc. Hob. 202. Semb. acc. 1 Mod. 116. Cro. Car. 9. 336. vide 3 Co. 43. a. Moor 299.

Intr. Trin. 8 Will. 3. C. B. Rot. 1303.

Norton *verſ.* Brigs.

S. C. Lutw. 1052. Pleadings Lutw. 1043.

A Prohibition was granted to a ſuit for tithes of cows, calves, herbage, and paſture, upon ſuggeſtion of a cuſtom, that every pariſhioner from time whereof, *&c.* had uſed to pay for every cow having a calf 1*d.* for every cow not having a calf 1½*d.* as far as five cows, and for five cows 1*s.* and 3*d.* and for ſix cows 2*s.* 6*d* and for ten cows 2*s.* 8*d.* *in plena ſatisfactione omnium decimarum vaccarum et vitulorum, et herbagii, et paſturae.* The plaintiff declared in attachment upon this prohibition, and upon traverſe of the cuſtom a verdict was found for the plaintiff in the prohibition. Upon which *Lutwyche* ſerjeant moved in arreſt of judgment in *Eaſter* term laſt paſt, 1. That this cuſtom was void, for it is laid to be a diſcharge of tithes of all cows, which it is not, for nothing is laid for the tithe of the ſeventh, eigth, and ninth cows, and payment for the ſixth cannot be payment for the ſeventh, *&c.* 2. This cannot be a diſcharge for the tithes of herbage and agiſtment, for tithes of one thing cannot be a diſcharge of tithes of another, and tithes are payable of both; then ſince the cuſtom is laid intire, it is void in the whole. And of this opinion was the whole court, and therefore judgment was arreſted and a conſultation granted, unleſs cauſe ſhould be ſhewn this *Trinity* term. At which time ſerjeant *Levinz* moved, that the prohibition ſhould ſtand, becauſe it appears here that there is a cuſtom, and then the ſpiritual court has no juriſdiction to proceed; and therefore (*a*) variance in caſe of a *modus* will not hurt, but the prohibition ſhall ſtand, becauſe it appears, that the ſpiritual court has not juriſdiction; and when they have not juriſdiction the Common Pleas cannot allow them to proceed. *Sed non allocatur.* For *per curiam* the queſtion is here, whether the *modus* be good or void. If the *modus* is void, the ſpiritual court has juriſdiction, and the *modus* is void for the reaſons given before. Then *Levinz* moved, that though the cuſtom was void for part, yet it was good for one, two, three, four, and five cows, and therefore he prayed, that the conſultation ſhould be granted only for that part which is void, and that the prohibition ſhould ſtand for the reſidue. And by this he ſaid that a man might have a *modus* for five cows, and then for the reſidue he ſhall pay tithes *in ſpecie.* And the court agreed the caſe put by him, but ſaid, that in the principal caſe the cuſtom was intire for all cows, and therefore if it was ill in part it was ill in the whole; and a conſultation was granted as to all In this caſe *Treby* chief juſtice ſaid, that tithes are not payable for aftermowth

A modus decimandi which in any inſtance exempts the party from paying either tithe or a recompence, void. R. acc. poſt. 677. 12 Mod. 496. Cro. Jac. 47. vide ante 137. 2 Bl. Com. 31.

A modus for one ſpecies of tithe can be no ground for a modus de non decimando as to another. R. acc. Moore 278. 454. 911. Cro. Eliz. 446. 475. 1 Keb. 716. 2 Keb. 212. 2 P. Wms. 530. Bl. 420. D. acc. Salk. 657. 2 Bl. Com. 30. Cunn. 43. Burn. tithes, IV. 4th edit. vol. III. p. 406.

(*a*) Vide Dyer 171. a Hob. 192. 300. 1 Vent. 32. 1 Term Rep. 427

Aftermowth is not de jure tithable. R. acc. Cro. Jac. 42. D. acc. 2 Inſt. 652. cont. 1 Roll. Abr. 640. 8 Vin. 574. 2 Danv. 589. pl. 11. Bunb. 10. 12 Mod. 498. Burn Tithes, V. 1. 2. 4th ed. vol. III. p. 422. 429. vide Hetl. 133. Hob. 250. Cro. Jac. 116. Cro. Eliz. 660. 1 Roll. Abr. 648. 8 Vin. 584. 2. Danv. 306. Cunn. 54. 55. Burn. ubi. ſupra. 5 Bac. Abr. 56.

mowth

mowth *de jure*, and therefore it is but form to lay a cuſtom to be diſcharged of tithes of aftermowth in conſideration of making the former mowing into hay, for tithes are payable only of things *ſemel in anno renovantibus*.

NORTON v. BRIGS.

Moor *verſ.* Riſdell.

INDEBITATUS aſſumpſit. The defendant pleads in abatement that the plaintiff is a popiſh recuſant convict, *prout patet per recordum* of the eſtreat of the Exchequer. The plaintiff demurs. And the firſt exception was, that in pleading the conviction the defendant ſays, that a proclamation iſſued to ſummon the plaintiff to appear and render himſelf before or at the next ſeſſions; and then ſays, that the plaintiff did not render himſelf at the next ſeſſions; but he does not ſay, that he did not render himſelf before. And *per curiam*, for this reaſon the plea is ill. 2. Exc. The defendant does not produce in court the record of the conviction, but only an exemplification of the eſtreat in the Exchequer. And *per curiam*, that is ill alſo, for the eſtreat in the Exchequer is not a record, but only minutes to make proceſs upon it for the king, and therefore *reſpond. ouſter.* was awarded.

Upon a plea that plaintiff is a popiſh recuſant convict, the defendant muſt ſhew that he did not render himſelf before or at the next ſeſſions after the proclamation, and produce in court the record of the conviction. R. 3 Lev. 132. The eſtreat in the Exchequer is no record. S. C. 18 Vin. 172. pl. 19.

Trinity Term

9 Will. 3. B R. 1697.

Sir John Holt *Chief Juſtice.*

Sir Thomas Rokeby
Sir John Turton
Sir Samuel Eyre
} *Juſtices.*

Penoyer *verſ.* Brace.

S. C. Comb. 441.

A writ of error does not abate by the death of one of ſeveral defendants. R. acc. poſt. 4391. Show. 186. Vide ante 71. 2 Bulſtr. 231. But it does by the death of one of ſeveral plaintiffs S. C. 12 Mod. 130 Holt. 640. Carth. 404. Salk. 319. 5 Mod. 338. R. acc. Salk. 261. 1 Show. 402. Car. 296. Holt 1. Yelv. 208. Bridgm. 28. D. acc. 10 Co. 135. a. 1 Show. 187. Car. 194. vide 2. Bulſtr. 231. Execution muſt be ſued out againſt all the perſons againſt whom a judgment is given, unleſs cauſe for omitting any appears on the record. S. C. Salk. 319. vide poſt. 808. Execution may be taken out after the death of the party againſt whom it iſſues, if teſted before S. C. Salk. 319. R. acc. 3 P.Wms. 399. D. acc. poſt. 810. Upon the abatement of a writ of error, execution cannot be ſued out until the cauſe of the abatement appears on the record. S. C. 12 Mod. 130. Holt 640. Carth. 404. Salk. 319. 5 Mod. 338. Vide Salk. 261. 1 Show. 402. Carth. 236. Holt. 1. A ſcire facias muſt be brought upon a judgment to warrant an execution upon it, by a ſtranger. S. C. Salk. 319. R. acc poſt. 768. 1 Will. 302. Dougl. 614. D. acc. 2 Inſt. 471. Or againſt one. S. C. Salk. 319. D. acc. poſt. 265. 808.. 2 Inſt. 471. In other caſes it is not neceſſary. S. C. 12 Mod. 130. Holt. 140. Carth. 404. Salk. 319. 5 Mod. 338. 8 Mod. 108. R. acc. Salk. 261. 1 Skow. 402. Carth. 236. Holt. 1. Noy. 150. Car 112. 122. 180. 193. D. acc. 7 Mod. 68.

5 Law Rep 224

TRESPASS was ſued againſt five. And upon not guilty pleaded, verdict for the plaintiff, and judgment againſt all. Upon which the five defendants ſue a writ of error upon this judgment for error in fact; and before the record is certified, one of the plaintiffs in error dies. Upon which the plaintiff in the original action ſues out execution againſt all, *&c.*. It was admitted by the court, 1. That the writ of error was abated by the death of this plaintiff. 2. It was agreed by the court, that if execution had been ſued againſt four defendants, omitting the fifth, that this had been erroneous, becauſe it varies from the judgment which does not warrant it 3. It was agreed by the court, that if the execution could be *teſted* the day of the judgment (as it might if the plaintiff had not been delayed by the writ of error) and has been ſued againſt all five, and this execution had been good, becauſe the death of the defendant was ſubſequent to the *teſte* of the writ of execution. 4. The court took this difference, if there are ſeveral plaintiffs in one writ of error, the death of one abates the writ, becauſe there cannot be any judgment according to the writ; but if there are ſeveral defendants in error, and one dies, it is otherwiſe, for they are not named in the writ. But the great queſtion was, whether the plaintiff in the original action could immediately ſue execution upon this abatement of the writ of error, without ſuing a *ſcire facias*. And Mr. *Northey*

argued,

argued, that the alteration of the court will never make an alteration of the proceſs; as if a judgment of the Common Pleas be affirmed in the King's Bench upon error within the year, the parties may ſue out execution without a *ſcire facias*. But where there is an alteration in the parties, as in this caſe, there muſt be a *ſcire facias*, becauſe there may alſo be an alteration in the cauſe, and the ſurvivor by poſſibility may have a releaſe, or ſome other new matter to plead againſt the execution.

Mr. *Eyre e contra* argued, that though there was here an alteration of the parties, yet the execution was the ſame, for it will not charge any perſon who was not party to the judgment. The executor to the party deceaſed was not liable. If he had been liable, then a new perſon had been become party to the execution, and therefore a *ſcire facias* had been requiſite to make him privy to the judgment. And he took this difference, where a new perſon ſhall take benefit by, or become chargable to, the execution of a judgment, who was not party to the judgment, there a *ſcire facias* ought to be ſued againſt him, to make him party to the judgment, as in the caſe of executors and adminiſtrators. But where the execution of a judgment is not chargeable or beneficial to a perſon who was not party to the judgment there it is otherwiſe, as where there is a ſurvivorſhip. And for this he relied upon 21 *Hen.* 7. 16. *Moor* 367, *Iſam*'s caſe. *Noy* 150. *Carter* 112. 122. 180. 193. As to the objection of a poſſibility, that the ſurvivor may have releaſed, that is of no force; for admitting that the other defendant was alive, that would as well prove, that no execution could be ſued againſt the other four without a *ſcire facias*. But the law without doubt is otherwiſe; for if the other four had a releaſe to plead living the fifth, yet execution might be ſued againſt them all within the year notwithſtanding that; and if one of them dies, that will not make an alteration of the law; for no reaſon can be given why the death of one ſhould put the ſurvivors in a better condition than they were before his death. And *Holt* at another day delivered the opinion of the court, that there is no need to ſue a *ſcire facias*, becauſe there was not any alteration of the record, nor any new perſon made liable to the execution. But it was adjudged, that the execution ſued upon the death of the plaintiff in error was erroneous, becauſe the court was ſuperſeded by the writ of error; and this *ſuperſedeas* continues until the court be appriſed of the abatement of the writ of error by the death of the party, for they ought either to certify the writ of error, or a matter of excuſe, which they cannot return, unleſs they are themſelves before certified of the death of the party, which may be by ſome ſuggeſtion or entry upon the record, &c. Therefore a *ſuperſedeas quia improvide* was awarded, becauſe the execution was ſued

upon

PENOYER v. BRACE.

upon the death of the plaintiff in error, before it appeared to the court.

Bacon *verſ.* Dubarry.

Pleadings poſt. vol. 3. 241. Salk. 5th ed. 793.

Submiſſion to an award on behalf of a third perſon binds the perſon who ſubmits. S. C. Salk. 70. Skinn. 679. Carth. 412. Comb. 439. 12 Mod. 129. Holt. 78. 3 Vin. 62. pl. 1. acc. 1 Roll. Abr. 244. 1 Danv. 516. 3 Vin. 44. pl. 18. 1 Term Rep. 691. Adm. Com. 184. Vide 2 Wilſ. 28. 58. But not the third perſon. S. C. Salk. 70. On the arbitrament inde ſomething muſt be awarded for the benefit of ſuch third perſon. S. C. Salk. Skinn. Carth. Comb. 12 Mod. Holt ubi ſupra 3 Vin. 44. pl. 18. & 1 Bac. 145. ſemb. acc. 1 Wilſ. 28. 58. quod vide. An award that one party ſhall pay the other a ſum of money is bad for want of mutuality, unleſs it appear on what account the money is paid or ſomething is awarded e converſo. S. C. Skinn. Carth. Com. & 12 Mod. ubi ſupra. R. 1 Saund. 236. Vide 1 Roll. Abr. 253. 1 Danv. 529. 3 Vin. 70. Sty. 44. 1 Roll. Rep. 2.

IN debt upon bond for 600*l.* the defendant prayed *oyer* of the condition, which was, that whereas there were divers controverſies between the plaintiff and defendant as attorney to *Derutter*, that the defendant ſhould perform the award of *J. S.* their arbitrator concerning the ſaid differences. The defendant pleads no award made, *&c.* The plaintiff replies, and ſhews the award, by which it was awarded, that the defendant ſhould pay to the plaintiff 345*l.* and that the plaintiff and defendant ſhould give mutual releaſes, *viz. Bacon* ſhould ſign a releaſe to the uſe of *Dubarry*, and *Dubarry* ſign a releaſe to *Bacon*; and then the plaintiff aſſigns a breach in the performance of this award by the defendant. The defendant demurs. It was reſolved by the whole court after ſeveral arguments *Hilary* term laſt paſt,

1. That *Dubarry* was bound by this ſubmiſſion, though it was not on behalf of himſelf but as attorney to another; that *Derutter* himſelf was not bound, becauſe he was a ſtranger to the ſubmiſſion, but *Dubarry* who ſubmitted is bound, becauſe he took it upon himſelf, and has bound himſelf by the bond to the performance of it.

2. It was reſolved, that this award was of one ſide only, and conſequently ill; for the defendant's ſubmiſſion is on behalf of *Derutter*, and nothing is awarded to *Derutter*, for he has no advantage by this award, becauſe the releaſe is awarded to be made to *Dubarry* to the uſe of *Dubarry*, ſo that *Derutter* has no benefit by it. But *per curiam* it had been otherwiſe if the award had been, that the plaintiff ſhould releaſe to *Derutter*, or to the defendant for the uſe of *Derutter*, or to (*a*) the defendant *Dubarry* generally, without ſaying to the uſe of *Dubarry*; for then it might have been intended to the uſe of *Derutter*, becauſe the ſubmiſſion was in behalf of *Derutter*; or as *Shower* argued, becauſe it had been a good diſcharge in equity.

3. It was reſolved, that this award could not be good without the releaſes, in reſpect of the money which the arbitrator had awarded to be paid by *Dubarry* to the plaintiff, becauſe it does not appear for what cauſe the defendant ought to pay that money. The arbitrator does not ſay, that having found 345*l.* due from *Duretter* to the plaintiff, his award is, that *Dubarry* ſhould pay the 345*l.* It is not

See alſo Com. 334. Bl. 1120. Burr. 274. Unleſs an award appears on the face of it to have been made on the matter ſubmitted, an averment that it was ſo, will not make it good. S. C. Salk. Skinn. Comb. and 12 Mod. ubi ſupra, Semb. acc. 1 Roll. Rep. 271. vide poſt. 533. 612.

(*a*) Vide 1 Wilſ. 28. 58.

ſaid,

said that he awards the payment of this 345*l.* in satisfaction of all accounts, or for all the money due from *Derutter*, or that *de et super praemissis* he awards it. If any such thing had been, this award had been good without the releases, because (*a*) the payment of the money had been a good discharge of itself. But as it is, the award is void, because it cannot be a discharge, for the uncertainty.

(*a*) Vide Com. 334. Bl. 1120.

4. It was resolved that though this award in pleading is alledged to be made *de et super praemissis*, that is of no avail, because the award itself does not justify any such averment, not being made *de praemissis*, as it is pleaded. And that which in itself is a void award, cannot be made good by the allegation of the parties. Judgment was given for the defendant. Mr. *Salkeld.*

Freeman *verf.* Bernard.

S. C. Salk. 69. Pleadings post. vol. 3. 245. Salk. 5th ed. 789.

If an award is to be made and ready to be delivered by a particular day it is sufficient to shew that it was made by the day, without adding that it was ready to be delivered. See ante 115. and the cases there cited.

An award that one of the parties or his executors shall give a release is good. S. C. 3 Vin. 56. pl. 23.

A man may plead in bar an award for the performance of mutual independent acts before performance of his part. S. C. Comb. 440. Holt 80. Vide ante 122.

An award directing the release of a duty without creating a new one, is no bar to an action for such duty before the release executed. S. C. Comb. 440. Holt. 80. Carth. 378. 3 Salk. 45. 12 Mod. 130. 3 Vin. 107. pl. 15. 7 Vin. 367. pl. 2. 1 Bac. 150. R. acc. post. 617. 12 Mod. 423. Vide Carth. 379. Comb. 441. Holt. 80. 1 Bac. 151.

Assumpsit upon an agreement for the delivery of a certain quantity of hops, *&c.* The defendant pleads, that the plaintiff and he had submitted this matter to the arbitration of *J. S. ita quod* the award should be made, and ready to be delivered, by such a day, *&c.* and the defendant shews that *J. S.* made an award before the day, that the defendant or his executors or administrators should give a general release to the plaintiff; and that the plaintiff should give a general release to the defendant; and the defendant pleads, that he was always ready, and yet is, to sign and seal a release. The plaintiff demurs. And divers exceptions were taken to this award. 1. That the submission is *ita quod* the award be ready to be delivered by such a day, and the defendant has not averred, that it was ready to be delivered by the day. *Sed non allocatur.* For *per Holt* chief justice it has been often held in this court, that if the award be made by the day, it is ready to be delivered, and so it appears, and therefore there is no need to aver that it was ready. 2. Exc. That the award is void for the uncertainty, *viz.* that he or his executors or administrators, *&c.* so that time is left to him to perform it during his life, or he may leave it to his executors. And election given in an award is ill, 1 *Roll Rep.* 271. But to this exception Mr. *How* for the defendant argued, that the court will reject the words [or his executors or administrators] because as to them (he said) the award was void, for the executor or administrator is out of the submission, and the power of the arbitrator determines with the life of the person submitting, and so cannot extend to the executor or administrator. Debt upon award

does

An Executor is bound by the ſubmiſſion of his teſtator to an award. Vide Cro. Liiz. 557. 600.

does not lie againſt an executor or adminiſtrator. But *Holt* chief juſtice ſaid, that the executors are bound by the ſubmiſſion of their teſtator, but the addition of them in this award is but cautionary, and therefore will not vitiate. 3. The third exception was, that the plea is ill, becauſe the defendant has not averred performance of this award, and the plaintiff has no remedy, to compel him to perform it. *Sed non allocatur.* For *per Holt* chief juſtice, heretofore if the award was, that the party ſhould do any collateral act, it was held, that the party could not plead this before performance; *contra* if the award appointed the payment of money. And the reaſon was, becauſe the party had no remedy in the former caſe to compel performance, but otherwiſe in the latter caſe. But that reaſon fails now, for now *aſſumpſit* lies upon the mutual promiſes, but heretofore if the ſubmiſſion was by bond, the award might have been pleaded before performance, becauſe the party might have had remedy to compel performance. And *Holt* chief juſtice ſaid, that he had known a rule of court to ſubmit to an award to be given in evidence upon *aſſumpſit*. But judgment was given by the whole court for the plaintiff; for the arbitrator has awarded nothing in ſatisfaction, but only has ordered means to diſcharge the action. He has not awarded a horſe or money in ſatisfaction, but only mutual releaſes. Where an award creates a new duty inſtead of that which was in controverſy, the party has remedy for it upon the award; and therefore if the party reſorts to demand that which was referred and ſubmitted, the arbitrement is a good bar againſt ſuch action. *Contra* where the award does not create a new duty, but only extinguiſhes the old duty by a releaſe of the action. Mr. *Salkeld.*

Aſſumpſit lies on the mutual promiſes to perform an award.

Prince *verſ.* Moulton.

S. C. Salk. 663. Carth. 386. 12 Mod. 131. Comb. 442. Holt. 192. 7 Vin. 299. 2 Bac. 6.

If a plaintiff demands damages in his declaration for a time during which according to his own ſtatement he is not intitled to any, and a general verdict is given thereon, the judgment ſhall be arreſted. Vide poſt. 329. and the caſes there cited.

CASE. The plaintiff declares, that he the ſecond of *July* was poſſeſſed of a meadow, near which there was a river, which run to an ancient mill; that the defendant the third of *Auguſt* built a new mill, and thereby raiſed the water, and drowned the meadow; *per quod* he loſt the profits and uſe of the meadow from the ſecond of *July uſque diem exhibitionis billae.* Not guilty pleaded. Verdict for the plaintiff. And after divers motions judgment was arreſted; becauſe the erection of the mill not being till the third of *Auguſt*, and damages being given upon the *per quod* from the ſecond of *July*, damages were given for longer time than the plaintiff had been damnified, and therefore it is ill, for he could not by this loſe the uſe of the meadow between the ſecond of *July* and the third of *Auguſt.* *Harbin v. Green,*

Green, Hob. 189. *Moore* 887. in point. But *per Holt* chief juſtice if it had been only that he loſt the profits, without ſaying the uſe, it might have been good, becauſe it might be, that the plaintiff permitted his meadow to lie freſh for moving from the ſecond of *July*, and ſo the water deſtroying it by overflowing, he loſt all the profits of it. Judgment was arreſted.

PRINCE v. MOULTON.

Benſon *verſ.* Derby.

THE defendant being an attorney, and ſued by the name of *Thomas Derby*, puts in bail by that name, and afterwards pleads in abatement, that his name is *John Derby*. And it was moved, that this plea might be rejected, becauſe it is contrary to what he hath admitted by putting in of bail by the name of *Thomas Derby*. But *per Holt* chief juſtice, the putting in of bail is the act of the bail and therefore will not eſtop the defendant. And therefore the motion was denied.

A defendant may plead miſnomer in abatement after putting in bail by the name whereby he is ſued. Vide 2 Keb. 824. Scimb. cont. 1 Vent. 154. See alſo 2 Wilſ. 393. & Imp. C. B. 2d Ed. 149. 150. 15 Imp. B. R. 2d Edit. 96.

Mich.

Mich. Term

9 Will. 3. B. R. 1697.

Sir John Holt *Chief Juſtice.*

Sir Thomas Rokeby, *Sir* John Turton, *Sir* Samuel Eyre } *Juſtices.*

Memorandum, *this term Mr. ſerjeant* Hatſel *was made baron of the Exchequer in the room of Sir* John Blencowe *removed into the Common Pleas.*

Sutton *verſ.* Moody.

ſimile 452.

A man has a property ratione loci in animals which are feræ natura on his land. S. C. Salk. 556. 5 Mod. 375. Comb. 458. 12 Mod. 144. Com. 34 Holt 608. 3 Salk. 290. 14 Vin. 329. pl. 2. 18 Vin. 72. pl. 8. 2 Bac. 613. Semb. acc. Cro. Jac. 195. Mar. 49. 1 Vent. 122. D. acc. Godb. 123. 11 Mod. 75. Holt 15, 16. 18. Vide Cro. Car. 282. 6 Mod. 183. 7 Co. 15. b. 2 Bl. Com. 419.

TRESPASS *quare clauſum ſuum fregit et centum cuniculos ſuos adtunc et ibidem inventos venatus fuit occidit cepit et aſportavit.* Upon not guilty pleaded, verdict for the plaintiff and intire damages. *Gould* ſerjeant moved in arreſt of judgment, that conies are *ferae natura*, and therefore there is no property in them in any; therefore ſince the plaintiff has laid property in them by the word [*ſuos*] it is ill, and no damages ought to have been given for them. But if the action had been for having hunted *in warenna ſua*, and killed *cuniculos ſuos* there found, it had been good, for then he would have had a privileged property in them. The ſame law for fiſh taken in *ſeparali piſcaria*. *F. N. B.* 87. *Greenhill v. Child*, *Cro. Car.* 399. *March* 48. *W. Jones* 440. But generally there is no property in things which are *ferae natura*, and therefore *trover* does not lie for a hawk, without alledging that he was reclaimed; and in ſuch an action it was adjudged againſt the plaintiff, though it was alleged in the declaration, that he was poſſeſſed of the hawk as of

But this property ceaſes, when they quit or are hunted off the land. S. C. Salk. Com. Holt 3. Salk. Vin. and Bac. ubi ſupra. Semb. acc. Cro. Jac. 195. 5 Co. 104. b. D. acc. Holt 18. vide 2 Bl. Com. 419. The right of the owner of a foreſt or warren in the animals of the foreſt or warren continues after they are hunted out of the foreſt or warren. S. C. Holt 3 Salk. and Bac. ubi ſupra. D. acc. Godb. 123. vide 2 Bl. Com. 419. But not after they voluntarily quit. it. S. C. 2 Bac. 613. vide 2 Bl. Com. 419.

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his proper goods, *Dier* 306. *b. pl.* 66. *Sed non allocatur.* For *per Holt* chief juſtice, a warren is a privilege, to uſe his land to ſuch a purpoſe; and a man may have warren in his own land, and he may alien the land, and retain the privilege of warren. But this gives (*a*) no greater property in the conies to the warrener, for the property ariſes to the party from the poſſeſſion; and therefore if a man keeps conies in his cloſe (as he may) he has a poſſeſſory property in them, ſo long as they abide there; but if they run into the land of his neighbour, he may kill them, for then he has the poſſeſſory property. If *A.* ſtarts a hare in the ground of *B.* and hunts it, and kills it there, the property continues all the while in *B.* But if *A.* ſtarts a hare in the ground of *B.* and hunts it into the ground of *C.* and kills it there, the property is in *A.* the hunter; but *A.* is liable to an action of treſpaſs for hunting in the grounds as well of *B.* as of *C.* But if *A.* ſtarts a hare, *&c.* in a foreſt or warren of *B.* and hunts it into the ground of *C.* and there kills it, the property remains all the while in *B.* the proprietor of the warren, becauſe the privilege continues. And theſe diſtinctions *Holt* chief juſtice took upon the authority of 12 *Hen.* 8. 9. And by the whole court judgment was given for the plaintiff, becauſe he had a property by the poſſeſſion. And *Holt* cited 1 *Vent.* 122, *Pollexfen* v. *Aſhford*, as a caſe in point, where it is ſaid, that it would be good upon a demurrer. See *Reg.* 93. *b. Brownl. decl.* 167. *Raſt. Entr.* 450. *b. Theloal. dig.* 196 22 *Hen.* 6. 59 *b.* And *Holt* ſaid, that the reaſon of the caſe in *Dier* 306. *b.* was, that he admitted himſelf out of poſſeſſion, and therefore the action could not lie, unleſs the hawk was reclaimed.

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(*a*) D. acc. Holt 16.

Trover will not lie for things in which the whole property ariſes from the poſſeſſion.

Smallcomb *verſ.* Croſs and Buckingham, &c. ſheriffs of London.

S. C. Salk. 320. Carth. 419. 5 Mod. 376. Com. 85. 12 Mod. 146. Holt 592. 3 Danv. 319. pl. 9, 10, 11, 12. 10 Vin. 568. pl. 18. 11 Vin. 13. pl. 14. 2 Bac. 356. 4 Bac. 460.

A ſale by the ſheriff under an execution binds the property, tho' he miſapplies the produce of it. Of ſeveral writs of execution the ſheriff is bound to prefer that which was firſt delivered to him. R. acc. 1 Term Rep. 729. otherwiſe he will be liable to an action. vide 1 Term Rep. 731, 732. unleſs the party neglected to take a warrant. vide 1 Wilſ. 44.

IN *trover* for goods, upon the general iſſue pleaded, at the trial at *niſi prius* in *London* at *Guildhall*, before *Holt* chief juſtice, the fact appeared to be thus: *J. S.* recovered judgment in debt againſt *Fox*, and *J. N.* recovered another judgment againſt *Fox*. *J. S.* ſued a *fieri facias* upon his judgment, which was delivered to the ſheriffs of *London* at nine o'clock in the morning, but he would not take a warrant of the ſheriff to levy the goods, but procured the writ to be indorſed according to the ſtatute of 29 *Car.* 2. *cap.* 3. *J. N.* ſued another *fieri facias*, which bore *teſte* before the *fieri facias* of *J. S.* but was delivered to the ſheriffs ſubſequent to the *fieri facias* of *J. S. viz.* at ten o'clock in the morning, but both the writs were delivered the ſame day. *J. N.* took a warrant from the ſheriffs, and levied the goods in execution, which the ſheriffs ſold to the plaintiff *Smallcomb.* Afterwards the ſheriffs ſeized the goods in execution

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execution upon the *fieri facias* of *J. S.* and ſold them to the defendant *Croſs*. And now *Smallcomb* brought *trover* againſt *Croſs* and the ſheriffs of *London*; and this matter appearing upon the evidence, *Holt* chief juſtice doubting of it, appointed that it ſhould be moved in court. And after argument on both ſides it was reſolved by all the judges, 1. That if two writs of execution are delivered to the ſheriff the ſame day, he has not an election to execute which he pleaſes, but he muſt execute that which was firſt delivered. But if the ſheriff levies goods in execution by virtue of the writ laſt delivered, and makes ſale of them (whether the laſt writ was delivered upon the ſame day or a ſubſequent day) the property of the goods is bound by the ſale, and the party cannot ſeize them by virtue of his execution firſt delivered; but he may have his remedy againſt the ſheriff. For ſales made by the ſheriff ought not to be defeated, for if they are, no man will buy goods levied upon a writ of execution. And at common law if a *fieri facias* had been ſued the firſt day of the term, and another *fieri facias* afterwards, and the laſt had been firſt executed, the other had had no (*a*) remedy but againſt the ſheriff. But in this caſe no action lies againſt the ſheriff, becauſe he who delivered his firſt writ would not take a warrant from the ſheriffs to levy the goods; ſo that it ſeems he had a deſign only to keep the execution in his pocket, to protect the defendant's goods by fraud. And judgment for the plaintiff by the whole court. And *per Holt* chief juſtice, if a writ of execution be delivered to the ſheriff againſt *A.* and *A.* becomes bankrupt before it be executed, the execution is ſuperſeded: and conſequently the property of the goods is not abſolutely bound by the delivery of the writ to the ſheriff. But (by him) the (*b*) *teſte* of the writ binds againſt all ſales and acts of the party himſelf.

(*a*) Vide Rybot v. Peckham. 1 Term Rep. 731. n.

A bankruptcy, any time before an execution is compleat, ſuperſedes it. R. acc. 3 Lev. 69. 191. Vide Burr. 20. 814. Bl. 65. 827. 1 Term Rep. 475. So does an extent. Sed vide Bl. 1251. 1294.

Note; in this caſe Mr. *Northey* ſaid *arguendo*, that it is the common practice at this day, that if a *fieri facias* be delivered, and the goods appraiſed and ſold, and the writ is not returned, and an extent for the king comes out of the Exchequer, it will over-reach the former ſale. But *per curiam* it is a very dangerous practice.

(*b*) Vide Cro. Eliz. 174. 181. 2 Vent. 218. 1 Mod. 188.

Dr. Groenvelt *verſ.* Dr. Burrell, *&c.*

S. C. Carth. 421. 12 Mod. 145. 12 Vin. 145. pl. 1.

A copy is grantable after iſſue joined but not before. R. acc. Bl. 1773. Wilſ. 398. Of papers of a public nature vide poſt. 705. Str. 1203.

DR. *Groenvelt* brought an action of falſe impriſonment againſt Dr. *Burrell*. The defendant juſtified under a judgment given againſt the plaintiff by the college of phyſicians, and a fine impoſed by them, and commitment to priſon. See before 213. And now Mr. *Northey* moved in behalf of the plaintiff, that the King's Bench would

If the party has an intereſt therein. R. acc. Bl. 27. 1030. 1061. Str. 136. 954. 1130. 1223. D. acc. Bl. 39. 40. Adm. poſt. 337. Vide 1 Term Rep. 689. Otherwiſe not. acc. Gilb. B. R. 134. D. acc. 1 Wilſ. 240. Str. 1003. & mb. acc. 3 Wilſ. 398. Vide 1 Wilſ. 104 & 297.

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GROENVELT v. BURRELL.

make an order, that the regiſter of the college of phyſicians ſhould permit the plaintiff to have copies of the proceedings and judgment, to enable the plaintiff to reply to the plea of the defendants, who are cenſors of the college. And he argued, that the plaintiff was a party to the judgment, &c. and therefore has a right to have a copy. Beſides, the ſtatute 46 *Edw.* 3. mentioned in the preface to the third *Report*, extends to this caſe, for it extends to the records of all publick courts. And it is the uſual practice, if an action is brought for a falſe return upon a *mandamus*, upon which the party is returned to be disfranchiſed, that the King's Bench will make an order that the plaintiff ſhall have recourſe to the publick books. And it is no objection, to ſay, that this will be to compel the defendants to diſcover their evidence; for the plaintiff does not pray to have an order to the defendants, but to the regiſter, who is a party unconcerned and indifferent. *Sed non allocatur* (*a*). For *per curiam*, the King's Bench cannot oblige the college of phyſicians to permit the plaintiff to have any copy of their proceedings; for they act in a judicial manner by an authority of an act of parliament, and therefore it ſhall be preſumed that they have done right; and this record may be pleaded without a *profert in curia*, and therefore no *oyer* can be prayed of it, and therefore the defendants ſhall not be bound to give a copy, for it would be in effect to diſcover their evidence. And the plaintiff has no right in this record; therefore this caſe differs from the caſe of the publick books of a corporation, for there the party has an intereſt. In the ſame manner where there is a diſpute between a lord and a copyholder, the copyholder ſhall ſee the rolls, becauſe he has an intereſt in them. If the lord of a manor claims land by forfeiture of his tenant for felony, he has a right to have a copy of the conviction, and he ſhall have it exemplified; but a man cannot have a copy of a record of a conviction of treaſon or felony without leave of the attorney general. In matters leſs criminal they never apply to the attorney general for copies of records, but they have them of courſe. All theſe caſes are where rights are to be tried, and after iſſue joined; but this action is for a treſpaſs, and not founded upon a right; and therefore the King's Bench cannot make any ſuch order. And *per Holt* chief juſtice, if *A.* be indicted of felony, and acquitted, and he has a mind to bring an action, the judge will not permit him to have a copy of the record, if there was probable cauſe of the indictment, and he cannot have a copy without leave.

(*a*) Sed vide Str. 1242. but ſee alio 1 Wilf. 239. Bl. 37. 351. Str. 1210.

A record may be pleaded without a profert, and therefore a man cannot have oyer of it. R. acc. Ford v. Burnham, 1 Barnes 250. Dougl. 215. 1 Term Rep. 149. Adm. Dougl. 460. vide Str. 1034.

A man cannot have the copy of a conviction for felony or treaſon, without leave of the Attorney General.

No copy of record of indictment for felony and acquittal, where there was probable cauſe for the proſecution. vide Bl. 385. Str. 1122.

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Giles *verſ.* Hartis.

S. C. Salk. 622. Carth. 413. 12 Mod. 152.

A plea of tender muſt ſhew that defendant was always ready to pay the debt from the time it accrued. S. C. Comb. 443. 3 Salk. 343. Holt 556. 20. Vin. 307. pl. 14. R. acc Salk. 623. Fort. 376. Semb. acc. Say. 18.

INdebitatus aſſumpſit for goods ſold the eleventh of *September*, the defendant pleads a tender in *April* following, *et quod ſemper paratus fuit adhuc eſt* ſince the tender. And this plea was pleaded after an imparlance. The plaintiff demurs. And *per Holt* chief juſtice, where debt is brought upon a bond conditioned to pay money at a day certain, if the defendant pleads a tender at the day, and that he had been always ready, *&c.* it is good. But in *aſſumpſit*, or debt upon a ſingle bill, he muſt plead, that he has been always ready; for though the defendant tendered the money, and has been always ready ſince the tender to pay it, yet the plaintiff may have demanded it before, it being a duty from the time of the promiſe; and if the defendant did not pay it upon demand, his promiſe was broken, though he tendered it afterwards. But if he pleads that he was always ready, this refers to the time of the promiſe made, and not to the time of the tender.

Tender bars not the action, but farther damages only. S. C. 3 Salk. 343. 20 Vin. 193. pl. 2. R. acc. poſt. 644. 1 Vent. 322. Comb. 334.

2. Though a tender is made, and the plaintiff refuſes the money, yet the tender cannot be pleaded in bar of the action, neither in debt nor *aſſumpſit*, but in bar of the damages only, for the debtor ſhall nevertheleſs pay his debt.

A tender without tout temps priſt cannot be pleaded after imparlance. S. C. Holt 556. R. acc. ante 44. Fort. 376. Comb. 334. Lutw. 238. 2 Mod. 62. vide 1 Crompt. 2d ed. 153. Imp. B. R. 3d ed. 190.

3. In debt upon bond conditioned to pay a ſum certain, a tender may be pleaded after imparlance. But in the principal caſe judgment was given for the plaintiff; for as the tender is pleaded, there might be a demand of the money which was due before the tender, between the time in which the money became due and the tender; in which caſe it cannot be pleaded, either in bar of the action, or of the damages: But if the defendant had pleaded *touts temps priſt*, the plaintiff ſhould have replied, and ſhewn the requeſt, and the time when it was made. But if the tender had been pleaded at the day of the promiſe with *touts temps priſt*, *Holt* chief juſtice doubted, whether it ſhould be in bar of the action or of the damages. He ſaid that in this action if it ſhould be in bar of the damages, as it is in debt, it would be a bar of the whole demand; for ſince *indebitatus aſſumpſit* is to recover uncertain damages, the plea which will bar the plaintiff of his damages, will bar him of his whole demand. But he ſaid, that he would find a means, by which the defendant in this action may excuſe himſelf of the charge of the trial, and payment of coſts, where he will pay what is due; as by bringing a ſum of money into court, and praying judgment *de ulterioribus damnis*; or by confeſſion of the damages to ſuch a value, and praying that the plaintiff may proceed at his peril for the reſidue.

A tender without tout temps priſt may. R. acc. Dyer 300 a. pl. 37. Semb. acc. 2 Mod. 62.

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GILES v. HARTIS.

As to theſe points, he gave no reſolution. But he ſaid, that he well remembred, that ſerjeant *Levinz* made the firſt motion, that upon bringing ſo much money into the King's Bench in *indebitatus aſſumpſit*, the plaintiff might proceed at his peril. And it was in the time of my lord chief juſtice *Keeling*, and it was thought an extraordinary motion. But *per Holt* chief juſtice, a man cannot plead a tender and *touts temps priſt* in a *quantum meruit*, becauſe the demand is entirely uncertain; nor could a man plead tender of amends in bar of an involuntary treſpaſs at common law, except in caſe of damage feaſant, to prevent the impounding of cattle, until the ſtatute of 21 *Jac.* 1. *cap.* 16. *ſ.* 5.

Tender not pleadable to a *quantum meruit*. S. C. 20 Vin. 199. pl. 6. R. cont. Str. 576.

Richards *verſ.* Cornford.

Error. C. B.

A general allegation that lands lie in ſeveral pariſhes, is good. Semb. ac. Carth. 186. at leaſt after verdict. An avowry for more than on the face of it is due, is bad. S. C. Salk. 580. Com. 42. more at large. 5 Mod. 363. & 3 Vin. 394. pl. 1. in margin. But it may be abated in part before judgment. S. C. 18 Vin. 594. pl. 9. in marg. Semb. acc. 11 6. 5. Bro. Avowry, pl. 118. Hob. 133. 208. 1 Roll. Rep. 77. 11 Co. 45. 6. 1 Saund. 285. vide Bro. Avowry, pl. 6. Moore 281. though if an intire judgment is given thereon, it ſhall be reverſed in toto. S. C. Salk. Com. & 5 Mod. ubi ſupra. 3 Vin. 394. pl. 1. in margine. Judgment and tranſcript amended after error

REPLEVIN. The defendant makes conuſance as bailiff to the earl of *Montagu* and his wife, and ſhews, that the duke of *Albemarle* deviſed the reverſion of the premiſſes expectant upon a leaſe for years upon which rent was reſerved, to the ducheſs of *Albemarle* his wife, now wife to the earl of *Montague*, and for rent-arrear he avows the taking of the diſtreſs. The plaintiff pleads in bar of the avowry, that the duke of *Albemarle* by deeds of leaſe and releaſe intailed the lands upon the earl of *Bath*, &c. And iſſue thereupon. And verdict and judgment in *C. B.* for the avowant. Upon which the plaintiff in replevin brought his writ of error, and two errors were aſſigned, 1. That the lands were alledged to lie in *Enfield* and *Edmonton*; which is impoſſible, that the land ſhould lie in both pariſhes, but part may lie in one pariſh, and part in another And a caſe was cited between *Treverton* and *Hickes*, *Paſc.* 3 *Will. & Mar. B. R. Carth.* 105. It was alledged, that *J. S.* was ſeiſed in fee of lands lying in divers pariſhes, whereof the lands in queſtion were parcel; and it was held impoſſible and ill. But *per curiam*, it was adjudged in this caſe, that it was well enough; for according to common and reaſonable intendment, part lies in the one pariſh, and part in the other. The ſecond error aſſigned was that the diſtreſs is taken for arrears of rent of two years; but it appears by the avowry, that the avowant had not title till the 29th of *September* 1694. and the diſtreſs was taken the 26th of *September* 1696. and the judgment is for the intire rent of two years; therefore the avowant has judgment for more than appears to be due to him by his own ſhewing, which is error. And by *Holt* chief juſtice, the avowry for that part of the rent which was not due till after the diſtreſs taken is ill; therefore the general judgment for all the rent is erroneous, and ought to be reverſed for the whole,

brought, by ſubſtituting the right avowry for one which had been entred by the plaintiff's attorney thro' miſtake.

RICHARDS v. CORNFORD.

whole, and is not good for any part. As if a leſſor avows for rent and a *nomine poenae*, and the rent was not demanded, ſo that the *nomine poenae* was not due: a general judgment for both ſhall be intirely reverſed. But if the court had abated the avowry for the rent which was not due, and had given judgment for the reſidue, he ſhould have had return irrepleviſable and good. But for the other reaſon the judgment was reverſed, *niſi*, &c. Mr. *Montagu* counſel for the avowant cited in this caſe 11 *Co.* 45. *Moor* 281. *Hob.* 133. 208. *T. Jones*, 138. *Yelv.* 148. *Cro. Eliz.* 799. But afterwards the record in the Common Pleas was amended (for this error proceeded from the miſtake of the attorney of the plaintiff in replevin, for the plaintiff brought two replevins, and the defendant made two avowries, and gave the records of them to the plaintiff's attorney, who made entry of the one avowry to this replevin, whereas it ſhould have been entred to the other replevin, and ſo *vice verſa*) and by it the tranſcript was amended in the King's Bench alſo; upon which the avowant prayed, that the judgment might be affirmed. But it was ordered that the record ſhould be put in the paper again, becauſe there might be more errors. And afterwards it was affirmed.

Rex *verſ.* Griepe.

S. C. 12 Mod. 139. Comb. 459. Salk 512. Carth. 421. Holt. 535. Com. 43. and with the arguments of counſel 5 Mod. 343. Pleadings 3 Mod. 342.

False evidence, if immaterial, is not perjury. R. acc. 2 Roll. Rep. 41. Cro. Eliz. 428. D. acc. 3 Inſt. 167. 2 Bulſtr. 150. 4 Bl. 137. & vide 16 Vin. 315.

In pleading collateral matters the county in which they aroſe muſt be mentioned as well as the vill. An innuendo can only explain or apply precedent matter, it cannot add or to extend it. R. acc. Hob. 6. Cro. Eliz. 428. 4 Co. 20. a. Yelv. 21. Sav. 280. D. acc. 3 Bulſtr. 265, 266, 267. Golſb. 191. Godb. 340. 341. 4 Co. 17. b. Bl. 960, 961.

AN information was exhibited againſt the defendant for falſe and corrupt perjury at common law. And the information ſhews that there was a ſuit in replevin *in C. B.* between *Richards* plaintiff and *Cornford* defendant; and that upon the trial at the bar of the Common Pleas the plaintiff produced in evidence indentures of leaſe and releaſe, bearing date the fifteenth and ſixteenth of *July* 1681, which were then executed by *Chriſtopher* duke of *Albemarle*, at *Albemarle houſe* in the pariſh of St. *Martin in the fields* in *Middleſex*; and that Mr. *Edward Strode* was produced at the trial as a witneſs, to prove the execution of theſe deeds; and that the defendant *Griepe* was produced as a witneſs at the ſame trial for the defendant; and that he ſwore, that Mr. *Strode*, *innuendo* the ſaid *Edward Strode* the witneſs *praedict.* was commorant all the middle of the month of *July* 81. *innuendo* the year 1681 at *Newnham*, *innuendo quandam domum manſionalem praedicti Edvardi Strode vocatam Newnham in parochia de Plimpton St. Mary in Comitatu Devon. ubi revera* the ſaid *Edward Strode non fuit ad Newnham praedict.* in the ſaid month of *July* 1681. Upon not guilty pleaded verdict was given for the King. Upon which the defendant's counſel moved in arreſt of judgment, and argued their exceptions ſeveral times. And now the court pronounced their opinions in ſolemn arguments, that the judgment ought to be arreſted, but as it

Cowp. 276. 684. 1 Term Rep. 66. and vide 1 Term Rep. 70. Prædictus always refers to the laſt antecedent, vide poſt. 888. The traverſe of a general affirmation muſt be general. If the judgment on an information for perjury is atteſted, and the defendant appear guilty, the court will not diſcharge him, but will give the informer leave to exhibit a new information.

ſeemed, for different reaſons. The three juſtices *Rokeby*, *Turton*, and *Eyre*, made but two points in the caſe. 1. Whether the words ſufficiently aſcertained the place, to make it material to the matter in iſſue without the *innuendo*. 2. Admitting that they did not, then whether the *innuendo* will help it. And as to the firſt point they held, that though a man ſwear falſely, yet if it be in a matter immaterial to the iſſue, it will not amount to corrupt perjury; for the reaſon that perjury is ſo high a crime, is, in reſpect of the injury that it does to a man; but if it is not material to the iſſue, it cannot by any means induce the jury to give their verdict one way or another, and conſequently cannot injure the other party, againſt whom the verdict is given. 3 *Inſt.* 164. 7. 2 *Bulſtr.* 150. *Hob.* 53. 11 *Co.* 13. *a.* *Stile* 336 2 *Roll. Rep.* 369. 41 *Yelv.* 111. And *Turton* juſtice cited the opinion of *Popham*, *Goldſb.* 191. that if *A.* ſwears that he ſaw *B.* ſteal, *&c.* ſuch a deed, and when he did it he was dreſſed in blue, where in truth he was not dreſſed in blue, this is not perjury. So if a man ſwears (*a*) to his belief, or *ad effectum*, if it be falſe (by him) he cannot be convict of perjury. Then to apply this to the firſt point, the judges ſaid, that it does not appear what diſtance there was between *Newnham* and *Albemarle houſe*, and therefore *Newnham* may be adjoining to it, and then Mr. *Strode* might have been at both places the ſame day; and ſo his being at *Newnham* would not falſify his oath, that he ſaw the deed executed at *Albemarle houſe*, for both might well ſtand together, and conſequently the oath of *Griepe*, that Mr. *Strode* was at *Newnham*, will not be material to the iſſue, and therefore no corrupt perjury. And to make this material to to the iſſue, it muſt be preſumed, that this *Newnham* is in *Devonſhire*, which would be in effect to make this conſtructive perjury, which ought not to be allowed any more than conſtructive treaſon. And as to the objection, that this information is for perjury at common law, which is puniſhable, though it be not corrupt or material to the iſſue, or prejudicial to any; the whole court anſwered, that the ſtatute only inflicts a greater puniſhment, but does not alter the nature of the offence. And *Holt* chief juſtice ſaid, that perjury at common law was an infamous crime, and the ſtatute of 11 *Hen.* 7. *c.* 25. ſuppoſes ſo. And in the *Mirror of Juſtices*, title *Infamy*, perjury is mentioned. So *Forteſcue de laud. leg. Angliae.* There is no reaſon therefore for any diverſity in the crimes, upon ſtatute or at common law; but the puniſhments are different, for in convictions upon the ſtatute, diſability is part of the judgment, but at common law it is only a conſequence. And therefore in this caſe the king may pardon and reſtore the party to his teſtimony,

(*a*) Vide Bl. 886.

Whatever is perjury at common law, is perjury under the ſtatute. The ſtatute does not alter the offence, but merely increaſes the puniſhment.

The King's pardon will remove a diſability which is the conſequence of a judgment not

one which is part of it. D. acc. Salk. 689. 691. On a conviction for perjury upon the ſtatute, the diſability of giving evidence is a part of the judgment. D. acc. Salk. 689. 681. On a conviction at common law a conſequence only.

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but upon the ſtatute he cannot. The puniſhment upon the ſtatute is certain, and confined to the direction of the ſtatute; but at common law it is diſcretionary in the court, and they may inflict greater fines than the ſtatute preſcribes; and therefore the charge ought to be as certain at common law as upon the ſtatute. Another difference is, if a man brings an action upon the ſtatute, he ought to ſhew particularly how he was damnified, as that the verdict paſſed againſt him, or that too great damages were given againſt him; but in indictments or informations it is not neceſſary to be ſhewn. 2 *Leon.* 211. *Hamper's* caſe.

But as to this point *Holt* chief juſtice held, that the information was ill without the *innuendo*; for *Newnham* muſt be a *ville*, hamlet, or *lieu conus*. In the general intendment of law it is a *ville*, but it is but an *individuum vagum*, and no man can know where it lies, and therefore the court cannot know where it lies; for in pleading it is neceſſary to ſhew the county where the *ville* lies; for if a *ville* be alledged, and no county where it lies; no proceſs can iſſue upon it. 4 *Hen.* 7. 8. *a.* *Scire facias* upon a recognizance for breach of the peace; the breach was aſſigned in a *ville*, and no county where was mentioned, and when the jury was brought to the bar they were diſcharged, and the information ſet aſide. But in ſome caſes the *ville* alledged ſhall be intended to be in the county where the action is brought; as if treſpaſs is brought in *Middleſex* for a treſpaſs done at *Iſlington*, *Iſlington* (*a*) ſhall be intended to be in *Middleſex*, becauſe that is the *giſt* of the action. But if a place is mentioned in matter collateral to the iſſue, it is neceſſary to ſhew in what county it lies, or otherwiſe it ſhall not be intended to be in any county. Therefore *Newnham* in this caſe is unknown to the court as to the ſituation, and the breach aſſigned is ill for this uncertainty. And as to the objection by the king's counſel, that it appears by the defendant's oath that *Newnham* is a place different from *Albemarle houſe*, and it is ſworn in contradiction to Mr. *Strode's* evidence, and induces a ſuſpicion in the jury of the evidence given by Mr. *Strode*, and therefore it is not material, whether *Newnham* be near, or very far off from *Albemarle houſe*. *Holt* chief juſtice anſwered, that he was of opinion, that it is not neceſſary to appear in an information for perjury, to what degree the point in which the man is perjured, was material to the iſſue; for if it is but circumſtantially material, it will be perjury. And therefore (he ſaid) he doubted much of the caſe cited by *Turton* juſtice out of *Gouldſbor*. For (by him) if *A.* ſwears, that *B.* delivered a deed in a blue coat, where in truth he was in a red; this will be perjury, for a witneſs ſwears to the circumſtances. So if a witneſs ſwears to the credit of another witneſs; if it be falſe it will be perjury, if it conduces to the proof of the point in iſſue. But if *A.* being produced as a witneſs to prove that *B.* was *tempore mentis* when

(*a*) R. acc. Cro. Jac. 618. D. acc. 3 Wilſ. 340.

Falſe evidence in a thing circumſtantially material to the iſſue, is perjury. Semb. acc. 2 Roll. Rep. 369. vide poſt. 889.

when he made his will, ſwears that ſuch a day he left his own houſe, and went to *C.* and lay there, and ths next day lay at D. *&c.* if he ſwears falſely in theſe circumſtances immaterial to the point of the iſſue, it will not be perjury. (Note, this alluded to the oath of Mr. *Wilkinſon*, who was produced as a witneſs at the trial between Sir *Iſaac Rebowe* who married the wife of Mr. *Honeywood* of *Eſſex* and his executrix, and Sir *John Cotton* who married the heir at law of Mr. *Honeywood*, and there in his evidence to prove Mr. *Honeywood compos mentis* when he made his will, he recited a very long ſtory of ſuch impertinent circumſtances.) But in this principal caſe (*per Holt* chief juſtice) though *Newnham* was next adjoining to *Albemarle houſe*, ſo that Mr. *Strode* might have been at both places the ſame day, yet if he was not at *Newnham* it will be perjury in *Griepe*, who was ſworn in contradiction to Mr. *Strode*'s oath. (And in this point he was of a contrary opinion to all the other judges.) But for the aforeſaid uncertainty it cannot be known where *Newnham* was, and therefore ill.

Pex v. Grape.

As to the ſecond point, whether this uncertainty is not aided by the *innuendo*; all the juſtices agreed that the *innuendo* could not aid it. 1. Becauſe the *innuendo* imports ſome other thing than is intended by the oath, and as in addition of new matter, which is ill. For by common intendment *Newnham* mentioned in the oath is a *ville*, but the *innuendo* reſtrains it to a *lieu conus*; and this reaſon was given chiefly by *Holt* chief juſtice. But, 2. All the juſtices ſaid, that no *innuendo* could ſupply the defect of certainty before; for an *innuendo* ſignifies nothing unleſs there be ſome matter of fact precedent, to which it may refer. If words are actionable, and then an *innuendo* comes by way of explanation, that will be good; but if not, the addition of an *innuendo* will not make them actionable. *Hob.* 6. 4 *Co.* 17. *b.* Then as great a certainty is required in indictments and informations as in actions upon the caſe; but if Mr. *Strode* had brought an action upon this caſe againſt *Griepe* for ſlander of his title, ſhewing that *Griepe* had ſaid, Mr. *Strode* has no title to *Newnham*, *innuendo Newnham* his houſe in *Devonſhire* it had been ill. But if he had declared, that Mr. *Strode* was ſeiſed in fee of *Newnham*, in *Plimpton* in *Devonſhire*, and then had ſhewn that *Griepe* had ſaid, Mr. *Strode* has no title to *Newnham*, *innuendo Newnham* in *Plimpton* in *Devonſhire*, that *innuendo* had been good, becauſe there would have been precedent matter ſufficient to which it might refer; and if *Griepe* had intended another *Newnham* he ought to ſhew it in his plea. 1 *Roll. Abr.* 78. *pl.* 3. 1 *Vin.* 518. *Cro. Car.* 234. *Alleyn* 32. So in this caſe, if the information had ſaid, that the queſtion upon the evidence at the trial was, if Mr. *Strode* was at his houſe at *Newnham* in *Plimpton St.*

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Mary's in *Devonſhire*, and then had gone on to ſhew, that Mr. *Griepe* ſwore, that Mr. *Strode* was at *Newnham*, *innuendo*, &c. as in this information, it had been good. And *Holt* chief juſtice ſaid, that the information might have averred poſitively, that the queſtion upon the trial was, whether Mr. *Strode* was at *Newnham* in *Plimpton*, although at the trial *Newnham* was mentioned generally; for this ſhould be underſtood according to the ſubject matter which ſhould appear upon the trial in the information. But in this caſe there is nothing to induce this *innuendo*, and therefore it is ill; for an *innuendo* is no (*a*) averment, and it is never proved at the trial. And for an authority in point all the court relied upon *Cro. Eliz.* 428. *Regina v. Bowles*, the record of which *Holt* chief juſtice brought into court, *viz. Mich.* 37 & 38 *Eliz. Rot.* 36. And as to the objections, he gave theſe anſwers.

(*a*) Sed vide Burr. 2666. 2685.

Object. Reject the *innuendo*. *Palm.* 358.

Anſw. This might be done if no uſe were made of it. But here no ſuch liberty is left to the court, for the aſſignment of the perjury refers immediately to the *innuendo*, *ubi revera non fuit ad Newnham praedict.* Beſides, that without the *innuendo* there is no certainty, as before is ſaid.

Obj. The office of an *innuendo* is to explain dubious words.

Anſw. That is true, but it is when there is ſufficient matter to induce the *innuendo*. Therefore between *Coggs* and *Rogers*, caſe for words, the plaintiff declared, that the defendant ſaid, "The ſhoemaker over the way is broke," *innuendo* the plaintiff; it is ill, for then the ſhoemaker might bring an action: but if the plaintiff had ſaid, that he lived over right, and that he was a ſhoemaker, &c. and then had declared as before, this had been good, for the *innuendo* had been well induced.

Obj. There is but one *Newnham* in the record, and therefore the court muſt intend that there is no more.

Anſw. That one is mentioned only in the *innuendo*, and therefore ſignifies nothing.

Obj. *Cro. Eliz.* 192.

Anſ. The words there were ſpoken to the ſervant, and therefore the *innuendo* was good; but it had been otherwiſe, if they had not been ſpoken to the ſervant.

Obj.

Obj. *Paſch.* 20 *Car.* 2. *B. R. Rot.* 91. *Rex verſ. Lewin*, in information for perjury againſt *Lewin* it was ſet forth, that he ſwore, that he brought him up in the art, *innuendo* the art of a founder, *ubi revera* he had not brought him up *in arte praedicta*. REX v. GRIEPE.

Anſw. *per Holt*. That is no authority; for *Lewin* had been indicted before for the ſame thing, and he pleaded *auterfois acquit*, and then being indicted for another point, it was amended.

Obj. The verdict finds, that *Griepe* meant *Newnham* in *Devonſhire*.

Anſw. The verdict cannot find that, for a man's meaning abſtract from the fact, cannot be put in iſſue. 4 *Edw.* 4. 8. 47 *Edw.* 3. 16. 5 *Co.* 77. *b*. A man's meaning abſtracted from the fact cannot be put in iſſue. vide poſt. 408. 465.

Obj. If a man ſwears generally or dubiouſly, it ſhall be left to the king to interpret.

Anſw. That opinion is very dangerous, and deſtructive to the ſafety of human kind.

3 Point. Whether the aſſignment ſhould refer to *Newnham* in the *innuendo*? And by all the judges it was reſolved, that it ſhould, For *ubi revera non fuit ad Newnham praedict.* this *praedict.* refers to the laſt antecedent, which is *Newnham* in the *innuendo*. Beſides, that *per Holt* chief juſtice, where a place is indefinitely mentioned, *praedict.* is not a proper word, but it ought to have been, *non fuit apud aliquam villam, &c. cognitam per nomen de Newnham*; or otherwiſe it might have been, *non fuit apud Newnham praedict. nec aliquam aliam Newnham*; for in this caſe he might have been at *Newnham*, though not at *Newnham* aforeſaid; for where a general is mentioned, aſſignment of a breach in particular is not good. And for theſe reaſons judgment was arreſted by the whole court. But becauſe the court was ſatisfied, that the defendant was guilty of corrupt and wilful perjury, they made an order that he ſhould not be diſcharged of his bail, and that leave ſhould be given to the informer, to exhibit a new information.

Note, this caſe was removed by error into the houſe of peers, and after hearing of counſel, when all the lords ſeemed to be of opinion to affirm the judgment, it was put to the vote, and the judgment was reverſed by the majority, without giving any reaſon, as *Holt* chief juſtice told me.

Sir

Sir Richard Raine's caſe.

S. C. 12 Mod. 136.

The court will not compel the ſpiritual court to grant adminiſtration where there is a will; though the validity of ſuch will be diſputed. The court will ſuperſede a mandamus granted improvide.

MR. *Grey* made a will dated the 25th of *March* 1697, but did not ſign it, in which he made Mr. *Tench*, &c. executor, and afterwards died in *April* following. After his death the executors produced this will in the prerogative court to prove it, but the court doubting the validity, becauſe it was not ſigned by the teſtator, iſſued a citation, to ſummon in all the perſons, who would be intituled to adminiſtration, if this will ſhould be adjudged null. And they all appeared, and retained proctors, except Mr. *Grey*, brother of the party deceaſed, who was in contempt, for which the court proceeded againſt him *ad excommunicandum*. Upon which the laſt day of *Trinity* term laſt Mr. *Grey* moved in *B. R.* for a *mandamus* to be directed to the judge of the prerogative court, to command him to grant adminiſtration to him as next of kin to his brother deceaſed, upon ſuggeſtion that he died inteſtate. And a *mandamus* was granted, returnable the beginning of this *Michaelmas* term. And now *Mr. Northey* moved for a *ſuperſedeas* to the *mandamus* upon *affidavit* that Mr. *Grey* made a will, the validity of which is now in conteſt in the prerogative court. And a *ſuperſedeas* was granted by the whole court. 1. Becauſe they ſaid that the court was ſurpriſed in the former motion; for they were not informed that Mr. *Grey* the brother was in contempt in the prerogative court, of which if they had been appriſed, they would have denied the former motion; for the party who makes ſuch a motion, ought firſt to reſort to the ſpiritual judge, and requeſt the granting of adminiſtration to him, and not be in contempt for the ſame thing. But 2. *Holt* chief juſtice ſaid, that the difference always is, when it is admitted on all ſides that the party died inteſtate, and when not. When it is admitted, then if the ordinary will not grant to the next of kin, the King's Bench will grant a *mandamus*. But if a will is produced, the judge of the ſpiritual court muſt determine whether the will be good or not, before he grants adminiſtration. For if he grants adminiſtration, and afterwards the will is proved, the grantee will be executor of his own wrong. And the judge of the ſpiritual court is the only proper judge, to determine the validity of wills for things perſonal, and therefore the probate is undeniable evidence to a jury. And *Holt* chief juſtice ſaid he remembered a caſe, which was in the time of lord chief juſtice *Kelynge*, 2 *Kel.* 337. 343. 1. *Sid.* 359. 1 *Lev.* 235. where an executor brought an action, and at the trial produced the probate, at *niſi prius* at *Guildhall*; and the defendant's counſel offered to prove, that the ſuppoſed teſtator died inteſtate, but *Kelynge* chief juſtice told them, that the probate was evidence uncontrovertible; and afterwards it was moved by his order,

A probate is concluſive evidence of a will of perſonalty. D. acc. poſt. 893. Com. 152. 3 T. R. 130, 131. vide poſt. 744. Dougl. 544. 392. Cowp. 596. 318. 322. Burr. 1009. Str. 960, 961. 952. Bl. 977. 1176. Str. 1178.

and

and all the other judges concurred in opinion with *Kelyng*; and ſo it has been always held ſince. Therefore if Mr. *Grey* will demand a return of the *mandamus*, if the judge of the prerogative court makes return of the ſubſtance of the *affidavit*, it will be a very good return; or if he returns that Mr. *Grey* made a will poſitively, although there may be an appeal and the will thereupon adjudged null, yet no action upon the caſe will lie upon that return, becauſe the party who made the return, was the proper judge of the ſubject matter, and no action lies againſt a man for what he does judicially. To all which things the other judges agreed.

SIR RICHARD RAINE's Caſe.

No action lies againſt a judge, for a judicial act vide poſt. 468. 941.

Aſhton *verſ.* Sherman.

S. C. Salk. 298, 12 Mod. 153. Holt. 308. 11 Vin. 259. and a ſhort ſtate of the plea Carth. 430.

A plea by an executor that ſix judgments are recovered againſt him, each for 20l. and that he has only 10l. aſſets, is a confeſſion of aſſets beyond the ſums recovered by five of them. S. C. Comb. 444. D. acc. poſt. 679. q. v. ſed vide etiam 2 Saund. 49. Cowp. 133.

DEBT upon bond againſt the defendant as adminiſtrator to *Field*. The defendant pleads ſix judgments againſt him on bonds in which *Field* was bound, (*a*) *ultra quæ* he has not *aſſets*. The plaintiff replies to four *obtent' per fraudem*; and as to the other two, that the defendant hath *aſſets ultra* them, *et hoc petit quod inquiratur per patriam*. The defendant demurs ſpecially. Reſolved that the replication is ill; for when the defendant pleads ſix judgments, he confeſſes by implication, that he hath *aſſets* over five; then when the plaintiff ſays, he has *aſſets ultra* two, and tenders an iſſue, if this iſſue ſhould be admitted, it would chaſe the defendant to take an iſſue that would be againſt him, for in effect he has confeſſed the fact before; and a man cannot oblige another to an iſſue of fact which he has confeſſed before. And therefore *per Holt* chief juſtice, the caſe of *Croydon v. Atway*, 1 *Rol. Abr.* 802. 10 *Vin.* 67. 2 *Danv Cont.* 105. *pl.* 6. is not law as to this point. But if the plaintiff had ſaid, that the defendant had *aſſets ultra* two judgments, *et hoc paratus eſt verificare*, although it ought to have been omitted, yet it ſhould be but ſurpluſage, and ſhould not vitiate. But the better way is only to anſwer to ſuch judgments, as he knows to be obtained by fraud; and if any of them are found for the plaintiff, he ſhall have judgment; becauſe it would appear that the defendant hath *aſſets*, for by pleading ſix judgments, he confeſſes *aſſets ultra* five. And therefore *Holt* chief juſtice denied the caſe 1 *Saund.* 336. *Hancock v. Prowde*, to be law. But all the court were of opinion, that the replication was not double, according to 2 *Saund.* 48. But the court gave leave to the plaintiff to amend his replication upon payment of coſts.

A plea which would compel the adverſe party to deny and take iſſue upon a fact he has before admitted, is bad.

If an executor pleads ſeveral judgments recovered againſt him, the plaintiff may in his replication anſwer each. S. C. Comb. 444. R. acc. 2 Saund. 48 vide 11 Vin. 342. pl. 2. and the caſes there cited 4 Bac. 120 Com. Pleader. F. 16 Ed. 1780. vol. 5. p. 106.

(*a*) In Lill. Ent. 158. is an entry of pleadings between theſe parties about this time: but they differ materially from what Lord Raymond and the other reporters above enumerated repreſent to have been the pleadings in this particular cauſe.

(*b*) The ſmalleſt judgment was for 20l. and the defendant pleaded that he had only 10l. aſſets. Vide Carth. 430. Salk. 298.

Turberville

Turberville *verſ.* Stampe.

4 Mod. 406. 8. C. Carth. 425. Com. 32. Salk. 13. Skinn. 681. 12 Mod. 151. Holt. 9. Comb. 459. 1 Vin. 216. pl. 9. 2 Vin. 400. pl. 15. 5 Vin. 404. pl. 11. Pleadings vol. 3. 250.

Caſe on the cuſtom of the realm lies againſt a man for damage done by a fire he has lighted in his field. D. acc. 1 Bl. Com. 431. Unleſs ſuch damage was occaſioned by the act of God. A maſter is reſponſible for all acts done by his ſervant in the courſe of his employment, though without particular directions. S. C. 15 Vin. 311. pl. 9. D. acc. 1 Bl. Com. 431. 2 Term Rep. 154.

CASE grounded upon the common cuſtom of the realm for negligently keeping his fire. The plaintiff declares that he was poſſeſſed of a cloſe of heath, and that the defendant had another cloſe of heath adjoining; that the defendant *tam improvide et negligenter cuſtodivit ignem ſuum*, that it conſumed the heath of the plaintiff. Not guilty pleaded. Verdict for the plaintiff. And *Gould* king's ſerjeant moved in arreſt of judgment that this action ought not to be grounded upon the common cuſtoms of the realm; for this fire in the field cannot be called *ignis ſuus*, for a man has no power over a fire in the field, as he has over a fire in his houſe. And therefore this reſembles the caſe of an inn-keeper, who muſt anſwer for any ill that happens to the goods of his gueſt, ſo long as they are in his houſe; but he is not anſwerable, if a horſe be ſtolen out of his cloſe. And in fact in this caſe the defendant's ſervant kindled this fire by way of huſbandry, and a wind and tempeſt aroſe, and drove it into his neighbour's field; ſo that it was not any neglect in the defendant, but the act of God. *Sed non allocatur.* For *per curiam* as to the matter of the tempeſt that appeared only upon the evidence, and (*a*) not upon the record, and therefore the King's Bench cannot take notice of it, but it was good evidence to excuſe the defendant at the trial. Then as to the other matter, *per Holt* chief juſtice, *Rokeby* and *Eyre* juſtices, a man ought to keep the fire in his field, as well from the doing of damage to his neighbour, as if it were in his houſe, and it may be as well called *ſuus*, the one as the other; for the property of the materials makes the property of the fire. And therefore this action is well grounded upon the common cuſtom of the realm. But *Turton* juſtice ſaid, that theſe actions grounded upon the common cuſtom had been extended very far. And therefore (by him) the plaintiff might have caſe for the ſpecial damage, but not grounded upon the general cuſtom of the realm. But by the other juſtices judgment was given for the plaintiff. Note Mr. *Northey* for the plaintiff cited 40 *Aſſiſ. pl.* 9. *Fitz. iſſue* 88. *double plea* 31. 28 *Hen.* 6. 37. 21 *Hen* 6. 11. *b. Raſt. Entr.* 8. and *Old Entr.* 219. where the declaration is general for negligently keeping his fire in ſuch a pariſh, without ſpecifying a particular houſe or ground. But *Holt* chief juſtice anſwered, that *that* was an antiquated entry. And (by him) if a ſtranger ſet fire to my houſe, and it burns my neighbour's houſe, no action will lie againſt me; which all the other juſtices agreed. But if (*b*) my ſervant throws dirt into the highway, I am indictable. So in this caſe if the defendant's ſervant kindled the fire in the way of huſbandry and proper

(*a*) Vide ante 232.

(*b*) D. acc. 1 Bl. Com. 431.

for

for his employment, though he had no expreſs command of his maſter, yet his maſter ſhall be liable to an action for damage done to another by the fire; for it ſhall be intended, that the ſervant had authority from his maſter, it being for his maſter's benefit.

TURBERVILLE v. STAMPE.

Moſely *verſ.* Warburton.

ALEVARI facias iſſued to the biſhop of *Cheſter*, to require him to levy the debt upon the defendant *de* (*a*) *bonis eccleſiaſticis*, *Warburton* being a fellow of *Magdalen* college. Upon which the biſhop writes to the warden and fellows of the college, requiring them to pay the penſion of *Warburton* to him. To which the warden and fellows anſwer, that they have not power to do it. Upon this a motion is made *in B. R.* on behalf of the biſhop of *Cheſter*, for advice of the court, what the biſhop ought to do. And *per Holt* chief juſtice, if a prebendary hath a ſole body, the biſhop upon a *levari facias de bonis eccleſiaſticis* may ſequeſter it; but if he hath but a body aggregate with the dean and chapter, he cannot ſequeſter it. Then in this caſe the profits of the fellowſhip are but caſual dividends, in which before diviſion *Warburton* hath no intereſt, ſo that they do not make an eſtate; and it ſeems in this caſe *Warburton* is not *clericus beneficiatus*, and the biſhop may return *nulla bona eccleſiaſtica*. And though the college hath the impropriation of a church, yet it belongs to the whole body, and not to one of them only. But the court would not give a poſitive opinion, becauſe the caſe did not come judicially before them.

A fellowſhip of a college is no benefice, nor are the profits of it bona eccleſiaſtica.

A biſhop can ſequeſter nothing but what an eccleſiaſtic has as a ſole body. S. C. Salk. 321. Not what he has as member of an aggregate one. S. C. Salk. 321.

(*a*) Vide 2 Bac. 360. Com. Eccleſiaſtical perſons. D. Ed. 1780. vol. 3. P. 154, 155.

Sparkes *verſ.* Crofts.

SPARKES brought an action againſt *Crofts*, as adminiſtrator generally to *J. S.* *Crofts* pleads that he was adminiſtrator *durante minoritate* of his wife; and this was in abatement. The plaintiff demurs. And adjudged, that the defendant ſhould anſwer over. For though a man cannot charge an adminiſtrator *durante minoritate* generally as adminiſtrator, becauſe it is a particular ſort of adminiſtration, and if a man obtains judgment againſt ſuch an adminiſtrator, if afterwards the adminiſtrator or executor comes of age, a *ſcire facias* lies againſt him upon this judgment. Yet the defendant ought to aver, that he continues adminiſtrator *durante minoritate*; which he has not done here, for he has not ſaid, that his wife is in life, and under the age of ſeventeen. See 5 *Co.* 29. *a.* *Pigot's* caſe. Afterwards the defendant came and pleaded, that adminiſtration was committed to him during the minority of his wife, and that his wife died ſince the laſt continuance. And

A man ſued as adminiſtrator generally, may plead that he is adminiſtrator durante minori ætate of J. S. only. S. C. Carth. 432. Comb. 465. vide Lutw. 20. But he muſt ſhew that J. S. continues under age. S. C. Carth. 432. After a defendant has admitted himſelf to be adminiſtrator generally, he cannot plead that he was a temporary adminiſtrator only; and that his adminiſtration is determined. S. C. Carth. 432. Comb. 465. A plea puis darrein continuance cannot be put in after a demurrer. R. acc. Moor. 871. Semb. 6 Mod. 9.

per

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per Holt chief juſtice, 1. This plea is contradictory to the admiſſion of the defendant, for by ill pleading before the defendant admitted himſelf adminiſtrator generally, and therefore this plea is ill. 2. *Holt* chief juſtice doubted whether a man could plead a plea *puis darrien continuance* after a demurrer; although (*a*) *Hob.* 81, *Stoner v. Gibſon* is ſo.

(*a*) But the ſame caſe is reported in Moor 871. contra.

A leſſee for years cannot preſcribe in his own name. S. C. 18 Vin. 139. pl. 9. poſt. 1228. Such a preſcription is bad after verdict. S. C. cit. poſt. 1228. vide Salk. 365. poſt. 1232. In a poſſeſſory action for an injury to an eaſement, the plaintiff need not ſet out his title. R. acc. 1 Vent. 319. 356. 274. 2 Lev. 148. 3 Keb. 528. 531. Lutw. 120. 4 Vin. 524. pl. 28. 1 Wilſ. 326. Burr. 441. D. acc. poſt. 9230. 1230. See alſo 16 Vin. 460. 4 Bac. 15. Unleſs the defendant appears to be tenant of the land. D. acc. 1 Wilſ. 327. Burr. 443. Str. 6. 12 Mod. 97. Skinn. 622. 6 Mod. 313. ſed vide Lutw. 120. 3 Lev. 266. Cro. Car. 415. 6 Mod. 313. But if he offers to do it, and ſets out an inſufficient title, it will be bad. S. C. cit. poſt. 1228. vide Salk. 365. poſt. 1232. A termor cannot be charged in a due eſtate with an immemorial obligation. (*b*)

Dorney *verſ.* Caſhford. B. R.

S. C. Com. 44. Salk. 363. Carth. 432. 2 Vin. 400. pl. 19. in marg.

CASE for obſtructing a private way. The plaintiff declares, that he is poſſeſſed for a term of years of a houſe, and that he and all thoſe whoſe eſtate he hath in the houſe, time whereof *&c. habuerunt et habere debuerunt* a way, *&c.* that the defendant obſtructed, *&c.* Upon the general iſſue pleaded, verdict for the plaintiff. But after divers motions in arreſt of judgment by the whole court judgment was arreſted. For though it had been good to declare againſt a wrong-doer, that he *habere debuit viam, &c.* as was lately adjudged in this court in a caſe between *Strode* and *Birch*, *Com.* 7. 12 *Mod.* 97. 4 *Mod.* 418. *Skinn.* 621. *Comb.* 370. 3 *Salk.* 12. 12 *Vin.* 199. 16. *Vin.* 460. *pl.* 4. 5. which was ſo adjudged in the Common Pleas, and the judgment affirmed in the King's Bench after ſeveral arguments, without a preſcription; yet here the plaintiff has laid a *que eſtate* in himſelf, when he is but leſſee for years, which is impoſſible, for he cannot have the eſtate of any other, but only his own. And *Holt* cited a caſe, which was *in B. R.* in the time of *Hale* chief juſtice, where in an action upon the caſe brought by a leſſee for years for ſtopping his light, the plaintiff declared as here with a *que eſtate*; and it was moved in arreſt of judgment, and the plaintiff could never procure judgment.

The caſe of *Strode verſ. Birch* was caſe, where the plaintiff declared, that he *fuit et adhuc eſt* lawfully poſſeſſed of a tenement, *&c. et quod de jure habuit et habere debuit* common of paſture in a thouſand acres, for all cattle *levant* and *couchant*, *&c. tanquam ad tenementum praedictum appertinentem*; that the defendant to deprive the plaintiff of his common dug coney-burrows; upon demurrer, judgment for the plaintiff *in C. B.* and affirmed *in B. R.* becauſe the defendant was a ſtranger, and therefore poſſeſſion a good title againſt him.

Replevin for cattle taken in a place called *B.* The defendant avows that *Mellor* was ſeiſed in fee of the place where, *&c.* and demiſed to the defendant for ten years, and he took the cattle there *damage feaſant.* The plaintiff pleads in bar, that Sir *Richard Sturtin* was ſeiſed in fee of a hundred acres contiguouſly adjoining to the place where, *&c.* and that the defendant, and all thoſe whoſe eſtate he hath, *&c.*

(*b*) But a charge upon him *and all former occupiers* is good.

have

have uſed to repair the fences between the hundred acres and the place where, &c. and that the hedges being down, the plaintiff's cattle entred into the place where, &c. The defendant demurs. And adjudged for him. For no man can lay a *que eſtate* in a leſſee for years. Adjudged *Trin.* 9 *Will.* 3. *C. B. Aſton verſ. Gwinnel.*

DORNEY v. CASHFORD.

Rex. *verſ.* Harris and Duke.

S. C. Comb. 447. Holt. 399. Skin. 684. Salk. 400. 12 Mod. 156.

HARRIS and *Duke* were found guilty of perjury at a trial at bar, in an information exhibited againſt them; and upon the *capias* they were outlawed; and upon the return of the exigent Mr. *Conyers* counſel for the earl of *Bath*, who was the proſecutor, moved that judgment ſhould be given againſt them in their abſence. But *per Holt* chief juſtice, no judgment for corporal puniſhment can be pronounced againſt a man in his abſence; and no writ can be granted to ſeize a man and ſet him in the pillory. Therefore the motion was denied.

Judgment for corporal puniſhment cannot be pronounced againſt a man in his abſence. D. acc. Salk. 56.

Winter *verſ.* Loveden.

S. C. 37. Carth. 427. 12 Mod. 147. 5 Mod. 244. 378. Holt. 414.

EJECTMENT for lands in *Somerſetſhire*. Upon the general iſſue pleaded, as to three parts the jury found the defendants not guilty; and as to the fourth they gave a ſpecial verdict, that the lands in queſtion are cuſtomary lands, parcel of the manor of *Goathurſt*, and demiſed and demiſable by copy of court-roll at the will of the lord, according to the cuſtom of the manor, time whereof, &c. that *George Powlett* was ſeiſed in fee of the manor of *Goathurſt*, and had iſſue *Edward Powlett*; that *George Powlett*, 9 *Jac.* 1. in conſideration of the marriage of his ſon, and of the marriage portion, ſettled the manor of *Goathurſt* to the uſe of himſelf for life, remainder to his wife for life, remainder to *Edward Powlett* and his heirs males of his body, &c. remainder to the heirs of the body of *Edward*, &c. with a proviſo, that *George Powlett* ſhould have power during his life, and his wife ſhould have power after his deceaſe during her life, to demiſe the premiſſes in poſſeſſion for one, two or three lives, or for thirty years, or any other number of years determinable upon one, two or three lives, or in reverſion for one, two or three lives, or for thirty years, or any other number of years, determinable upon one, two or three lives, ſo that the demiſe be not of the ancient demeſne lands, parcel of the premiſes, or any of the other lands uſed or reputed demeſne lands within ſeven years before the ſettlement, and ſo as the

Copyholds are part of the demeſnes of a manor. S. C. Salk. 537. 1 Freem. 507. cit. Powell. 398. A power ſhall never be conſtrued to give a right to deſtroy the nature of its ſubject. S. C. cit Powell 407. A leaſe by tenant for life under a power, is as a leaſe by the owner of the inheritance. S. C. 1 Freem. 508. The leaſe of a copyhold for life deſtroys the nature of the eſtate. vide Dougl. 689. 694. Under a power to leaſe the whole of a manor except the ancient

demeſne lands, copyholds cannot be leaſed. S. C. Salk. 537. 1 Freem. 507. cit. Powell. 398. But the rents and ſervices of the manor may. S. C. 1 Freem. 507. Notwithſtanding a condition be annexed to the power, that upon every leaſe the uſual rent ſhall be reſerved. A qualification in a power which can apply to ſome of its ſubjects only, ſhall not prevent its execution as to the reſt. S. C. 1 Freem. 507. R. acc. 1 Vent. 294. 3 Keb. 544. 547. 586. 595. 2 Lev. 150. 1 Freem. 413. 2 Roll. Abr. 262. 16 Vin. 469. pl. 15. Dougl. 544. And ſee Powell 402, to 411. Words in a power tending to enlargement, ſhall never be conſtrued to reſtrain a former clauſe. Under a power to leaſe in poſſeſſion for one two or three lives, or for thirty years or any other number of years determinable on one, two or three lives, or in reverſion for one, two or three lives, or for thirty years, or for any other number of years, determinable on one, two or three lives, a man cannot make an abſolute leaſe in poſſeſſion for thirty years; an abſolute leaſe in reverſion for thirty years he may. S. C. Salk. 537.

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ancient rent be reſerved, &c. the jury find that the marriage took effect, and that *Edward Powlett* had iſſue four daughters, the eldeſt of whom was the leſſor of the plaintiff; they find, that *George Powlett* by indenture between him and *Robert Blanchburne*, reciting that *Robert Blanchburne* and his wife held certain lands in *O.* in the pariſh of *Goathurſt* (which are the lands now in queſtion) by copy of court-roll for their lives, in conſideration of 60*l.* demiſed the ſaid lands to *Robert Blanchburne*, *habendum* for thirty years to commence immediately after the death, ſurrender, forfeiture, or other determination of the eſtate of *Blanchburne* and his wife; they find, that *George Powlett* and *Elizabeth* his wife, *Edward Powlett* and his wife, and *Robert Blanchburne* and his wife are dead; that *Robert Blanchburne* entered and was poſſeſſed, and aſſigned to the defendant *Loveden*, who was poſſeſſed, &c. And after ſeveral arguments at the bar, the court in ſolemn argument pronounced their opinion for the plaintiff, but they differed in their reaſons. *Rokeby* juſtice ſaid, that the queſtion was, whether this leaſe was within the power; and he was of opinion, that it was not; for he ſaid, that the rules for conſtructions of powers are, 1. That they ought to be interpreted according to the intent of the parties. 2. They ought to be purſued ſtrictly. In this caſe (by him) the intent was to enable *George Powlett* to continue the eſtate in leaſe, as it was at the time of making the ſettlement; but under ſome reſtrictions. 1. He could not demiſe the lands which were for the ſuſtenance of the family. 2. Nor make any leaſes without determinability. 3. Nor deſtroy the copyhold eſtates. And he was of opinion, that this leaſe was not void for the breach of the firſt branch, *viz.* for demiſe of the copyholds, which in law are demeſnes. For though in ſtrictneſs of law copyholds are demeſnes, yet it was not the intent of the power to include them within the word demeſnes. But (by him) by the third reſtriction the demiſe of the copyholds is void, becauſe it breaks the implied conſtruction; for ſuch a power would deſtroy the copyhold manor *qua* copyhold, which is contrary to the intent of the parties. 2. The leaſe is an abſolute leaſe, and therefore void; for the determinability goes to all the years there mentioned, as well the term for thirty years as for the uncertain number of years. And if the words [or for] in the laſt limitation make a difference, *George Powlett* would have a greater power to make leaſes in reverſion than in poſſeſſion, which would be unreaſonable. For in poſſeſſion the term for thirty years ought to be determinable upon one, two or three lives, and not abſolute. *Holt* chief juſtice, *Turton* and *Eyre* juſtices argued alſo for the plaintiff. And *Holt* chief juſtice ſaid that the great queſtion was, whether this leaſe was purſuant to the power? And therefore, 1. It is conſiderable, whether the term for thirty years abſolutely be within the power. 2. Whether the lands demiſed are within the power. And as to the firſt, he conceived, that the land

Powers muſt be conſtrued according to the intent of the parties. S. P. 5 Mod. 379. D. acc. Burr. 120. Dougl. 552. and purſued ſtrictly. S. P. 5 Mod. 380. D. acc. Burr. 120. vide Burr. 1446.

was

was in poſſeſſion of *Blanchburne* at the time of the making the ſettlement, but that does not appear by the verdict. For if a man has power to make leaſes in poſſeſſion or reverſion, if he makes a leaſe in poſſeſſion once, he ſhall never after make a leaſe in reverſion, for he has an election to do the one or the other, but not both. Therefore if the copyhold was demiſed after the ſettlement in poſſeſſion, he could not have executed this power to demiſe in reverſion. But he ſaid, that he would not declare his opinion of that, becauſe it did not come judicially before him. And 1. (by him) This leaſe as a leaſe in reverſion is within the power, for a leaſe in reverſion in the largeſt ſenſe ſignifies a leaſe made to begin *in futuro* and in that ſenſe is oppoſed to a leaſe in poſſeſſion; but that is not meant here. 2. It ſignifies a leaſe to begin from and after a leaſe, *&c.* in poſſeſſion. The ſtatute of 14 *Eliz. c.* 11. *ſ.* 19. which reſtrains the clergy from making of leaſes in reverſion is to be underſtood of leaſes *in futuro* So was the caſe of *Baily v. Muns* in the time of lord chief juſtice *Hale. Intr. Trin.* 23 *Car.* 2. *B. R. Rot.* 1012. 1 *Vent.* 244. 2 *Lev.* 61. 3 *Keb.* 46. 107. 193. contrary to the opinion in the caſe of *Thomſon* and *Trafford* in *Popham*, 9. But in the caſe of a leaſe for life within this power, it muſt be intended of a leaſe of the reverſion, and not of a leaſe *in futuro*, becauſe the freehold muſt commence in poſſeſſion immediately. Then the queſtion here is, if this leaſe in reverſion might be abſolute; and he held that it might, for it is within the reaſon of *Finch*'s caſe, 6 *Co.* 39. *a.* It is to demiſe in reverſion for one, two or three lives, or for thirty years, or for any other number of years determinable upon one, two or three lives. Theſe words [or for] disjoin the ſentences, and make them ſeveral, and go to the latter part by way of enlargement of the power. *Regina v. Lewis.* 1 *Leon.* 119. Where words tend to enlargement they ſhall never be conſtrued to be a reſtraint upon the former clauſe. If this power be conſidered with relation to the intereſt intended to be paſſed by the power, it is very reaſonable, for thirty years bear a proportion to three lives. Heretofore twenty one years were accounted proportionable to three lives, but now thirty years are looked upon as proportionable to three lives. Then though it may be thought ridiculous to have a greater power, to make leaſes in reverſion, than in poſſeſſion, nevertheleſs the words carry this conſtruction, by which the court ought to be guided; and though it ſeems odd, yet it is a part of the bargain. And therefore he was of opinion, that an abſolute leaſe for thirty years was warranted by the power; to which *Turton* and *Eyre* juſtices agreed.

Under a power to make leaſes in poſſeſſion or reverſion, a man may make either, but not each.

Under a power to make a chattel leaſe in reverſion a man can only make leaſe to begin after the determination of an exiſting one. S. P. Com. 39. Salk. 537. 5 Mod. 381. Carth. 429. 12 Mod. 150. Powell 423, 424, 425.

Under a ſimilar power to make a freehold one, a concurrent leaſe of the reverſion only. S. P. Com. 59. Salk. 537. 5 Mod. 381. Carth. 429. 12 Mod. 150. Powell 424, 425.

2. By *Holt* chief juſtice theſe copyhold lands are excepted out of the power. His brother *Rokeby* was of opinion, that this was an exception implied; but (*per Holt* chief juſtice) ſince

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ſince it is unreaſonable, that theſe lands ſhould be within the power, and they are both within the words of the exception, and the meaning of it, it is very reaſonable to confine the exception to the ſtrict words; and ſince copyhold lands are part of the demeſnes, they ſhall be excepted by the word demeſnes. If a man aliens all his demeſnes, except the ſervices of his freeholders and copyholders, the manor remains; which could not be if the copyholds were not demeſnes. Beſides, that it is unreaſonable, to enable a tenant for life, to deſtroy the copyhold, which he might do without this conſtruction of the power, for the power being derived out of the inheritance, if theſe copyhold lands were out of the exception, this leaſe, though made by a bare tenant for life, would deſtroy them for ever. And this power is limited to the wife, which is more unreaſonable. And there was no occaſion for a power to enable a tenant for life to make ſuch leaſes, for he might by the cuſtom have granted cuſtomary eſtates. Therefore ſince the words are comprehenſive enough, and it is reaſonable, he would conſtrue copyholds to be within the exception under the word demeſnes.

Objection. If you conſtrue copyholds to be within the exception under the word demeſnes, there will be no lands for the power to have operation upon.

Anſwer. There are other lands found in the verdict whereof *George Powlett* was ſeiſed.

Objection. Though there are other lands found, as *Bridgwater*, that is not to the purpoſe, for the words of the power are confined to the manor.

Anſw. The power does not extend to all the manor, but to ſo much of the manor except the demeſnes. And it is not contrary to the premiſſes, for though copyholds and demeſnes are excepted, yet there are rents and ſervices, and that is ſufficient to ſatisfy the power; for though no rent can be reſerved out of them, yet ſince there is a power to leaſe them, that will be ſufficient; for where there is a power to demiſe divers things, and there is one qualification which does not extend to them all, the power may be executed in the reſt. And for this *Holt* cited 2 *Roll. Abr.* 262. 16 *Vin.* 469. *pl.* 15. and the caſe of *Walker* and *Wakeman*, which he put at large. See the caſe, 1 *Ventr.* 294. 3 *Keb.* 544. 547. 586. 595. 2 *Lev.* 150. 1 *Freem.* 413. So in this caſe *George Powlett* might leaſe the rents and ſervices without reſervation of any rent; and ſo all the words of the power are ſatisfied. But if the demeſnes might have been demiſed, no conſtruction could have been made, to ſeparate the ſervices from the demeſnes. But ſince the demeſnes could not be demiſed it is reaſonable that he ſhould be able

to

to demiſe the rents and ſervices to ſatisfy the power. *Turton* and *Eyre* juſtices agreed. And judgment was given for the plaintiff.

WINTER v. LOVEDEN.

Evans *verſ.* Marlett.

An action againſt the maſter of a veſſel for the loſs of goods muſt be brought by the perſon in whom the property in them is veſted. Sed vide Burr. 2686. 1 T. R. 659. *(a)* Upon a general conſignment the property veſts in the conſignee, notwithſtanding it appears upon the invoices that he is a truſtee only. S. C. 12 Mod. 156. 3 Salk. 290. But on a conſignment to A. for the uſe of B. the property is in B. S. C. 12 Mod. 156. 3 Salk. 290. A bill of lading is aſſignable. R. 2 T. R. 63. 674.

IF goods by bill of lading are conſigned to *A. A.* is the owner, and muſt bring the action againſt the maſter of the ſhip if they are loſt. But if the bill be ſpecial, to be delivered to *A.* to the uſe of *B. B.* ought to bring the action. But if the bill be general to *A.* and the invoice only ſhews, that they are upon the account of *B. A.* ought always to bring the action, for the property is in him, and *B.* has only a truſt, *per totam curiam*. And *per Holt* chief juſtice, the conſignee of a bill of lading has ſuch a property as that he may aſſign it over. And *Shower* ſaid, that it had been adjudged ſo in the Exchequer.

(a) According to 12 Mod. 556. and Salk. 290. The queſtion was whether the action could be brought by the conſignee, it appearing by the invoices that he was a truſtee only.

Shermoulin *verſ.* Sands.

S. C. Comb. 462. Carth. 423. 12 Mod. 143. 6 Vin. 536. pl. 21.

Q. Whether the admiralty ſhall be prohibited after ſentence, if it appears to have juriſdiction upon the whole of the pleadings, though not upon the libel. On a libel in the admiralty for the capture of a ſhip, it ought to appear that the capture was upon the ſea. Where the court is divided no rule can be made. R. acc. poſt. 486. D. acc. 3 Mod. 156.

Shermoulin libelled in the admiralty, for that he and others equipped a ſhip for a voyage, and *T.* the defendant there unlawfully took her from him. *T.* pleaded there, that this ſhip was taken by *Du Barth* upon the high ſea, and that he bought her of *Du Barth* at *Bergen*. *Shermoulin* replied that ſhe was taken unlawfully. And ſo the queſtion there was, whether the capture by *Du Barth* had altered the property. And a decree was made for *Shermoulin*. Upon which *T.* appealed to the delegates, and pending the appeal moved for a prohibition. *Northey* againſt this cited the caſe of the *King* and *Brcome*, *Trin.* 9 *Will.* 3. 12 *Mod.* 134. *Carth.* 318. 5 *Mod.* 340. *Comb* 444. *Salk.* 32. *Broome* captain of a man of war took a *French* ſhip upon the high ſea in the *Weſt Indies*, which afterwards was condemned in the admiralty in *England* for prize; and he ſold her at *Barbadoes*; and then returning to *England*, the king libelled in the admiralty againſt him for the ſhip and goods; and *Broome* moved for a prohibition, upon a ſuggeſtion that the converſion was upon the land; but it was denied, becauſe the original cauſe, which was the capture, was upon the high ſea, and immediately upon the capture the captain became chargeable to the king; ſo that though he broke his truſt at land, yet the right, which is the cauſe of the action to the king commenced upon the high ſea, and ſo proper for the admiral's juriſdiction. In the ſame manner here, the queſtion being prize or not prize, which is proper for the admiralty, though the title of *T.* commenced at land, yet that will not withdraw the ſuit from the admiralty. 2 *Saund.* 259. 1 *Sid.* 367. *Darnell* ſerjeant argued to the ſame effect; and

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and farther that *T.* comes too late after ſentence, 1 *Cro. Car.* 69. for after ſentence and appeal a prohibition ſhall not be granted, unleſs it appears in the body of the libel that the matter of the ſuit is not within their juriſdiction. 2 *Roll. Abr.* 318. 18 *Vin.* 51. *pl.* 2.

No prohibition after ſentence unleſs the want of juriſdiction appears upon the pleadings. R. acc. Dougl. 363. D. acc. poſt. 1453. Vide Com. Prohibition. D. Ed. 1780. vol. 4. p. 490.

Holt chief juſtice, It is not alledged in the libel, that the capture was *ſuper altum mare*; ſo that nothing appears to give juriſdiction to the admiralty. For a man ſhall not ſue in the admiralty, only becauſe it is a ſhip. It appears by the plea, to be matter proper for the admiralty; but that alone will not give them juriſdiction; for if the admiralty has not conuſance of the original cauſe, but ſomething ariſes upon it which is within their juriſdiction, that will not give them juriſdiction over the principal. But *e contra*, when the principal is within their juriſdiction, and an incident happens triable at common law, *&c.* And the reaſon of this is, becauſe the common law is the over-ruling juriſdiction in this realm: and you ought to intitle yourſelves well, to draw a thing out of the juriſdiction of it. In the caſe of *Radley v. Egleſfield*, 2 *Saund.* 259. the capture was alledged in the libel to be *ſuper altum mare*; in the ſame manner in *Broome's* caſe, *ubi ſupra.* Now this libel is no more than a replevin, and the matter of this plea might have been a good juſtification in treſpaſs. As to the matter of the time of the motion, the common difference is, if the cauſe belongs to the courts of the civil law, and a man ſues in an inferior dioceſe, where the conuſance of the cauſe belongs to the metropolitan, and the defendant acquieſces in it, and admits the juriſdiction, and ſentence is given, he ſhall not reſort afterwards to the ſuperior court. But if it appears that the ſpiritual court has no juriſdiction, no admittance whatſoever ſhall ſtop the prohibition. *Holt* chief juſtice and *Rokeby* were of opinion, that a prohibition ought to be granted: but *Turton* and *Eyre* juſtices *contra*; becauſe it was after ſentence and great expences in the admiralty; and becauſe now upon the whole proceedings it appears, that the admiralty has juriſdiction, the defect of the libel being aided by the defendant's plea. Therefore becauſe the court was divided, no prohibition could be granted.

The court ſhall not grant a prohibition after ſentence to a ſuit of ſpiritual cognizance becauſe it is brought in an improper ſpiritual court. R. acc. Cro. Car. 69. 18 Vin. 51. pl. 1. And ſee the caſes there cited.

Courtney *verſ.* Collet.

S. C. 12 Mod. 164.

Actions which require different judgments cannot be joined. Vide 2 Wilſ. 321. 1 Term. Rep. 276. ante 58. and the caſes there cited.

Treſpaſs *quare clauſum* of the plaintiff called *B. fregit, et herbam ibidem creſcentem pedibus ambulando conculcavit et conſumpſit, et piſcatus fuit in ſeparali piſcaria, necnon quare foſſea, viz. eodem die et anno* the defendant threw down a certain wear, *per quod aqua ab eadem cataracta decurrens piſcariam ipſius* the plaintiff *ibidem in tantum inundavit, quod per curſum aquæ*

Bro. Treſpaſs. pl. 112. 2 Vin. 39. pl. 13. The judgment in treſpaſs is a capiatur. In actions upon the caſe, though vi & armis, a miſericordia. Therefore treſpaſs and caſe cannot be joined. Cauſing water to overflow another's fiſhery or land, though by an act on the party's own ſoil, is a direct treſpaſs. S. C. Carth. 374. Cit. Str. 635. Blackſt. 895. Vide Hardr. 60. poſt. 1042, 1403. ante 188. and the caſes there cited.

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illius,

illius, et inundationem praedictam, piſces in eadem piſcaria tunc exiſtentes ad valentiam exiverunt, &c. Upon not guilty pleaded, verdict for the plaintiff, and intire damages were given. *Gould* king's ſerjeant moved in arreſt of judgment, that the plaintiff has joined an action of treſpaſs, and an action upon the caſe, which cannot be joined, 2 *Roll. Rep.* 139, 140, *Dawtry verſ. Dee*, for the former part of the declaration is a plain treſpaſs, but the latter is only caſe. For if *A.* breaks the fences of *B. per quod* the cattle of *C.* eſcape into *B.*'s land; caſe lies for *C.* againſt *A.* if the cattle of *C.* are diſtrained for eſcaping and *damage feaſant* in *B.*'s land. And in this caſe the plaintiff does not ſay, that the defendant broke his wears, but they might be ſome other perſon's: and in fact they were the defendant's own wears, and therefore treſpaſs does not lie for it, but caſe, for the conſequential damage to the plaintiff. And therefore the caſe differs from the caſe of (*a*) *Drake v. Cooper*, *Carth.* 113. where in treſpaſs for breaking the plaintiff's cloſe, containing one hundred acres, upon which a fair uſed to be held every *Michaelmas* day, and for throwing down booths and ſtalls *ibidem erecta*, *per quod* the plaintiff loſt the benefit of his pickage; after verdict for the plaintiff, upon motion in arreſt of judgment, the court were of opinion, that this was an intire treſpaſs, becauſe the booths appeared to be erected upon the plaintiff's land and therefore intended to be his. But in the preſent caſe the wears do not appear to be upon the plaintiff's land, and therefore different. And *Hill.* 25. *&* 26 *Car.* 2. *B. R. rot.* 700. between *Robinſon* and *Bailey*, 3 *Keb.* 331. *Robinſon* brought an action for battery of his ſervant, *per quod ſervitium amiſit*, and for taking of nine pound of butter; and upon not guilty pleaded, and verdict for the plaintiff, it was held by the court, that the one was caſe, and the other treſpaſs, and therefore they could not be joined. But it was argued by Mr. *Carthew* for the plaintiff, that if it ſhould be admitted that this was but caſe, yet it being laid for a malfeaſance, it might be laid with *vi et armis*, and therefore may be joined with a plain treſpaſs. But, 2. (by him) this latter part of the declaration is but bare treſpaſs: and for this he cited *Reg.* 97. *a.* 12 *Hen.* 4. 3. *a.* *F. N. B.* 89 *M.* where it is ſaid, if a man fills a ditch with dung, *&c.* by which the water uſed to have its courſe, *per quod* another man's land is ſurrounded, he ſhall have treſpaſs *vi et armis*. And *Reg.* 95. *a*, *b.* *F. N. B.* 87. *L.* the very precedent from which this declaration was drawn. And as to the former point, after two arguments at bar, the court was of opinion, that treſpaſs, and treſpaſs upon the caſe, were two diſtinct things of different natures; and although if *vi et armis* is put in treſpaſs upon the caſe for malfeaſance, this will not vitiate; yet the judgments in treſpaſs and caſe are

Caſe lies for breaking the fences of a third perſon, per quod my cattle eſcape into his land and are diſtrained.

(*a*) The ſtatement of this caſe in Carthew differs from that here given.

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different. For in treſpaſs always the judgment is *quod capiatur*; but in treſpaſs upon the caſe, though *vi et armis* be inſerted, yet the judgment is, *quod ſit in miſericordia*; and actions can never be joined, which have different judgments. But as to the ſecond point, it ſeemed to the court that this was a plain treſpaſs; for the cauſing a ſuperfluity of water to drown or overflow the land or fiſhery of the plaintiff, is a plain treſpaſs, and the *per quod* the fiſh eſcaped is but an aggravation of damages. And therefore the whole court was of opinion for the plaintiff. *Sed adjournatur*. Note, that *Holt* chief juſtice ſaid in this caſe, that if *A.* brings an action againſt *B.* for battery of *A.'s* ſervant, *per quod ſervitium amiſit*, it is a plain action of treſpaſs.

An action for beating a ſervant per quod, &c. is an action of treſpaſs. Semb. acc. Bl. 854, 855. Sty. 44. Semb. cont. Al. 9. poſt. 831. Salk. 206. Morris v. Fitzroy B. R. M. 11 G. 2. 2 Term Rep. 167.

Green *verſ.* Watts.

The diſcontinuance of an action does not annul the record of it. The reverſal of a judgment does annul the record of the judgment.

PER Holt chief juſtice, if the defendant pleads an action depending in another court for the ſame cauſe in abatement, and *nul tiel record* is pleaded; if there was ſuch record at the time of the pleading of the plea, though the action was afterwards diſcontinued, yet the plea is good, becauſe it was true at the time of the pleading. But if a man pleads a recovery by judgment in bar of an action, and the ſaid judgment is reverſed after the pleading of the plea, now the plea is ill, becauſe now it is no ſuch record *ab initio*.

Mich.

Mich. Term

9 Will. 3. C. B. 1697.

Sir George Treby *Chief Juſtice.*

Sir Edward Nevill
Sir John Powell
Sir John Blencowe *removed this term out of the Exchequer in the room of Sir* John Powell *deceaſed.*
} *Juſtices.*

Arnold *verſ.* Jefferſon.

S. C. Salk. 654.

TROVER de ſcripto ſuo obligatorio. The plaintiff declares, that he and *J. S.* were bound by this obligation jointly and ſeverally to *R. F.* that the plaintiff was poſſeſſed of this, and that he loſt it, and that the defendant found and converted it; *&c.* Not guilty pleaded. Verdict for the plaintiff. And now it was objected, that though the obligee might bring *trover* for this bond *ut de ſcripto ſuo obligatorio*, yet it could not be *ſcriptum obligatorium* to a ſtranger; therefore the plaintiff could not bring *trover* in this manner. For though it be ſuppoſed that the bond was given to the plaintiff, yet nothing paſſed to him but the material part, *viz.* paper, *&c.* but the *lien* and right of action continued undiſpoſed in the obligee. But it was admitted, that the plaintiff might have had treſpaſs, becauſe that might be maintained upon the bare poſſeſſion. But *trover* will not lie without property, therefore the plaintiff has miſtaken his action. At leaſt, if it ſhould be admitted, that *trover* would lie, yet the plaintiff has not brought his action well, becauſe this could not be

Trover lies upon a ſpecial property. R. acc. 1 Mod. 30. 1 Vent. 52. 1 Sid. 438. Cro. Eliz. 819. 5 Co. 24. b. 3 Will. 332. D. acc. 1 Roll. Abr. 4. l. 52. 1 Vin. 236. The baillee of a bond may maintain trover for it. Vide 1 Vin. 239. pl. 3. and deſcribe it as *his writing obligatory.* Vide Cro. Jac. 637.

ARNOLD v. JEFFERSON.

ſcriptum ſuum obligatorium, ſince it appears of his own ſhewing, that it was the bond of *R. F.* But to this it was anſwered and reſolved by the court, 1. That *trover* and converſion will lie upon a ſpecial property, as in caſe of a carrier. 2. That any ſtranger may maintain *trover* for a bond upon a ſpecial property, by bailment, as well as the obligee himſelf. 3. That a ſtranger may not only bring *trover*, but alſo *ut de ſcripto ſuo obligatorio*, as well as the obligee himſelf, becauſe the *ſcriptum obligatorium* is not inſerted, to declare that the defendant has converted the duty or *choſe in action* which belonged to the plaintiff, but to ſhew what ſort of deed it is, which is converted; for *per Treby* chief juſtice it is admitted, that the obligee might bring *trover pro ſcripto ſuo obligatorio*, but in that caſe the *trover* is not of the right of action, which is a thing inviſible, but it is of the material part of the deed; and therefore theſe words are uſed, to intimate what ſort of deed is converted. 4. After verdict, that the court would intend, that the bond was given to the plaintiff. And in truth the fact was ſo, for the plaintiff was forced to pay the money, whereupon the bond was given to him.

Shalmer *verſ.* Pulteney.

Pleadings Lutw. 1586. poſt. vol. 3. 181.

Adjoining buildings ſhall be intended to lie in one pariſh.

The time of limitation on a quod permittat is fifty years. Vide 32 H. 8. c. 2. ſ. 2.

A quod permittat lies againſt the owner of the land, his heir or feoffee in reſpect of a nuſance levied by a ſtranger. S. C. Lutw. 1588.

A quod permittat proſternere *quadam edificia* is good. S. C. Lutw. 1588.

THE plaintiff brought *quod permittat* againſt the defendant, to permit him *proſternere quaedam aedificia* raiſed within fifty years upon the freehold of the defendant's huſband, and now ſince the death of her huſband her freehold, to the nuſance of the plaintiff. And the plaintiff ſhews, that Sir *William Pulteney* was ſeiſed in fee of three meſſuages in *St. Martin's in the fields* in *Middleſex*, to which a void piece of ground was contiguouſly adjoining; and that Sir *William Pulteney* granted theſe meſſuages to the plaintiff; and that he and all thoſe whoſe eſtate he hath in the ſaid three meſſuages time whereof, *&c.* have had and have uſed to have eleven windows towards the ſaid piece of ground: that 1 *June* 4 *Jac.* 2. *Gervaſe Hulker* leſſee for years of the defendant's huſband raiſed certain edifices upon the ſaid void piece of ground, which ſtopped the lights of the plaintiff; that this piece of ground came to the defendant after the death of her huſband; and that the defendant would not permit the plaintiff to throw down theſe buildings, though ſhe was often times requeſted. The defendant pleaded in abatement, that there is no ſuch writ of *quod permittat* in the *Regiſter*, as this which the plaintiff hath brought. The plaintiff demurred. And the firſt exception was, that no pariſh nor *lieu conus* is alledged, in which theſe edifices ſuppoſed to be built lie. See 9 *Co.* 58. *a.* But to this the court anſwered, that they ſhall be intended to lie in the ſame pariſh where the three meſſuages

meſſuages lie, becauſe they are ſaid to be contiguouſly adjoining. The ſecond exception was, that the writs in *F. N. B.* 124. *H.* are, *poſt* (*a*) *primam transfretationem*, &c. but this writ is, *infra quinquaginta annos*. But to this the court anſwered, that it is well enough, for now the time of limitation is altered. Third exception *per Wright* was, that the *Regiſter* allows a writ of *quod permittat* againſt the perſon who levied the nuſance, his heir or feoffee; but in this caſe the defendant does not claim under him who levied the nuſance. But to this *Levinz* ſerjeant anſwered, that if *A.* levies a nuſance upon my land, if I continue it, *quod permittat* lies againſt me, for the prejudice to the plaintiff is the ſame. And to this the court agreed. *F. N. B.* 124. *E.* Fourth exception was, that the word *quædam* was a word too general. But to this the court anſwered, that it has been allowed before, and therefore it is well enough. *Hearne's Pleader* 579. 587. *Warren v. Sainthill*; in the record, *quaedam foſſa*, &c. Fifth exception was, that *quod permittat* will not lie *proſternere aedificium*; but *per Wright* the plaintiff ought to ſhew, what kind of edifice it is; for *praecipe quod reddat* will not lie *de quodam aedificio*, nor (*b*) ejectment. Then here there ought to be as great certainty as in a *praecipe*, becauſe the ſheriff in this action muſt proſtrate the nuſance, and totally take away the defendant's property. *Treby* chief juſtice ſaid, that he wiſhed, that to allow this might not be of ill conſequence; for if it ſhould be allowed, aſſizes or *quod permittat* for time to come would not be brought for any thing certainly ſpecified by its proper name, by which the ſheriff would be inveſted with an unlimited power in ſuch executions. 1. He ſaid, that there were reſolutions almoſt in point againſt this, for it has been adjudged, that nuſance will not lie *de mole*, which (by him) ſeemed to be much leſs equivocal than the word *aedificium*. See *Noy* 68. (*c*) But notwithſtanding that, he and the whole court were of opinion, that in this caſe the writ was good. 1. Becauſe it might be, that there is a building or edifice, which hath not any certain appellation, and they would intend that it was ſo in this caſe. 2. Nuſance *de fabrica*. *Old N. B.* 110. *F. N. B.* 184. *B.* and conſequently it will lie *de aedificio*, for the one is equally uncertain as the other. 3. In *quod permittat* the view is grantable, and it is not like ejectment or a *praecipe*, where the thing itſelf is demanded, and ought to be recovered. Therefore the court awarded *reſpondeat ouſter*. But note the court did not rely upon the reaſon of the view, for that might ſatisfy the jury, but was no direction to the ſheriff. And *Powell* juſtice ſaid, that there could not be any *Anglice* in a writ of right; and that in this action ſo much of the building as ſtops the lights ought to be abated, and no more.

Blackett

Shalmer v. Pulteney.

(*a*) Vide 20 H. 3. c. 8. 3 Edw. 1. c. 39.

(*b*) Vide Burr. 629. 2672.

(*c*) Sed vide S. C. Moor. 449. Cro. Eliz. 520.

In a quod permittat for ſtopping lights, ſo much only of the nuſance as ſtops the lights ſhall be abated. D. acc. W. Jon. 222.

Blackett *verſ.* Criſſop.

Pleadings Lutw. 686. poſt. vol. 3. 143.

A contract to indemnify a ſheriff in doing what he ought to do, is good, vide 1 Anderſ. 267. pl. 274. Hob. 12 Moor 856. 3 Vin. 452.

A contract to indemnify him in doing what he ought not to do, bad.

The ſheriff may take a bond from the plaintiff in replevin to proſecute, &c. make return, &c. and indemnify the ſheriff againſt the replevin, S. C. Lutw. 687. D. acc. Dalt. 434. Gilb. Replev. 67. and vide Dalt. 439. 440.

The ſheriff may be ſued if he omits taking pledges de retorno habendo in replevin. R. Cro. Car. 322. D. 16 Vin. 399. vide 13 Ed. 1. c. 2. ſ. 3. or takes inſufficient ones. R. 16 Vin. 399. D. acc. Dalt. 434. Gilb. Replev. 67. 2 Inſt. 340.

On a replevin in a court of record a ſcire facias lies againſt ſuch pledges R. 3 Mod. 56. D. acc. Gilb. Replev. 68. 177.

In a court not of record a precept in the nature of a ſcire facias. S. C. cit. Gilb. Replev. 177.

The ſheriff is not warranted in taking money inſtead of pledges to ſecure a return.

DEBT upon bond. Upon *oyer* it appears, that the condition was, that if the defendant *Criſſop* ſhould appear at the next county court, *&c.* and proſecute his action with effect againſt *J. S.* for wrongfully taking and detaining of his gelding, and ſhould make return thereof if return ſhould be adjudged, and ſave harmleſs the plaintiff *Blackett* ſheriff of, *&c.* by the delivery of the ſaid gelding, that then, *&c.* And upon this the defendant demurred. And it was argued, that this bond was void by the common law. For the ſheriff had not power before the ſtatute of *Weſtm.* 2. 13 *Ed.* 1. *c.* 2. *ſ.* 3. to take pledges, ſo that ſuch bond taken before the ſtatute of *Weſtm.* 2. 13 *Ed.* 1. *c.* 2. *ſ.* 3. had been without doubt void: and therefore it ſhall be void now, for the ſheriff has no authority by the ſtatute for this practice. See *Dalton* 434. But *per Holt* juſtice, there are two ſorts of pledges, *plegii de proſequendo*, and *plegii de returno habendo*. The pledges of proſecuting were at common law, but thoſe *de returno habendo* were appointed by *Weſtm.* 2. 13 *Ed.* 1. *c* 2. *ſ.* 3. *(a)* by which ſtatute an action lies againſt the ſheriff if he omits to take pledges, or if he takes thoſe that are inſufficient; for the party may have a *ſcire facias* againſt the pledges, where the ſuit is in any court of record. And though in the county court, *&c. ſcire facias* will not lie againſt the pledges, becauſe theſe are not courts of record, and every *ſcire facias* ought to be grounded upon a record; yet there the party may have a precept in nature of a *ſcire facias* againſt the pledges. And this is the reaſon, why the ſheriff cannot take gage inſtead of pledges, for the party has no remedy againſt the gage, as he hath againſt the pledges. And (by him and *Treby* chief juſtice) ſuch a bond will anſwer the intent of the ſtatute that requires pledges, for the obligors are ſureties. And *plegii* in the old books ſignifies ſureties. And this practice of taking bond inſtead of pledges is ancient uſage. But (by them) the queſtion will not be in this caſe, whether the ſheriff can take a bond inſtead of pledges; as it would have been, if the party had brought an action againſt the ſheriff, for not having taken pledges, and the ſheriff had pleaded that he had taken this bond; but the queſtion now is, whether this bond ſhall be void. And by the whole court the bond is not void. At common law it had been void, becauſe it had been to ſave the ſheriff harmleſs in making replevin by plaint, which he could not have done before the ſtatute of *Marleb.* 52. *H.* 3. *c.* 21. and alſo that the defendant ſhould make return of the cattle. to do which the ſheriff could not have taken pledges; and therefore he would have done

R. W. Jones. 378. vide Cro. Car. 322. Dalt. 434. Gilb. Replev. 68.

what

what he ought not to have done. But now it is the duty of the ſheriff, to take pledges to make return, and alſo to replevy by plaint; therefore the bond is lawful. For by *Powell* juſtice, where the ſheriff takes a bond or promiſe, to keep him harmleſs in the doing of a lawful act, the bond or promiſe is good; but if it be in the doing of that which he ought not to do, the bond or promiſe is void and againſt law.

BLACKET v. CRISSOP.

Studholme *verſ.* Mandell.

Intr. Trin. 9 W. 3. Rot. 1943.

S. C. Lutw. 693. Nelſon's Lutw. 213.

Pleadings. Lutw. 688. poſt. Vol. 3. p. 186.

AN action of covenant was brought by the plaintiff upon covenants in an indenture, by which the plaintiff demiſed a mill to the defendant, and in which the defendant covenanted, to leave the mill ſtones in as good condition as he found them, or to pay to the plaintiff ſo much as they ſhould be damnified; the damage to be eſtimated by *A.* and *B.* who viewed them when the defendant entred upon the premiſes. The plaintiff aſſigns for breach, that the defendant had left the mill ſtones damnified, and had not made ſatisfaction to the plaintiff. The defendant pleads, that *A.* and *B.* had not eſtimated the damage. The plaintiff demurs. And ſerjeant *Wright* for the defendant argued, that this was a condition disjunctive, and therefore the leaving of the mill ſtones damnified will not be a breach, becauſe at the time of the covenant he had election, to perform the one or the other part; therefore (according to *Laughter*'s caſe 5 *Co.* 21. *b. Cro. Eliz.* 398. *Moor*, 357) without eſtimation by *A.* and *B.* of the damage of the mill ſtones, the defendant is excuſed from the performance; becauſe it is impoſſible for him to make the adjudication, or to compel *A.* and *B.* to do it; and till that be done, the defendant cannot be liable; no more than if *A.* enters into bond, to perform the award of *B.* and *C.* and *B.* and *C.* will not make any award. Serjeant *Gould contra.* Theſe covenants are part of the condition of the bond. And ſince the latter part of this disjunctive covenant is for the ſafety of the defendant, it belongs to him to procure this eſtimation, or otherwiſe he ſhall be liable. If the eſtimation ought to be made by ſuch perſons as the obligee ſhould appoint, and the obligee had refuſed to appoint, this would have excuſed the defendant; becauſe the performance of the covenant is rendered impoſſible by the act of the obligee. But in this caſe the fact is contrary. And of this opinion was the whole court, and they ſaid, that the rule and reaſon of *Laughter*'s caſe ought not to be taken ſo largely as *Coke* has reported it, but according to the nature of the caſe. And *Treby* chief juſtice put this caſe; (*a*) *A.* in conſideration of a marriage bound himſelf in a bond, with condition, either to make

On a covenant to do *either a particular act or an act to be appointed by a third perſon*, it is incumbent on the perſon who is to do the act, if he chooſes the latter to procure the appointment. R. acc. [illegible]. Cro. Eliz. 716. 814. Moor. 645.

On a diſjunctive condition, if the obligee prevent the performance of one branch, the obligor ſhall be excuſed from performing the other. R. acc. Cro. Eliz. 396. 539. S. C. Salk. 172. pl. 2.

STUDHOLME v. MANDELL.

make a leaſe for the life of the obligee before ſuch a day, or to pay him 100*l.* The obligee died before the day; yet in the time when *St. John* was chief juſtice of the Common Pleas, it was adjudged that the obligor ſhould pay the 100*l.* and *St. John* then declared, that he knew well ſome of the judges who gave the reſolution in *Laughter*'s caſe, and that they denied that they laid down ſuch a rule as *Coke* has reported; yet the whole court held, that the principal caſe of *Laughter* was good law. Judgment for the plaintiff. Note, this laſt caſe put by *Treby* ſeems to be undiſtinguiſhable in reaſon from *Laughter*'s caſe.

Stanfill *verſ* Hickes.

A leaſe for a year, and ſo from year to year, quamdiu. &c. is a leaſe for two years, and afterwards at will. Vide ante 170.

A landlord cannot diſtrain for rent due under a leaſe after the determination of that leaſe, though the tenant continues in poſſeſſion. Sed vide 8 Ann. c. 14. ſ. 6, 7. H. Bl. 5.

IN treſpaſs the caſe was thus; *A.* made a leaſe for a year, and ſo *de anno in annum quamdiu ambabus partibus placuerit*. The leſſee having occupied the land for two years and more, is diſtrained for rent due for the laſt year of the two years. And the queſtion was, whether the diſtreſs was lawful. And *Girdler* ſerjeant argued, that it was all one intire intereſt ariſing from the ſame root; and that as the leaſe at will is derived from the ſame grant, ſo it is but a continuation of the intereſt firſt granted, and then the diſtreſs is lawful. But againſt this *Gould* ſerjeant argued, that this was but a leaſe for two years, and afterwards a leaſe at will. Then ſince the intereſts are different, the ſecond eſtate cannot be anſwerable for the debts of the former eſtate, which was before determined. Of which opinion was the whole court, and for this reaſon it was adjudged, that the diſtreſs was unlawful.

Bellaſis *verſ.* Heſter.

S. C. Lutw. 1591. Pleadings Lutw. 1589. poſt. vol. 3. 336.

In real actions the writ may abate in part. In perſonal one's it cannot. There ſhall be no fraction of a day. Vide Dyer 218. pl. 6 Cro. Eliz. 168. 5 Co. 1. b. poſt. 480. 1095. Unleſs to prevent an inconvenience. vide Burr. 1434. 3 Wilſ. 274. Cowp. 699. 20 Vin. 269. Where time is to be computed from an act done, the day in which the act is done muſt be included. R. acc. 5 Co. 1. a. Hob. 139. poſt. 486. Dougl. 446. D. acc. Co. Litt. 46. b. Cro. Jac. 258. & vide 20 Vin. 266. but ſee alſo ante 85. Where from *the day itſelf*, excluded, R. acc. Cowp. 189. D. acc. 5 Co. 1. b. Cro. Jac. 258. Co. Lit. 46. b. poſt. 480. & vide 20 Vin. 266. but ſee alſo 2 Wilſ. 165. Cowp. 714. Powell on powers 435 to 541. On a bill of exchange payable a certain number of days after ſight, the day of the ſight ſhall be included. Sed vide Bayley 37 ante 85. On a plea in abatement of the writ no exception can be taken to the count before the writ was adjudged good. Vide Carth. 171. 172. The want of a defence in a plea can only be objected to upon a ſpecial demurrer. S. C. 7 Vin. 498. pl. 11.

ASSUMPSIT for 40*l.* The plaintiff declares upon a bill of exchauge for 20*l.* payable ten days after ſight, and that the bill was ſeen by the defendant and accepted the fifth of *May*; and then he ſhews another *aſſumpſit* for the other 20*l.* &c. The defendant craves (*a*) *oyer* of the original, and upon that prays, that the writ may abate *quoad primam promiſſionem*, becauſe the original bears *teſte* the fifteenth of *May*, and the bill was not payable until ten days after ſight; *et quoad alteram promiſſionem*, he pleads in bar without defence. The plaintiff demurs. It was argued by the defendant's counſel, that if the bill be payable ten days after ſight, the day of ſight ſhall be taken excluſive, as well by reaſon of the word *poſt*, as becauſe it is always ſo underſtood among merchants. But the court was of opi-

(*a*) Vide Ford v. Burnham Barnes 4to ed. 340. Dougl. 215.

nion, 1. That in real actions the writ may abate in part, but in perſonal actions a writ cannot abate in part. Therefore admitting that the day is excluded here, the writ muſt abate for the whole, or not all. 2. That there is no fraction of a day in this caſe, but that it ſhall be intirely included or excluded in this caſe; for the law will never account by minutes or hours, to make priorities in a ſingle day, unleſs it be to prevent a great miſchief or inconvenience; as if a bond be made the firſt day of *January*, and this bond is releaſed the ſame day, the bond may be averred to be made before the releaſe. So if a *feme ſole* bind herſelf in a bond, and the ſame day marries; one may aver, that ſhe married after the bond delivered. In aſſiſe it appears that the diſſeiſin was done the ſame day on which the writ was *teſte*, yet this ſhall not abate the writ, becauſe the aſſiſe might be purchaſed after the diſſeiſin. 3. That if there is a cuſtom among merchants, that the day of the ſight ſhall be excluded, it ought to have been pleaded ſpecially; for it is a ſpecial cuſtom, of which the court cannot take knowledge without pleading. And *Powell* juſtice ſaid, that the court would take notice of the *lex mercatoria*, as that there is no ſurvivorſhip, or of a general cuſtom, as gavelkind; but that ſuch ſpecial cuſtom as this here ought to be pleaded. As is an action upon a bill of exchange, unleſs the plaintiff declares upon a cuſtom to ſupport the *aſſumpſit* according to the common form, the action (*a*) will not be maintainable. 4. *Powell* and *Nevill* juſtices were of opinion, that the day in this caſe ought to be included, ſo that the day on which the bill was ſhewn ſhall be reckoned one of the ten. For according to *Clayton*'s caſe, 5 *Co.* 1. *a.* and all the books, when the computation is to be made from an act done, the day in which the act was done muſt be included; becauſe ſince there is no fraction in a day, that act relates to the firſt moment of the day in which it was done, and was as if it were then done. But when the computation is to be from the day itſelf, and not from the act done, there the day in which the act was done muſt be excluded by the expreſs words of the parties. As if a leaſe be made to commence *a die datus*, the day is excluded; but if it be *a confectione*, which is an act done, the day of the making ſhall be included. But *Treby* chief juſtice *contra* held, that if a bill be payable ten days after ſight, the day of the ſight cannot be accounted one of the ten days, but ſhall be excluded. 1. Becauſe it may be ſeen the laſt minute of the day, and that may be intended as reaſonable, as that it was ſeen the firſt minute. 2. The party may have the whole day to view the bill, and that is allowed him by the law. 3. Becauſe the contrary conſtruction ſeems abſurd; for then if a bill be payable one day after ſight, it muſt be paid the ſame day that it is ſeen, which is not the day

The law will take notice of the cuſtom of merchants. R. acc. ante 175.

Or a general cuſtom, as the cuſtom of gavelkind, though not ſet out at large. D. acc. poſt. 1025. 1 Bl. Com. 76. Co. Litt. 175. b. Sed vide Co. Litt. 175. 1. 13th ed. n. 4.

(*a*) R. Cont. ante 175.

after

Bellasis v. Hester.

after the fight, as the bill requires. As to *Clayton's* case, he admitted, that it was good law, but not contrary to his opinion; for if a man makes a leaſe the firſt of *January*, to have and to hold *a confectione* for a year, there the day of the making muſt be accounted one; becauſe being a leaſe from the delivery, and to continue but for one year, unleſs the day be included, the leaſe will not determine until the end of the firſt of *January* the next year, and ſo there will be two firſt days of *January* in one year. But notwithſtanding his opinion, becauſe his brothers were of a contrary opinion, he awarded, that the writ ſhould ſtand, and that the defendant ſhould anſwer over. Note, Before this opinion of the court was pronounced, the defendant's counſel offered to take exception to the declaration, but the court refuſed to admit them; for *per curiam* upon a plea to the writ, the defendant cannot take exceptions to the count, before the writ be adjudged good, for then the defendant has time enough to take advantage of the declaration; and before it is needleſs; becauſe if the writ be abated, that will determine the whole. After this it was objected, that the defendant had not made defence, and the queſtion was, if this was matter of form, and ſo aided by the general demurrer. And *prima facie* the court was of opinion, that this was matter of ſubſtance: becauſe the defendant is not party to the action without defence; but after having conſulted the judges of the king's bench, where it has been along time held matter of form, they agreed that it was aided by the general demurrer, though at the ſame time they ſeemed to comply with that opinion, rather than to approve it with their own judgments, to the end that there might be a conformity between the two courts.

Wells *verſ.* Williams.

S. C. Lutw. 35. Salk. 46. Pleadings Lutw. 34.

DEBT upon bond. The defendant pleads, that the plaintiff was an alien enemy born in *France* of *French* parents who were alien enemies, and that he came into *England ſine ſalvo conductu*, and concludes in bar. The plaintiff replies, that at the time of making of the bond he was, and yet is, here *per licentiam et ſub protectione domini regis*. The defendant demurs. And *Wright* ſerjeant, objected, that it appears that the plaintiff is an alien enemy, and came here *ſine ſalvo conductu*. He admitted, that an alien enemy, who comes here with ſafe conduct, may maintain an action. But unleſs there is a ſafe conduct, though it be *per licentiam et protectionem*, he cannot maintain an action. For by the ſame reaſon a captive or priſoner of war may maintain an action. But to that it was anſwered and reſolved, that the neceſſity of trade has mollified the too rigorous rules of the old law in their reſtraint and diſcouragement of aliens. A *Jew* may ſue at this day, but heretofore he could not, for then they were looked upon as enemies. But now commerce has taught

An alien enemy commorant here by the King's licence, and under his protection may ſue, though he came in time of war without a ſafe conduct. R. acc. Fort. 221. Vide Moor. 431. Bendl. 58.

A Jew may ſue.

taught the world more humanity. And as to the caſe in queſtion, admit that the plaintiff came here before the war was proclaimed, (for ſo it may be intended) then this action is maintainable, 1. Becauſe there was no need of a ſafe conduct in time of peace. 2. Though the plaintiff came here ſince the war, yet if he has continued here by the king's leave and protection ever ſince, without moleſting the government or being moleſted by it, he may be allowed to ſue, for that is conſequent to his being in protection. And *Treby* chief juſtice ſaid, that wars at this day are not ſo implacable as heretofore, and therefore an alien enemy, who is here in protection, may ſue his bond or contract; but an alien enemy abiding in his own country cannot ſue here. And *Dier* 2. *b. pl.* 8. and the other books ought to be underſtood ſo. Note, That *Treby* chief juſtice ſaid in this caſe laſt *Trinity* term, that the king may declare war againſt one part of the ſubjects of a prince, and may except the other part. And ſo he has done in this war with *France*, for he has excepted in his declaration of war with *France* all the *French* proteſtants. And of ſuch proclamations all ought to take notice, becauſe the war begins only by the king's proclamation.

A alien may come into this kingdom in time of peace, without a ſafe conduct.

An alien enemy abiding in his own country cannot ſue here, Vide Burr 1734. Dougl. 619. Anthon v. Fiſher. Dougl. 627. 2 ed. n. 132. War may be declared againſt part only of the ſubjects of a prince Vide Foſt. Diſc. 1. ſ. 4. p. 185. Co. Litt. 129. b. 13 Ed. n. 3.

The court will take notice of proclamations of war.

Elſtob. exec' of Jane Elſtob *verſ.* Thorowgood.

An executor may have a writ by journeys accounts in reſpect of an action commenced by a temporary executor. S. C. Salk. 393. Comb. 428. R. cont. poſt. 432. vide 6 Co. 10. b.

INdebitatus aſſumpſit for an *aſſumpſit* to the teſtatrix. The defendant pleads *non aſſumpſit infra ſex annos*. The plaintiff replies, that *Charles Elſtob* was executor to *Jane Elſtob* *durante minoritate* of the plaintiff, and that he ſued an action within ſix years, *&c.* againſt the defendant, and that pending the action, the plaintiff came of age, and brought this action by *journeys accounts*. The defendant demurs. And after ſeveral arguments at bar it was reſolved by the court, 1. That if *Charles Elſtob* had been adminiſtrator to *Jane Elſtob durante minoritate* of the plaintiff, and had brought an action, pending which the plaintiff had come of age; he could not have continued that by *journeys accounts*, becauſe he would not have come in, in privity to *Charles*, but he had claimed immediately from the ordinary; and in ſuch caſe the ſtatute of limitations would have been a bar to the plaintiff, as it was adjudged in a caſe in this court about four years ago; where an adminiſtrator brought an action upon the brink of the ſix years, and pending that, died, upon which the next adminiſtrator *de bonis non* brought another action, in which the ſtatute of limitations being pleaded, the plaintiff replied and ſhewed all the ſpecial matter, how the former adminiſtrator brought an action, *&c.* and it was adjudged, that *that* could not aid him, becauſe he did not come in in privity of the former adminiſtrator. 2. That this action was recently enough brought, for it appears, that it was brought within

In reſpect of an action commenced by a temporary adminiſtrator, not. S. C. Salk. 393. Comb. 428.

But if an executorſhip is given to A. and if he does a particular act to B. and A. does the act, B. cannot have a writ by journeys accounts, in reſpects of an action commenced by A. S. C. Salk. 393.

An action by journeys accounts, muſt be brought within thirty days after the right to bring it attaches. S. C. Salk. 393. Vide Winch. 82. Lutw. 296. 6 Co. 11. a. In an aſſumpſit by an executor, during whoſe minority another perſon had the executorſhip, the plaintiff muſt aver that the money was not paid to the executor durante minori ætate.

ſeven

Elstob v. Thorowgood.

seven days after the plaintiff came of age. Heretofore they used to allow half a year to bring an action by *journeys accounts*, but now that is held to be too long, and therefore they allow but thirty days. 3. That this executorship being but an office, both persons make but one executor, and therefore the plaintiff is privy to *Charles*, and to the writ sued by him. See *Owen* 134. *Co. Entr.* 923. *Hob.* 265. 1 *Roll. Abr.* 921. 11 *Vin.* 227. *pl.* 15. And by *Treby* chief justice, if *Charles* had obtained judgment, the new plaintiff after his being of age might have sued execution. But it was resolved, that if *A.* makes *B.* his executor, adding that if he does such an act *C.* shall be his executor; if *B.* bring an action, and then does the act, *C.* cannot have an action by *journeys accounts*, &c. because *B.* has determined his office by his own act; and though he was once sole and perfect executor of himself, yet by the breach of the condition he is now as if he had never been executor, and *C.* is not privy to him. But then serjeant *Wright* took exception to the declaration, that the plaintiff has said, that the debt was not paid to him, but does not say that it was not paid to *Charles Elstob* the executor *durante minori aetate*. And *per Treby* chief justice there was a case here lately, where *A.* brought an action of debt in right of his wife due to her before coverture, and he said that the debt was not paid to the wife, but did not say that it was not paid to him *post desponsalia*; and upon demurrer it was adjudged ill, though it had been good after verdict. But I think, that upon reading the record in the principal case, it was averred as it should be, and that the plaintiff had judgment.

In debt by a husband for money due to his wife dum sola, the plaintiff must aver that it was not paid to him after the marriage, or the declaration will be ill on demurrer. Though it cannot be objected to after verdict Vide 1 Vent. 119.

Wingfield *verf.* Jefferys.

Exchequer Chamber.

Information for selling live cattle or causing them to be sold is good. Sed vide Dougl. 174. Bl. 810.

AN information was exhibited in the court of Exchequer against *Wingfield* for selling live cattle, or causing them to be sold, &c. Judgment in the Exchequer for the informer. And error brought here, and assigned that the information was uncertain, because in the disjunctive. And *Holt* chief justice inclined that it was ill for this reason. But upon certificate by the barons that the course was so in the Exchequer, and since the jury had found the defendant guilty as to one, judgment was affirmed

Ellis

Ellis *verſ.* Thomas.

S. C. 5 Salk. 186.

Exchequer Chamber.

DENIAL of imparlance was generally aſſigned for error. And *per Holt* chief juſtice, if it appear upon the record, that the defendant has title to an imparlance, and he prays it, and it is denied him, it is error. But if no ſuch thing appear upon the record, denial of an imparlance cannot be aſſigned for error. Judgment was affirmed.

The refuſal of leave to imparle is error, if the defendant's right to it appears upon record. Otherwiſe it is not.

Hilary

Hilary Term
9 Will. 3. B. R. 1697.

Sir John Holt *Chief Juſtice.*
Sir Thomas Rokeby, *Sir* John Turton, *Sir* Samuel Eyre } *Juſtices.*

Meggot aſſignee of the commiſſioners of Bankrupt of Wilſon *verſ.* Mills et al'. Trover.

Permitting the vendor to continue in poſſeſſion will in general make a ſale fraudulent againſt creditors. R. acc. 1 Vez. 348. 1 Atk. 165. 1 Eq. Abr. Creditor and Debtor. E. pl. 2 Ed. 1756. p. 148. Hall v. Gurney B. R. H. 24 G. 3. 2 T. R. 587. D. acc. 2 Bulſtr. 226. Cowp. 434. Burr. 484. q. v. See alſo 3 Co. 80. b. Dougl. 303. But if one man lends another money to buy furniture, and takes a bill of ſale of the furniture, leaving it in the vendor's poſſeſſion will not make the ſale fraudulent. An innkeeper cannot be a bankrupt. S. C. 12 Mod. 159. R. acc. March. 34. Cro. Car. 395. W. Jones 437. 3 Mod. 327. 1 Show. 96. 268. 3 Lev. 309. Carth. 149. Comb. 181. Salk. 109. vide Bro. C. C. 177, 178. 1 T. R. 572. Though he is in the habit of ſelling goods to his gueſts; or has a ſhare in a ſtage coach. But a victualler may. S. C. 12 Mod. 159. R. cont. Burr. 2064. 2 Wilſ. 382. vide Bro. C. C. 177, 178. A man who has retired from buſineſs may be a bankrupt in reſpect of debts contracted before he did retire. S. C. 12 Mod. 159. R. 1 Vent. 5. But not in reſpect of debts contracted afterwards. S. C. 12 Mod. 159. D. acc. 3 Mod. 329. 1 Show. 268. Cooke 17. Dougl. 282. Though creditors upon ſuch debts may come in under a commiſſion. S. C. 12 Mod. 159. D. acc. Cooke 17. If a man contracts while in buſineſs a debt of 100l. and after retiring from it, a ſecond debt of 100l. with the ſame perſon, a general payment of 100l. will preclude the creditor from taking out a commiſſion of bankruptcy. Vide 2 Vern. 607. 2 Cha. Caſ. 84. Str. 24. 1194. 3 Atk. 555.

THE caſe was thus. *Wilſon* exerciſed the trade of a victualler, during which time the plaintiff *Meggot* being a brewer furniſhed *Wilſon* with ale, by which *Wilſon* contracted a great debt with *Meggot*. Afterwards *Wilſon* quitted the trade of a victualler and exerciſed the trade of an innkeeper, and borrowed money of the defendant *Mills* (being *Wilſon*'s leſſor) to buy goods to furniſh his houſe; and for ſecurity of the money *Wilſon* made a bill of ſale of the goods to *Mills*, but *Wilſon* kept the poſſeſſion of them. After *Wilſon* was become an inn-keeper, the plaintiff *Meggot* continued to ſell him drink, for which *Wilſon* was indebted to *Meggot* as before. Afterwards *Wilſon* not being able to continue his trade, makes an agreement with the defendant *Mills*, to give him ſecurity for his money by a new bill of ſale of the ſame goods and others. But before he executes the new bill of ſale, by contrivance with the plaintiff he commits an act of bankruptcy. The defendant *Mills*, not knowing of the trick accepts the new bill of ſale. The plaintiff *Meggot* ſues a commiſſion of bankruptcy againſt *Wilſon*, and obtains an aſſignment from the commiſſioners, and thereupon brings *trover* againſt the defendant *Mills* for theſe goods. It appeared farther upon the evidence, that *Wilſon* had paid to *Meggot* the plaintiff ſeveral ſums of money after he became an inn-keeper, amounting to as much as the debt was, which he owed to the plaintiff, when he quitted the trade of a victualler; but when he paid them, he did not expreſs upon what account. And *per Holt* chief juſtice, 1. If theſe goods of *Wilſon*'s had been aſſigned to any other creditor, the

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keeping of the poſſeſſion of them had made the bill of ſale fraudulent as to the other creditors. But ſince the original agreement was thus, and that honeſtly and really made for ſecuring the money of the defendant *Mills*, which he had lent to *Wilſon* for this purpoſe, the agreement was good and honeſt. 2. *Per Holt* chief juſtice, though an inn-keeper cannot be a bankrupt (For this ſee the caſe of *Newton v. Trigge*, 3 *Mod.* 327. 1 *Show.* 96. 268. 3 *Lev.* 309. *Carth.* 149. *Comb.* 181. *Salk.* 109. adjudged *Trin.* 3 *Will. & Mar. B. R. Intr. Mich.* 1 *Jac.* 2. *B. R. rot.* 226. in *trover* the jury find a ſpecial verdict, that an inn-keeper bought goods for the uſe of his gueſts, and ſold them to his gueſts; and the queſtion was, whether the inn-keeper by this was a bankrupt? and adjudged by the whole court that he was not, becauſe the trade was not at large, but confined *hoſpitantibus*, and is properly the accommodation of his gueſts; and it was agreed in that caſe, that farmers are not within the ſtatutes of bankrupts; it was alſo found in that caſe, that the inn-keeper had a ſhare in a ſtage coach, but that was not regarded;) though an inn-keeper cannot be a bankrupt, yet a victualler may; and though a man quits his trade, yet he may be a bankrupt for the debts that he owed before. And though a man who has become creditor to him after the quitting of his trade cannot ſue a commiſſion of bankrupts for ſuch debts contracted after, yet if the old creditors ſue a commiſſion of bankrupt, this new creditor ſhall be admitted to have a ſhare of the bankrupt's eſtate. 3. *Per Holt* chief juſtice, if *A.* being a trader becomes indebted to *B.* in 100*l.* and then he quits his trade and afterwards becomes indebted to *B.* in 100*l.* more, and afterwards *A.* pays to *B.* 100*l.* not expreſſing upon what account; ſince ſo much in quantity is paid to *B.* as was due to him from *A.* when *A.* was capable of being a bankrupt, it would be too rigorous, to admit *B.* to ſue a commiſſion of bankrupts for the old debt of 100*l.* But to this point he ſaid, that he would not give an abſolute opinion. Note; all this that *Holt* chief juſtice ſaid, was not contradicted by any of the other judges. This was ſaid upon motion for a new trial of this cauſe, which was tried before *Holt* chief juſtice at *niſi prius*.

Jones *verſ.* Morley.

S. C. Salk. 677. 12 Mod. 159. Comb. 429. And with the arguments of counſel. 4 Mod. 261. Carth. 410.

EJectment for the manor of *Frenſham* in *Surrey*. Special verdict, that *Anne Bowyer* being ſeiſed in fee of the ſaid manor in queſtion, by deeds of leaſe and releaſe, bearing

A deed to lead the uſe of a fine may be controlled by another deed executed before the fine levied. R. acc. 2 Anderſ. 46. Clayt. 51. Semb. acc. Cro. Jac. 29. 1 Co. 99. b. D. acc. Moore 107. 2 Anderſ. 78. 5 Co. 26. a. 9. Co. 10. b. Vide Gilb. on Uſes, 54. 55. But not by a ſimple contract agreement. R. acc. Cro. Jac. 29. 5 Co. 75. b. D. acc. ante 155. vide Gilb. on Uſes, 54. 55. Unleſs the fine varies from the deed to lead the uſes, R. acc. 5 Co. 25. b. vide Gilb. on Uſes. 54. 55. And notwithſtanding ſuch variance, the deed ſhall control the fine, unleſs it appears to have been the intention of the parties that it ſhould not. R. acc. 5 Co. 25. b. D. acc. Carth. 5. 3 Bulſtr. 251. 1 Co. 99. b. 2 Co. 76. a. Whatever ſhews the intention of the parties is ſufficient to control the uſes of a fine. Vide Moore 610. poſt. 526. 3 P. Wms. 208. but ſee alſo 29 Car. 2. c. 3. ſ. 7. Unleſs ſuch intention appears, the fine ſhall enure to the uſe of the former owner. R. acc. 2 Will. 19. Dougl. 2. D. acc. 9 Co. 9. b. 11. a. The deed of a feme covert declaring the uſes of a fine levied by her, is binding. Vide Dougl. 44. 45.

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date the 22 & 23 *July* 1664, conveyed the ſaid manor to Sir *William Morley* and *Watts* and their heirs, in conſideration of a marriage to be ſolemnized between the ſaid *Anne Bowyer* and *Edward Morley* ſon and heir to the ſaid Sir *William Morley*, to the uſe of the ſaid *Anne Bowyer* and her heirs, until *Edward Morley* ſhould ſettle a jointure upon her of 390*l. per annum ultra repriſas*; and from and after ſuch ſettlement of a jointure, to the uſe of *Edward Morley* and his heirs; provided that if *Edward Morley* ſhould not make ſuch ſettlement of jointure before the *Eaſter* term next following, that then the uſe limited to *Edward Morley* and his heirs ſhould ceaſe; the jury find, that no ſettlement of jointure was made by *Edward Morley* within the time limited, ſo that no uſe (though the marriage took effect) aroſe by that deed to *Edward Morley* and his heirs; afterwards *Edward Morley* and *Anne* his then wife, by their deed bearing date the 29th of *January* 1665, between the ſaid *Edward Morley* and *Anne* his wife of the one part, and *Richard Young* and *John Truſter* of the other part, reciting that a fine was agreed to be levied *Hilary* term next following, between *Richard Young* and *John Truſter* complainants, and *Edward Morley* and *Anne* his wife deforcients, declared that the uſe of that fine ſhould be to *Edward Morley* and his heirs; afterwards and before the fine levied, by writing indented bearing date the 31ſt of *January* 1665, between *Edward Morley* of the one part, and *Anne* his wife of the other, in conſideration of the ſaid marriage it was agreed between them, that all preceding conveyances, grants, bargains and ſales, agreements, *&c.* made concerning the manor of *Frenſham*, with any perſon or perſons whatſoever, ſhould be revoked, until *Edward Morley* ſhould perform the articles of marriage in the deed of the 23d of *July* 1664. and that if *Edward Morley* ſhould not ſettle 300*l. per annum ultra repriſas* for the jointure of the ſaid *Anne* according to the agreement in 1664, then he covenants that it ſhall be lawful for *Anne* and her heirs to enter, *&c.* The laſt return of *Hilary* term 1665 a fine was levied, but no jointure of 300*l. per annum* was ſettled; but afterwards a jointure of 250*l. per annum* was ſettled; charged with 15*l. per annum* rent charge; the tenth of *July* 1666 *Edward Morley* mortgages this manor of *Frenſham* in fee (under which the defendant claims) and afterwards in 1667 *Edward Morley* died, and *Anne* ſurvived him, and entred into the land allotted for her jointure, and enjoyed it during her life; in 1679 *Anne* died, leaving *H. Bellenger* the leſſor of the plaintiff her next heir, and then under the age of 21 years. And the general queſtion in this caſe was, whether the fine levied in *Hilary* term 1665 was to the uſe of *Edward Morley* and his heirs, or to the uſe of *Anne* his wife and her heirs. And the caſe was often argued at bar. And now *Holt* chief juſtice pronounced the reſolution of the whole court. And, 1. he ſaid, that there is an uncertainty upon the ſpecial verdict how the poſſeſſion hath been, ſo that it may be a queſtion,

whether the leſſor of the plaintiff is not barred by the ſtatute of limitations, of this action; for if *Anne* was out of poſſeſſion in 1667, when her huſband *Edward Morley* died, then the ſtatute of limitations took place from that time, and ſo the plaintiff might be within the ſtatute; but that is not found by the jury expreſsly, and the ſtatute of limitations ſhall not be taken by conſtruction, to bar a man of his action, unleſs it be expreſsly found how the poſſeſſion hath been.

Then this caſe depends upon the operation of the two writings; and the whole court was of opinion, that the fine was not to the uſe of the deed of the 29th of *January*, but that this deed was controlled by the writing dated the 31ſt of *January*; to prove which *Holt* chief juſtice premiſed three things.

1. That if it be covenanted by deed, to levy a fine of lands, &c. to ſuch perſons and uſes, and the fine be levied purſuant to the deed; no proof whatſoever by *parol* ſhall be admitted, to evince that this fine was levied to other uſes, than thoſe that are contained in the deed. But a ſubſequent deed may alter the uſes of the fine, though a *parol* agreement (as this writing between huſband and wife is not a deed, but amounts to a *parol* declaration) cannot. But if there is a variance between the deed and the fine in any circumſtance, then the parties may aver the fine to be levied to other uſes.

2. Though there is a variance between the deed and the fine, yet if nothing appears to the contrary, the fine ſhall be taken to be to the uſes of the deed; and in that caſe the deed is not only evidence of the uſes, but the fine is by conſtruction of law to the uſes of the deed.

3. If this fine had agreed with the deed, the uſes limited by the deed could not have been controuled by the writing of the 31ſt of *January*; becauſe though the deed of a *feme covert* is not valid in law, yet the deed having relation to the fine, takes validity from thence, and will conclude her. Therefore (*a*) infancy cannot be alledged againſt a deed which leads the uſes of a fine, ſo long as the fine continues in force, becauſe the deed is ſupported by the fine. The ſame law of coverture.

(*a*) Vide 3 P. Wms. 206.

Theſe things being premiſed, it follows that this fine cannot be to the uſe of the deed of the 29th of *January*; becauſe the fine to be levied by the deed of the 29th ought to have been levied the *Hilary* term next following, excluſive of that *Hilary* term in which the deed was made, but

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this fine was levied the same *Hilary* term in which the deed was made, and therefore there was a variance between the fine and the deed, and consequently room left for averment. For if there is room for averment, where a fine is levied of a time after, there is as much reason to admit it, where a fine is levied of a time before. For in both cases the fine varies from the fine agreed to be levied by the deed. There is the same room for averment, where the declaration of uses is by deed subsequent to the levying of the fine. The only difference is, where the uses of a fine or recovery precedent are declared by a deed subsequent, the conusor and his heirs, or any claiming under him, are estopped to say, that the fine was to the use of the conusor and his heirs, *&c.* but a stranger shall not be estopped to say that. But in case of a fine varying from a precedent deed, no person is estopped, to aver against the deed, that the fine was to other uses. Then in this case since there is a variance between the fine and the deed, it is reason that the wife should avoid it. For if the deed had been pursued, she would have had twelve months to see whether the husband would perform the marriage agreement, and if he would not, she might have refused to join in levying the fine; of which benefit she was deprived by the immediate levying of the fine. Then the husband by the writing of the 31st of *January* agrees to give her the terms of her marriage agreement. And accordingly the fine was levied. From whence it appears manifestly, that the agreement contained in the deed of the 29th was relinquished, and the new agreement was designed to lead the uses of the fine.

A deed declaring the uses of a precedent fine or recovery will estop the parties and their heirs. R. acc. 9 Co. 7. b. vide 4 Ann. c. 16. f. 15. But not strangers. vide 9 Co 11. a.

2. This writing of the 31st of *January* (by the whole court) is a sufficient declaration of the uses of the fine. And to prove this, *Holt* chief justice said, that there are several ways to declare uses, either upon transmutation of the possession, or without it. If there is a transmutation of the possession, as by fine, feoffment, or recovery, the declaration will be sufficient without consideration or deed. But if there is no transmutation of possession, then there must be some obligatory agreement, or valuable consideration; because the use depending intirely upon equity, the chancellor will not compel performance, where there is no transmutation of possession, unless there is a valuable consideration, or binding agreement. Bargain and sale will raise a use upon payment of money. But consideration of blood will not raise a use without deed. *Moore* 687, *Callard v. Callard.* 2. This writing of the 31st is sufficient, to declare the uses of this fine. It is not absolutely necessary to make use of the word use in the declaration of uses of a fine, for any kind of agreement which manifestly shews the intent of the parties will be sufficient. An use is defined, in *Chudleigh*'s case, a

A use may be raised either on a transmutation of possession, R. acc. 1 And. 37. Moore 101. 1 Leon. 138. D. acc. Jenk. 247. Plowd. 301. Carter. 143. 1 Co. 176. b. Gilb. on Uses, 45. 5 Bac. 358. Or on a sufficient consideration. Vide Cro. Eliz. 394. 22 Vin. 194. Com. Dig. Uses K. 1. 2d. Ed. vol. 5. 627. Bac. 366. Gilb. on Uses. 47. to 51. 112. 113. 114. 224. 225. Carter. 137. Plowd. 300. 2 Co. 15. a. 1 Co. 154. a. 1 Leon. 194. Moore 520.

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meer equitable intereſt, where one has the eſtate in the lands, and another takes the profits. The invention of them was of late time, and the cauſe of the invention was to avoid the ſtatute of mortmain. (a) 2 *Leon.* 14. *Brent's caſe.* Uſes only affected the conſciences of the feoffees to the uſes, then the clergy having power over the conſciences of men, and ſitting in chancery until the time of *Henry* the Eighth, compelled men to perform their agreements. Theſe uſes were kept ſecret, until they were diſcovered in the contentions between the houſes of *Lancaſter* and *York*; at which time they were found very beneficial, to ſave mens eſtates from eſcheats; and were tolerated by both parties for the common convenience: ſo that the greateſt part of the eſtates in *England* were conveyed to uſes. And in the reports of the time of *Edward* the Fourth there are more of them mentioned than at any time before; and ſo being generally uſed, they were licked into form, and became the common conveyance. If an agreement is, that *A.* for ſo much money paid ſhall have the land, this will raiſe an uſe. 8 *Co.* 93. *b. Foxe's* caſe. See 1 *Ventr.* 137, *Croſſing v. Scudamore.* If *A.* bargains and ſells to *B.* and his heirs, and the deed is not inrolled, or if a deed of feoffment is not executed by livery; if a fine be levied between the ſame parties, the deed of bargain and ſale, or deed of feoffment, will declare the uſes of the fine. Now there is here an agreement between the huſband and wife, that the huſband ſhall have the land to him and his heirs, if he make to the wife a jointure of more than 300*l. per annum*, this agreement will well enough declare the uſes of the fine levied.

(a) Vide Bl. Com. 271. 328.

A bargain and ſale not inrolled, or a deed of feoffment not executed by livery, is ſufficient to declare the uſes of a fine.

3. If this writing of the 31ſt of *January* is not a good original declaration of the uſes of the fine, yet it will be ſufficient to control the deed of the 29th of *January*, for by that it is agreed, that all deeds, conveyances, &c. made in contradiction to the marriage agreement ſhould be null and void. Now a *parol* declaration of the intent of the parties will be ſufficient to hinder any uſe from ariſing by the former deed, where the former deed varies from the fine. Then if no uſe can ariſe according to the deed of the 29th, then there is here a fine levied, and the uſe by operation of law is to the wife and her heirs, and then judgment ought to be given for the plaintiff. And judgment for theſe reaſons was given by the whole court for the plaintiff, and upon error brought in parliament was affirmed there. *Sho. P. C.* 140.

Rex et Regina v. Episcopu Cestr. Piers & Scroope.

Error. C. B. Quare impedit. Rot. 705, 706.

S. C. With the arguments of counsel well reported Skinn. 651. Arguments of Counsel. 5 Mod. 297. Declaration post. vol. 3. p. 251.

PLACITA irrotulata coram Georgio Treby milite et sociis suis justiciariis domini regis et dominae reginae, de termino sancti Michaelis, anno regni dicti domini regis et dictae dominae reginae dei gratia Angliae, &c. sexto. Ebor. ss Nicholaus episcopus Cestrienſis Richardus Piers armiger, et Richardus Scroope clericus summoniti fuerunt ad respondendum domino regi et dominae reginae nunc de placito quod permittat ipsos dominum regem et dominam reginam praesentare idoneam personam ecclesiae de Bedall quae vacat et ad juam spectat donationem, &c. et unde Edwardus Ward miles attornatus dictorum domini regis et dominae reginae nunc generalis qui pro eisdem domino rege et domina regina in hac parte sequitur pro praedictis domino rege et domina regina dicit, quod domina Elizabetha nuper regina Angliae fuit seisita de advocatione ecclesiae praedictae ut de uno grosso per se ut de feodo et jure in jure coronae suae Angliae, et sic inde seisita existens ad ecclesiam illam vacantem per literas suas patentes sub magno sigillo suo Angliae sigillatas gerentes datum apud Westmonasterium in comitatu Middlesexiae decimo quarto die Februarii anno regni ejusdem nuper reginae duodecimo praesentavit quendam Johannem Tyms clericum suum prout per recordum irrotulamenti dictarum literarum patentium in curia cancellariae dictorum domini regis et dominae reginae nunc apud Westmonasterium praedictum remanens plenius apparet, qui quidem Johannes Tyms ad praedictam praesentationem praefatae nuper reginae fuit admissus institutus et inductus in eodem tempore pacis tempore dictae nuper reginae, praedictaque nuper regina de advocatione ecclesiae praedictae ut praefertur seisita existente, eadem nuper regina postea apud Westmonasterium praedictum de tali statu suo de et in advocatione ecclesiae praedictae ut praefertur seisita obiit, post cujus quidem nuper reginae mortem advocatio ecclesiae praedictae descendebat Jacobo nuper regi Angliae primo, per quod praedictus nuper rex Jacobus primus fuit seisitus de advocatione ecclesiae praedictae ut de uno grosso per se ut de feodo et jure in jure coronae suae Angliae, et sic inde seisito existente, ecclesia praedicta vacavit per mortem praedicti Johannes Tyms, per quod idem nuper rex Jacobus primus ad ecclesiam illam sic vacantem per literas suas patentes sub magno sigillo suo Angliae sigillatas gerentes datum apud Westmonasterium praedictum decimo tertio die Julii anno regni ejus dem nuper regis Jacobi primi Angliae, &c. decimo nono praesentavit quendam Johannem Wilson sacrae theologiae professorem clericum suum, prout per recordum irrotulamenti

Queen Elizabeth seised in gross of the advowson of the church of Bedall.

14 Feb. 12 regni presented Tyms by her letters patents, Prout patet by the inrolment of the letters patent in Chancery: who was admitted, &c.

The queen died seised of the advowson; by which it descended to James I. who was seised in gross.

The church became void by the death of Tyms.

James I. 13 July 19 regni, presented John Wilson;

lamenti dictarum litterarum patentium ultimo mentionatarum in praedicta curia cancellariae dictorum domini regis et dominae reginae nunc apud Weſtmonaſterium praedictum remanens plenius apparet, qui quidem Johannes Wilſon ad praedictam praeſentationem praefati nuper regis Jacobi primi fuit admiſſus, inſtitutus et inductus in eodem tempore pacis tempore dicti nuper regis Jacobi primi, praedictoque nuper rege Jacobo primo de advocatione eccleſiae praedictae ut praefertur ſeiſito exiſtente, idem nuper rex poſtea apud Weſtmonaſterium praedictum de tali ſtatu ſuo inde ſeiſitus obiit, poſt cujus quidem nuper regis Jacobi primi mortem advocatio eccleſiae praedictae deſcendebat Carolo nuper regi Angliae primo ut filio et haeredi praedicti nuper regis Jacobi primi, per quod praedictus nuper rex Carolus primus fuit ſeiſitus de advocatione eccleſiae praedictae ut de uno groſſo per ſe ut de feodo et jure in jure coronae ſuae Angliae, et ſic inde ſeiſito exiſtente, eccleſia praedicta vacavit per mortem praedicti Johannis Wilſon, per quod idem nuper rex Carolus primus ad eccleſiam illam ſic vacantem per literas ſuas patentes ſub magno ſigillo ſuo Angliae ſigillatas gerentes datum apud Weſtmonaſterium ſexto die Martii anno regni ejuſdem nuper regis Caroli primi decimo praeſentavit quendam Henricum Wickham ſacrae theologiae profeſſorem clericum ſuum prout per recordum irrotulamenti dictarum literarum patentium ultimo mentionatarum in praedicta curia cancellariae dictorum domini regis et dominae reginae nunc apud Weſtmonaſterium remanens plenius apparet, qui quidem Henricus Wickham ad praedictam praeſentationem praefati nuper regis Caroli primi fuit admiſſus, inſtitutus et inductus in eodem tempore pacis tempore dicti nuper regis Caroli primi, praedictoque nuper rege Carolo primo de advocatione eccleſiae praedictae ut praefertur ſeiſito exiſtente, eccleſia praedicta vacavit per mortem praedicti Henrici Wickham, quodque quidam Johannes Piers armiger ad eandem eccleſiam ſic vacantem, jus praeſentandi non habens ad eandem ſed uſurpando ſuper dominum nuper regem Carolum primum, preſentavit quendam Willelmum Metcalfe clericum ſuum, qui ad praeſentationem praedicti Johannis Piers fuit admiſſus, inſtitutus et inductus in eadem, poſteaque praedictus nuper rex Carolus primus de advocatione eccleſiae praedictae ut praefertur ſeiſitus exiſtens apud Weſtmonaſterium praedictum de tali ſtatu ſuo inde ut praefertur ſeiſitus obiit, poſt cujus mortem advocatio eccleſiae praedictae deſcendebat Carolo nuper regi Angliae ſecundo ut filio et haeredi praedicti nuper regis Caroli primi, per quod praedictus nuper rex Carolus ſecundus ſeiſitus fuit de advocatione eccleſiae praedictae ut de uno groſſo per ſe ut de feodo et jure in jure coronae ſuae Angliae, et ſic inde ſeiſito exiſtente, eccleſia praedicta vacavit per mortem praedicti Willelmi Metcalfe, per quod praedictus nuper rex Carolus ſecundus ad eccleſiam illam ſic vacantem per literas ſuas patentes ſub magno ſigillo ſuo Angliae ſigillatas gerentes datum apud Weſtmonaſterium vicesimo octavo die Auguſti anno regni ejuſdem nuper regis Carol.

Who was admitted, &c.

Jam. I. died.

Whereby the advowſon deſcended to Charles I.

The church became void by the death of Wilſon.

K. Charles I. 10 Mar. 10. regni preſented Dr. Henry Wickham,

Who was admitted.

The church became void by the death of Wickham.

John Piers by uſurpation, on the king preſented Will... Metcalfe.

Who was admitted, &c. Charles I. dies.

Whereby the advowſon deſcends to Charles II.

The church void by the death of Metcalfe.

Charles II. 27 Aug. 12 regni preſented ... Samways

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roli ſecundi duodecimo praeſentavit quendam Petrum Samwayes ſacrae theologiae profeſſorem clericum ſuum, prout per recordum irrotulamenti dictarum literarum patentium ultimo mentionatarum in praedicta curia cancellariae dictorum domini regis et dominae reginae nunc apud Weſtmonaſterium praedictum remanens plenius apparet, qui quidem Petrus Samwayes ad praedictam praeſentationem praedicti nuper regis Caroli ſecundi fuit admiſſus, inſtitutus et inductus in eadem tempore pacis tempore dicti nuper regis Caroli ſecundi, praedicto, nuper rege Carolo ſecundo de advocatione eccleſiae praedictae ut praefertur ſeiſito exiſtente, idem nuper rex Carolus ſecundus poſtea apud Weſtmonaſterium praedictum de tali ſtatu ſuo inde ſeiſitus obiit, poſt cujus mortem advocatio eccleſiae praedictae deſcendebat Jacobo nuper regi Angliae ſecundo ut fratri et haeredi praedicti nuper regis Caroli ſecundi, per quod praedictus nuper rex Jacobus ſecundus fuit ſeiſitus de advocatione eccleſiae praedictae ut de uno groſſo per ſe ut de feodo et jure in jure coronae ſuae Angliae, qui quidem nuper rex Jacobus ſecundus de advocatione praedicta ut praefertur ſeiſitus de regimine hujus regni Angliae ſe demiſit, per quod advocatio praedicta eiſdem domino regi et dominae reginae nunc devenit, per quod iidem dominus rex et domina regina nunc fuerunt et adhuc exiſtunt ſeiſiti de advocatione eccleſiae praedictae ut de uno groſſo per ſe ut de feodo et jure in jure coronae ſuae Angliae, et ſic inde ſeiſitis exiſtentibus, eccleſia praedicta vacavit per mortem Samways, whereupon it belongs to the king and queen to preſent, and the defendants hindred them, *&c.*

Who was admitted, &c.

Charles II. dies.

whereby the advowſon deſcends to James II.

James II. abdicates.

Whereby the advowſon devolves upon W. and M.

The church becomes void by the death of Samwayes.

The biſhop claims nothing but an ordinary, therefore judgment is given againſt him with a *ceſſet executio*, *&c.*

The defendant *Piers* confeſſes by his plea, *quod bene et verum eſt*, that *Charles* I. was ſeiſed of this advowſon in groſs, and that he preſented Dr. *Henry Wickham* his chaplain; but he farther ſays, that *Charles* I. being ſeiſed as aforeſaid, by his letters patent dated the nineteenth of *July* 14th of his reign (which he pleads with a *profert in curia*) *ex ſpeciali gratia et mero motu* granted the ſaid advowſon *Willelmo Theaxton tunc armigero poſtea militi*, to him and his heirs, by virtue whereof *Theaxton* was ſeiſed in groſs, and being ſo ſeiſed the church became void by the death of *Wickham*; whereupon *John Piers* father of the defendant, not having any right, but upon uſurpation upon *Theaxton*, preſented *William Metcalfe*, who was inſtituted and inducted, upon which *Piers* became ſeiſed of the advowſon in groſs by uſurpation, and *William Theaxton*, then being created knight, releaſed to *Piers* and his heirs all his right, intereſt, *&c.* in the ſaid advowſon; that *Piers* being ſeiſed in fee died, whereby the advowſon deſcended to the defendant *Richard Piers* as ſon and heir, whereby he was ſeiſed in groſs, and being ſo ſeiſed, the church became void by the death of *Metcalfe*,

Metcalfe and continuing void for a year and a half, King *Charles* II. preſented Dr. *Samwayes* by lapſe, who was inſtituted and inducted; that Dr. *Samwayes* is dead, upon which the defendant preſented the other defendant *Scroope* [who is alſo ſince dead] and then he traverſes, *abſque hoc* that *Charles* I. died ſeiſed.

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The defendant *Scroope* pleaded the ſame plea.

The attorney general craves *oyer* of the letters patent, which being entered *in hæc verba*, recited that Queen *Elizabeth* by her letters patent dated the 20th of *February* the thirteenth of her reign *inter alia* granted to the earl of *Warwick* and his heirs the manor of *Bedall* and other lands late the poſſeſſions of *Simon Digby* attainted of high treaſon, with all meſſuages, &c. and among other general words, *omnes advocationes et jura patronatus eccleſiarum in Bedall, et alia dicto manerio de Bedall ſpectantia vel quoquomodo pertinentia*; then the letters patent recite, that King *James* I. the eighteenth of *Auguſt* in the ſeventh of his reign granted the rent reſerved by the patent of Queen *Elizabeth* to Sir *Chriſtopher Hatton* and *Needham*; and then they recite, that all theſe premiſes by good and ſufficient aſſurances were veſted in Sir *William Theaxton*; then king *Charles* I. confirms to Sir *William Theaxton* and his heirs the ſaid manor of *Bedall* and the rent, and all advowſons appertaining to the manor; *cumque prædictus Willelmus Theaxton virtute præceptarum literarum patentium eidem comiti Warwick de præmiſſis ut præfertur factarum advocationem eccleſiæ de Bedall prædictam, vel jus præſentandi ad eccleſiam illam ſecundum tenorem et intentionem earundem literarum patentium habere clamat ſibi hæredibus et aſſignatis ſuis*; and foraſmuch as we before this time preſented one *John Wilſon* to the ſaid church of *Bedall* by lapſe, and afterwards the church being void by the death of *Wilſon*, we preſented Dr. *Wickham pleno jure*; and then they recite, that *Theaxton* to recover his right and preſentation ſued a *quare impedit* againſt the biſhop of *Cheſter* and *Wickham*, in which iſſue was joined; but that afterwards an agreement was made between *Theaxton* and *Wickham*, that *Theaxton* ſhould deſiſt from his ſuit, and permit Dr. *Wickham* to enjoy it during his life, and afterwards *Theaxton* and his heirs ſhould preſent as often as the church ſhould be void; and the king recites that he was informed of this agreement by Dr. *Wickham* his chaplain; *nos igitur volentes*, that the ſaid preſentations of *Wilſon* and *Wickham*, or of either of them, or their inſtitution and induction, ſhould not prejudice the lawful right of *Theaxton* and his heirs, to preſent to the ſaid church for the time to come; *intentioque noſtra ulterius exiſtit*, That *Theaxton* his heirs and aſſigns ſhould freely and peaceably enjoy the advowſon of the ſaid church *ſecundum tenorem et veram intentionem prædicta um literarum*

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literarum patentium per prædictam nuper reginam Elizabetham præfato comiti Warwick ut præfertur confectarum, aliquo defectu ſeu aliquibus defectibus in eiſdem literis patentibus non exiſtantibus; ſciatis igitur, quod dedimus et conceſſimus advocationem prædictæ eccleſiæ de Bedoll, necnon medietatem advocationis illius eccleſiae, et totum jus, titulum, et clameum, quæcunque, &c. quæ quoviſmodo habemus, vel habere poterimus, to the ſaid advowſon; then follows a general *non obſtante* of the omiſſion of the mention of the true value or of any former grant, *&c.*

The traverſe of part of a title muſt be induced by an incompetent title. Vide 3 Salk. 353. Com. Pleader. G. 20. 2d. Ed. vol. 5. p. 121.

A void grant by the owner of an advowſon is not a ſufficient inducement to a traverſe that he died ſeiſed.

The attorney general after this *oyer* of the letters patent demurs, and ſhews for cauſe, that the defendant *Piers* has not ſufficiently induced his traverſe. The defendants join in demurrer. And in the common pleas judgment was given for the king and queen by *Treby* chief juſtice, *Nevill* and *Powell ſenior* juſtices. Upon which error was brought *in B. R.* and this caſe was argued by ſerjeant *Pemberton* and ——— for the plaintiffs in error, and by Mr. *Place* and the attorney general for the king; and afterwards ſolemnly argued on the bench, in this term by all the judges; and two points were made in this caſe.

The truth of an immaterial allegation is not admitted by pleading over. S. C. Salk. 560. 5 Mod. 297. Semb. acc. Salk. 91. Str. 298. and vide ante 18. H. Bl. 62. Com. Pleader. Q. 6. 2d. Ed. vol. 5. p. 139.

In a quare impedit the exact period in a particular reign when a man was ſeiſed or preſented, is immaterial. S. C. Salk. 560. 5 Mod. 297.

Letters patent may be pleaded in the court in which they are enrolled without a profert. D. acc. 5 Co. 74. b. But not elſewhere. Sed vide Ford v. Burnham. Barnes 4to. Ed. 340. Dougl. 215. 1 Term Rep. 149, 150.

Upon oyer every intendment muſt be made in favour of the inſtrument produced. Vide Cro. Jac. 679. pl. 17.

Under a grant from the crown of all advowſons appendant to a manor, an advowſon in groſs will not paſs. Vide Moor 45. Hob. 323. 2 Mod. 2.

Though it has the reputation of appendancy.

Dropping a quare impedit in favour of a perſon preſented by the king without the king's knowledge, is a good conſideration for a grant from the crown, though the plaintiff had in ſtrictneſs no right to the preſentation.

Words expreſſing an intent that the patentee ſhall enjoy the ſubject of it at all events, will make a patent of confirmation operate as a grant de novo. S. C. 5 Mod. 297. R. acc. 8 Co. 166. b. See alſo 8 Co. 167. a. 1 Mod. 195.

A falſe recital in an immaterial point will not vitiate the king's grant. D. acc. Lane 75. 109. 2 Co. 54. b. Vide Hob. 203. 223. 1 Co. 43. a. 6 Co. 55. b. ante 50.

Under a patent from the crown, reciting that the patentee claimed an advowſon under a former patent, that the crown had notwithſtanding afterwards preſented once by lapſe, and then pleno jure; that the patentee had upon the latter preſentation brought a quare impedit to recover his right and preſentation, and dropped it on an agreement with the perſon preſented by the crown that ſuch perſon ſhould enjoy during his life, and that from thenceforth the preſentation ſhould belong to the patentee and his heirs; of which agreement the crown had afterwards been informed, that the crown was unwilling that its preſentation ſhould prejudice the patentee's lawful right, and intended that he ſhould enjoy the advowſon according to the true intent of the former patent, any defect therein notwithſtanding, and granting the advowſon de novo, with all the claim and title of the crown thereto, the patentee ſhall have the advowſon, though it did not paſs under the firſt patent.

The validity of one patent cannot be decided upon from the recital of it in another.

A man may take by the addition of knight, though he is really no knight. S. C. 12. Mod. 185. 187. Carth. 440, 441. Salk. 560. 3 Salk. 236. Holt 493. Semb. cont. Bro. Grant. 50. D. cont. arg. 4. H. 6. 1. b. Vide 1 Bulſtr. 21. Cro. Jac. 240. Litt. Rep. 181. 197. 223. W. Jon. 215. Cro. Car. 271. Hob. 129.

1. If

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1. If the letters patent of king *Charles* I. paſſed the advowſon to Sir *William Theaxton* and his heirs.

2. If the grant ſhewn upon the *oyer* can be intended the ſame grant with that which was pleaded.

And as to the firſt point *Turton* juſtice argued, that the letters patent of *Charles* I. could not paſs the advowſon to Sir *William Theaxton* and his heirs.

And he ſaid, that he would conſider the caſe abſtracted from the letters patent.

And ſecondly as it was upon the record with them.

And 1. he was of opinion, that if the defendant had not pleaded theſe letters patent with a *profert in curia*, as he had no need to do, *Cro. Jac.* 317. that then the plea had ſufficiently confeſſed and avoided the plaintiff's declaration, and the alledging of the grant to *Theaxton* in fee had been a good inducement, to traverſe the dying ſeiſed of King *Charles* I. *Jones* 11, 12. *Winch.* 13, 14.

2. He was of opinion, that this advowſon ought to be taken as an advowſon in groſs. 1. Becauſe the king has declared that queen *Elizabeth* was ſeiſed in groſs, which the defendant has not denied, but has admitted it. 2. Becauſe the defendant has not only admitted it, but he has alſo confeſſed it; for he ſays *quod bene et verum eſt, quod Carolus primus devenit ſeiſitus modo et forma*, as is ſpecified in the declaration, and in the declaration it is ſhewn, that the queen was ſeiſed in groſs; ſo that it is as full a confeſſion, as if he had confeſſed it *in terminis*. 3. It muſt be in groſs, becauſe if it had been appendant, it would have paſſed to the earl of *Warwick* by the letters patent of the queen, and then the queen had not died ſeiſed of it, as is alleged in the declaration.

2. He conſidered the caſe as it was upon the record together with the letters patent, and in that conſideration two queſtions ariſe.

1. If the advowſon paſſed by the letters patent of queen *Elizabeth* to the earl of *Warwick*.

2. If not, yet if it paſſed by the letters patent of king *Charles* I. to Sir *William Theaxton*.

And as to the firſt he was of opinion, that this advowſon did not paſs to the earl of *Warwick* by the letters patent of the queen; 1. Becauſe the queen was ſeiſed thereof in groſs, and ſhe grants it as appendant, and ſo ſhe was deceived in her grant. 2. It does not appear that the queen intended, that this advowſon ſhould paſs; for it is compriſed only in the general words *advocationes et jura eccleſiarum*, &c. And probably if the queen had intended, that this advowſon ſhould paſs, the church being of great value, ſhe would have granted it by expreſs name.

Objection. It ſhall be intended to have been appendant.

Anſwer. That intendment cannot be admitted againſt the record.

2. Admit-

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2. Admitting that it did not paſs by the letters patent of the queen to the earl of *Warwick*, then if it paſſed by the letters patent of king *Charles* I. to Sir *William Theaxton*. And he was of opinion, that it did not. 1. Becauſe upon conſideration of the recital of the letters patent it appears, that the king's intent was only to confirm the old title of Sir *William Theaxton*, and not to give him a new title, but that he would have ſuch eſtate as the earl of *Warwick* had of the grant of the queen. For the clauſe in which the grant is contained is not independant of the precedent clauſe, but is coupled with it and the recitals by the illative conjunction *igitur*. 2 *Brownl.* 232. And in effect the deſign of the king ſeems to be only to prevent any prejudice that his preſentations might have done to *Theaxton*'s title under the earl of *Warwick*. 2. One ought to take care that the king be not deceived, for when he is deceived the grant is void. 5 *Co.* 93. *b.* 1 *Co.* 43. *a. b. Lane* 75. 2 *Roll. Abr.* 188, 189. 17 *Vin.* 98. to 108. Now here the king is deceived, for the king imagined, that *Theaxton* had a right to the advowſon, when in truth he had none at all; and therefore the grant founded upon ſuch falſe conſideration is void. Beſides, that a falſe recital in letters patent will render the king's grant void, *Hob.* 203, 204. Now it is recited in theſe letters patent, that *Theaxton* claimed, *&c.* which according to (*a*) 2 *Co.* 90. ought to be intended a lawful claim; whereas it appears before, that he had no title to the advowſon; and for this cauſe the grant is void. 3. No notice is taken in any of the letters patent, that this advowſon was in groſs; and therefore that vitiates the grant. And for theſe reaſons he concluded, that the letters patent of king *Charles* I. did not paſs the advowſon to Sir *William Theaxton* and his heirs.

When the king is deceived, his grant is void. Vide Lane, 109. 3 Leon. 119. pl. 170. 1 Mod. 195, 196, 197, ante 50. Com. Dig. Grant. G. 8, 9. 2d. Ed. vol. 3. p. 449, 450.

But againſt this it was argued by *Holt* chief juſtice, and *Rokeby* juſtice, that this grant of *Charles* I. was good. And *Holt* chief juſtice ſaid, that the principal ground upon which the judges of the common pleas gave their opinion was, that they took it as admitted, that this advowſon was in groſs in the reign of queen *Elizabeth* at the time of the grant to the earl of *Warwick*.

And as to that he was of opinion, that it is not admitted upon this record, that queen *Elizabeth* was ſeiſed in groſs at the time of the grant to the earl.

2. Admit that it was then in groſs in the queen, yet he was of opinion, that it paſſed by the letters patent of *Charles* I. to *Theaxton*.

As to the firſt, the caſe is thus. The attorney general declares that queen *Elizabeth* 14th of *February*, 12th of her reign, was ſeiſed of this advowſon in groſs, and then preſented *Tyms*, *prout* by the inrolment of the letters patent in chancery *nunc apud Weſtmonaſterium remanens plenius ap-*

(*a*) I can find nothing in 2 Co. 90. to warrant this quotation

paret

paret. Now though the defendant admits *Charles* I. to have been ſeiſed of this advowſon in groſs by deſcent, and conſequently that queen *Elizabeth* was ſeiſed in groſs of it at ſome time of her reign; yet he does not admit it at the preciſe time of the 14th of *February*, 12 of her reign; becauſe the alleging of the time and day when queen *Elizabeth* was ſeiſed in groſs is ſurpluſage and immaterial; for it is ſufficient to allege general ſeiſin in a *quare impedit* in time of peace in the reign of ſuch a king. Then though the defendant does not deny a thing, yet he admits by it only things materially alleged, but he does not admit things immaterially alledged. Then if he has not admitted the ſeiſin in groſs, and preſentation of *Tyms* 14th of *February*, 12th of the reign of *Elizabeth*; then the advowſon may have been appendant to the manor of *Bedall* at the time of the grant to the earl of *Warwick*, and ſo might well paſs by the letters patent. The time of the ſeiſin and preſentation is not traverſable, and all the precedents never allege the day of the ſeiſin or of the preſentation. Then if it is ſo immaterial, that one cannot deny it, the not denying it will not amount to an admittance. Beſides, that nothing that is immaterial, though it be admitted, will amount to an eſtoppel. If the defendant had ſhewn another title in his plea, and had traverſed the preſentation of *Tyms*, *modo et forma*, and it had appeared upon the evidence at the trial, that the queen had preſented in the 43d year of her reign; that would have maintained the iſſue, and the verdict muſt have been againſt the defendant. In actions of treſpaſs and battery, where it is neceſſary to ſhew a time in the declaration, evidence of a treſpaſs at any other time before the action brought will maintain the iſſue. *A fortiori* in this caſe, where there is no need to allege a time; ſo that it would be very unjuſt, to conclude a man by his admittance of a thing which he could not traverſe, or if he could, is not material to be proved. And though it is an admittance of a ſeiſin in groſs in queen *Elizabeth* in ſome time of her reign, yet there was time enough in her long reign for uſurpations after the letters patent, by virtue of which ſhe might have preſented *Tyms*. 2. There is art here in the pleading of the inrolment of the letters patent of preſentation in chancery, for they thought that they could not be denied; but that is of no ſignification, for if the letters patent are inrolled in the ſame court where the plea is, one may plead them without ſhewing them, but if they are inrolled in another court one cannot plead the inrolment, without making a *profert* of an exemplification of them under the great ſeal. Now if the declaration had been without artifice in the uſual manner, *viz.* in the time of peace, *&c.* and the defendant had pleaded as he has done here upon *oyer* of the letters patent, it had been a good

An immaterial allegation not operate as an eſtoppel. R. acc. T. Jones. 170. T. Raym. 456. Fitz. Eſtoppel, 69. 247. D. acc. Co. Litt. 352. b. Vide Com. Eſtoppel, E. 6. 2d. Ed. vol. 3. p. 274.

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Dyer, 215.

good title for the defendant, becauſe the defendant would not be obliged to aver that this advowſon was appendant, for the contrary, *viz.* that it was in groſs in the queen at the time of the grant of the earl of *Warwick*, would not appear; and all things upon *oyer* ſhall be intended to make the grant good, if nothing to the contrary appears.

2. Admit that it was not appendant at the time of the grant to the earl of *Warwick*; yet he was of opinion, that this advowſon paſſed by the letters patent of king *Charles* I.

1. By, him, the grant is full and expreſs.

2. No ſuggeſtion in the patent is falſe unleſs that which ſays, that *Wilſon* was preſented by king *Charles* by lapſe; nor is it ſaid, that the advowſon paſſed by the letters patent of the queen.

3. Where it is ſaid that *Theaxton* claimed it by virtue of the patent of the queen, that muſt not be intended lawful claim; for if a man claims an advowſon by colour of a void patent, and the king preſents, and afterwards in conſideration that the other will permit his clerk to enjoy during his life, the king grants the advowſon to the other and his heirs, and the other permits the king's clerk to enjoy it during his life; it is a good conſideration, and the patent is good.

Objection. It is ſaid in the recital of the patent of *Charles* I. that *Theaxton* ſued a *quare impedit*, to recover *ſuam praeſentationem*.

Anſwer. That is only the ſuggeſtion of the writ.

4. It is ſuppoſed and admitted by the letters patent of *Charles* I. that the patent of *Elizabeth* might be void, yet the king declares, that it was his true intent, that *Theaxton* and his heirs ſhould enjoy it notwithſtanding any defects in the letters patent, and then proceeds to the abſolute grant of the advowſon to *Theaxton* and his heirs. There are ſtronger caſes, where the intent of the king has been to confirm letters patent that were void, yet if his intent has alſo appeared, to grant the thing *de novo*, the letters patent have been adjudged good and the grant alſo. *Hil.* 22. & 23 *Car.* 2. *in ſcaccario* in the time of chief baron *Hale*, the caſe between *Atkyns* and *Holford* was thus; king *Edward* 3. by his letters patent, reciting that king *John* had by his charter granted to the abbot and convent of *Thiſtleworth returna brevium*, and reciting that it had been found by inquiſition, that the abbot and convent uſurped the franchiſe of the crown, ſo that the franchiſe was reveſted in the crown; firſt *Edward* III. confirms the charter of king *John*, and then goes on and grants to the abbot and convent *returna brevium*; it was agreed in that caſe, that the charter of king *John* was void; and it might have been objected, that king *Edward* III. eſteemed the charter of king *John* good, and that the inquiſition was falſe, and therefore he intended

intended only to make reſtitution of the franchiſe that was reveſted in the crown; but it was adjudged, that though the grant of king *John* was void, yet the grant of *Edward* III. was good, becauſe the intention of the king appeared to paſs to the abbot and convent the *returna brevium*. And this caſe he cited as a caſe in point.

Objection. This clauſe is qualified by the *ſecundum tenorem et veram intentionem literarum patentium* of the queen, &c.

Anſwer. That intent is not to be underſtood of that which actually paſſed, but of that which was deſigned to paſs; for the patents of *Charles* I. ſuppoſe a defect in thoſe of the queen; ſo that it is not conſtrued a legal intent, but a moral intent. If this advowſon at the time of the queen's grant had the reputation to be appendant, the queen might well have intended to paſs it, though in ſtrictneſs of law if it was in groſs it could not paſs. A manor in reputation may paſs by the name of a manor in grants, between common perſons, 6 *Co.* 63. *a.* 64. *b.* though perhaps the law may be otherwiſe in the caſe of advowſons. If a man ſeiſed of a manor to which an advowſon is appendant, mortgages the manor in fee, excepting the advowſon; if the money is paid at the day, the advowſon is become again appendant; but if the money is paid after the day, it will have the reputation of appendancy, but in truth it is not appendant. It might be that this advowſon was appendant before the queen preſented *Tyms*, and was then ſevered, but retained afterwards the reputation of appendancy; and if in this caſe the grant was of the manor with the advowſon appendant, this reputation might be ſufficient to juſtify the intent of the letters patent, that it was intended to be paſſed. Beſides, that in this caſe it does not appear, that there was any other advowſon but *Bedall* appendant to this manor, which is a foundation of a very ſtrong preſumption of the queen's intent to paſs it. He ſaid farther, that he had ſearched in the hiſtory of this church, and it ſeemed to him, that it was appendant to the manor at the time of Queen *Elizabeth*'s grant. See *Co. Entr.* 477. *b. tit. quare imp. pl.* 2. It appears, that this advowſon was appendant to this manor in the time of *Edward* III. afterwards a man was ſeiſed in fee of the manor of *Bedall*, to which this advowſon was appendant, and it deſcended to two coparceners, ſo that then it was appendant by turns, one time to the one moiety, and the other time to the other moiety; one moiety of it came to the lord *Lovel* in fee, who was attainted of treaſon in the time of *Henry* VII. by which *Henry* VII. was ſeiſed of it in fee; afterwards *Henry* VII. gave this moiety to the anceſtor of *Digby* in tail, from whom it came to *Simon Digby*, who in the time of queen *Elizabeth* committed treaſon, and then the church became void, and the queen preſented, and then *Digby* was attainted;

If an appendant is excepted out of a mortgage of the principal, on the forfeiture of the mortgage the appendancy is deſtroyed. S. P. 3 Salk. 24. 40. Vide ante 198.

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If a reverſioner puts the particular tenant out of poſſeſſion of an appendant, the appendancy will revive when the particular eſtate determines.

tainted: ſo that the caſe is thus; tenant in tail of a manor, to which an advowſon is appendant, reverſion to the queen in fee: tenant in tail commits treaſon, then the queen in reverſion uſurps, by this the advowſon is in the queen in groſs, afterwards tenant in tail is attainted, the advowſon is become appendant again; for the appendancy was not deſtroyed by the uſurpation, for though it was ſevered from the eſtate tail, yet it was not ſevered from the fee: then by the attainder the eſtate tail is wholly extinct, and the queen is ſeiſed in her *reverter*. As if there is tenant for life of a manor to which an advowſon is appendant, the reverſion in fee to *A. A.* uſurps upon the tenant for life, the advowſon is become in groſs, but if the tenant for life dies, it is become appendant again. *Hob.* 322. Sir *William Elvis*'s caſe. So that though the queen might have been ſeiſed in groſs, when ſhe preſented *Tyms*, yet the advowſon might have been appendant at the time of the grant to the earl of *Warwick*. And the ſurer way here to have come to the right, had been to have taken iſſue upon the traverſes, and not to have laid ſnares to trap men's rights, which judges ought to diſcourage.

Objection. There is a falſe ſuggeſtion, that king *Charles* I. preſented *Wilſon* by lapſe, where in truth king *James* I. preſented him *pleno jure*.

Anſwer. Every falſe recital in a thing not material will not vitiate the king's grant, if it appears that it was his intent to grant the thing; now here the king would not hazard the title of *Wickham*, and therefore took this means to determine the controverſy, by the confirmation of *Theaxton*'s right, if there was any in him, or if he had no right, to give him a right. And the conſideration is ſufficient if *Theaxton* had no right, *viz.* the deſiſting from the ſuit, whether he had right of ſuit or not. And be compared it to 1 *Co.* 43. *a.* 6. *Co.* 55. *a.* ſurrender of letters patent, *&c.* It is not material to *Theaxton* whether king *James* I. preſented by lapſe, or *pleno jure*; and every little miſtake in an immaterial point will not avoid the king's grant, if the intent appears, and the ſubſtance is performed.

An immaterial miſtake will not avoid the king's grant if his intent remains

apparent. R. acc. 1 Roll. Rep. 23. D. acc. 1 Mod. 196.

Beſides, if the judges adjudge theſe letters patent of *Charles* I. void, it will avoid the letters patent of queen *Elizabeth*, which are not before the court; and one cannot adjudge letters patent void, which appear only by recital. And farther the letters patent of the queen might have words general enough to convey the advowſon in groſs; for the recital ſays, that the queen *inter alia* granted; now it may be, that the letters patent of the queen contain theſe words, *viz. aut exiſtentes in Bedall*; and thoſe words would paſs the advowſon in groſs; and if that had appeared in evidence upon iſſue joined, the verdict would have been for the defendant. 1 *Mod.* 195.

Objection

Objection. The granting part of the letters patent muſt relate to the recitals.

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Anſwer. If it appears by the recitals, that the king has intent to paſs nothing in which he had profit, but only what was detained by concealment from him, the recital will qualify the general words of the grant, becauſe it appears that his intent was not to diminiſh the revenues of the crown. But if there are words in the grant which ſhew that the king intended to paſs the land, although it was not concealed, the grant will be good to paſs the land which was not concealed. *Hardr.* 231. *pl.* 7. And for theſe reaſons he was of opinion, that this advowſon paſſed by the letters patent of *Charles* I. *Eyre* juſtice declared that he was of the ſame opinion. But he did not argue this point, becauſe the other point which follows was, as he ſaid, an unſurmountable obſtacle.

Where it appears from the recital of a patent that the king means only to convey a right concealed from him, the recital ſhall controul any general words in the patent. S. P. Salk. 560. Skinn. 663. R. acc. 10 Co. 109. a.

As to the ſecond point, whether the grant ſhewn upon the *oyer* can be the ſame grant with that which was pleaded, by reaſon of a variance. For the defendant pleaded a grant *Wilielmo Theaxton tunc armigero poſtea militi*, and upon the *oyer* the grant appears to be *Wil.elmo Theaxton militi*. *Rokeby* juſtice was of opinion, that there was a ſufficient demonſtration of the perſon, and that nothing appeared in the record to induce the court to intend that *William Theaxton* eſquire and *William Theaxton* knight were two diſtinct perſons, but that they were the ſame perſon; for (by him) the dignity does not change the man; and it is only in this caſe a miſtake in an adverb of time. And as to the objection, that if one makes a grant to a man by the ſtile of knight, who is but an eſquire, the grant is void. He anſwered, that it is a maxim, that *veritas demonſtrationis tollit errorem nominis*.

But it is otherwiſe where a contrary intent appears. S. P. Salk. 560. Skinn. 663.

2. (By him) if a grant be made to a man by the name of knight, if he is not a knight, yet the grant is good, if it may *conſtare de perſona*. And in *Littleton's reports* 181, 197, 223. *W. Jon.* 215. it is the opinion of all, that the miſtake of an addition will not avoid a grant, if it may *conſtare de perſona*. And therefore he was of opinion, that the judgment given in the common pleas ought to be reverſed.

But *Holt* chief juſtice, *Turton* and *Eyre* juſtices, argued againſt *Rokeby* juſtice in this point. For by *Holt* chief juſtice, a grant to *William Theaxton* eſquire, by the name of *William Theaxton* knight, is void; 1. Becauſe knight is part of the name of a man; 2. It is a name of dignity, which is part of the name of a man as much as a *Chriſtian*

A title of dignity is part of a man's name. R. acc. 81 Ed. 3. 23. a. ol 39. Hutt. 41. D. acc. Bro. Additions, 58. 21 Ed. 4. 72. a. 2 Inſt. 594. poſt. 859. Semb. acc. Bro. noſmes. 33. long quinto. 106 b.

Knight is a title of dignity. D. acc. Bro. Additions. 44. long quinto. 106. b. 2 Inſt. 594. 1 Bl. Com. 403, 404. Semb. acc. 9 Co. 49. b. Cro. Car. 271. 1 Hob. 129.

name.

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name. So that if a man be ſtiled of another dignity than that of which he is, it is ill. And as to the *demonſtratio perſonæ* objected by *Rokeby*, *Holt* anſwered, that it ought to appear upon the face of the grant; for otherwiſe the allegation of the party, that he is the ſame perſon, ſignifies nothing. The name of eſquire is merged by the acceſſion of the name of knight, ſo that he who is a knight, can never be called eſquire afterwards, which is but a name of worſhip. 6 *Hen.* 4. 8. *Seld. tit. hon.* 683. 9.

Objection. Sir *William Theaxton* might be a reputed knight, and not a real knight; and a name by reputation is ſufficient for purchaſes.

Anſwer. A knight reputed, and who is not a real knight, is no knight at all, and cannot take by that name. 2. If there was ſuch a reputation, the defendant ſhould have ſhewn it.

In all caſes of reputation there ought to be ſome foundation for ſuch reputation, which could not be in this caſe. It is agreed, that a baſtard in legal underſtanding has no father nor mother; nevertheleſs, ſome of them muſt know their mother well enough; yet a grant to a baſtard by the name of ſuch a woman is ill, unleſs he be reputed the ſon of that woman by all the neighbourhood, not by one or two; and notwithſtanding that there is a ground in nature to raiſe a reputation, for he muſt be the ſon of ſome woman. But if a man be baſtard *eigne*, becauſe by the civil law he is a *mulier*, there is a greater foundation for reputation, and he ſhall take by the name of ſon of ſuch a woman, without a general reputation. Then in the caſe of knights, heretofore knights were created by great lords as well as by the king, but that was ſuppoſed to have been by virtue of a charter; but ſince honour is conferred by none but the king, there cannot be any foundation for a reputation to be a knight. The dignity of knights was in great eſteem in the law, and great credit was given to them. In the trial in a writ of right, the law will not intruſt the ſheriff to return the jury, but the panel of the great aſſiſe muſt be made by four knights, &c.

A baſtard cannot take under the deſcription of the ſon of a particular woman, unleſs he be either *generally* reputed her ſon. Vide 6 Co. 65. a. or baſtard eigne. Vide 6 Co 65. a.

Objection. A name of dignity may be ſupported by reputation. For ſuppoſe a grant be made to the eldeſt ſon of an earl, by the name of viſcount of ſuch a place, it would be a good grant.

Anſwer. There is a foundation for ſuch a reputation, for by the law of heraldry the eldeſt ſon of a duke precedes all earls; and conveyancers call them eſquires, commonly known by the name of earls. The eldeſt ſon of an earl precedes barons, &c.

The eldeſt ſon of a duke precedes an earl. acc. 1 Bl. Com. 405.

Objection. *Cro. Jac.* 240, Lord *Ewre v. Strickland.*

Anſwer. The addition of that caſe being of ſuch a dignity, as that one perſon only is capable of it, carried ſufficient certainty in itſelf, and therefore was good according to *Co. Litt.* 3. *a.* which was the reaſon of that caſe, as appears

The eldeſt ſon of an earl, a baron. acc. 1 Bl. Com. 405.

pears, 1 *Bulſtr.* 21. where the ſame caſe is better reported than in *Cro.* which is extraordinary, that any thing ſhould be better reported in *Bulſtrode* than in *Croke.*

As to the caſe of the earl of *Pembroke* againſt *Green and Boſtock*, reported in *Littlet. Rep* 181, *&c.* 1 *Cro.* 172. and 1 *Jones* 215 the caſe is miſtaken in 1 *Cro.* for the iſſue there was not upon the grant to *W. S.* but upon the grant of the next avoidance. But it is the expreſs opinion of three great judges, *Dier* 299. *b. pl.* 35. that if iſſue had been taken upon the grant to *W. S.* the iſſue had been for the defendant. Though that ſeemed to *Holt* chief juſtice difficult to maintain, when the verdict had found him to be the ſame perſon. But there is no reaſon for the opinion of *Hutton* and *Richardſon* chief juſtice in *Littleton's Reports.* For if the law were ſo, names would be uſeleſs, for *John S.* is as much *Thomas S.* as Sir *William Theaxton* knight is *William Theaxton* eſq. It is true, that there are ſeveral perſons who purchaſe by the name of *Thomas John, &c.* who were never chriſtened; but in ſuch caſes thoſe are ſurnames only. 2. If reputation might have been ſufficient, the defendant nevertheleſs ought to have averred it, *viz.* that *William Theaxton* was *revera* eſquire, *ſed tamen cognitus et reputatus* a knight. And ſuch an averment ought to be made in all caſes where a man has required a reputation contrary to the truth of the fact. And for theſe reaſons the three judges were of opinion, that this variance was ſo great an obſtacle, that they could not come at the merits of the cauſe, but for this defect the plea was ill; and therefore (by them) the judgment in the common pleas ought to be affirmed, which was done accordingly. Afterwards upon error brought in parliament this judgment was (*a*) reverſed, without any conſideration had of the opinion of the judges.

(*a*) Sho. Parl. Caſ. 212.

Britton *verſ.* Cole.

S. C. Comb. 434. 469. Carth. 441. 12 Mod. 175. Pleadings poſt. vol. 3. 145. 5 Mod. 109.

TRESPASS. The plaintiff declares, that the defendant the twentieth of *May*, 7 *Will.* 3. at *Hanap* in *Glouceſterſhire* took and chaſed forty-three ſheep and two lambs of the plaintiff, *&c.* The defendant pleads, that 12 *Febr.* 6. *Will.* 3. a *levari facias* iſſued out of the exchequer,

A levari facias iſſues only where the party's land is debtor. S. C. Salk. 395. 5 Mod. 112. Skinn. 617. Com. 51. Holt. 421.

Any cattle levant and couchant thereon are iſſues of ſuch land. S. C. Salk. 395. 5 Mod. 112. Skinn. 617. Com. 51. Holt. 421.

And may be ſeized and ſold under ſuch writ. S. C. Salk. 395. 5 Mod. 112. Skinn. 617. Com. 51. Holt, 421.

Upon a levari facias againſt the iſſues of an outlaw's lands, the ſheriff, his officers, or any one acting in his or their aid, may juſtify under the writ alone. S. C. Salk. 408. Vide 1 Lev 95. 3 Wilſ. 345. 376. Bl. 847. Poſt. 733. Bl. 701. Burr. 2631.

No other perſon can. S. C. Salk. 408. Vide 1 Lev. 95. 3 Wilſ. 376.

In a juſtification under a writ and warrant, it is not neceſſary to ſhew the delivery of the writ to the ſheriff. R. acc. 1 Saund. 298. or of the warrant to the bailiff.

Under a warrant to A. and B. B. and C. cannot act. S. C. cit. poſt. 1531. And if a plea ſets out a warrant to A. and B. and that by virtue thereof (through miſtake) B. and C. did the act directed by the warrant, the court will not after a demurrer and argument permit an amendment.

BRITTON v. COLE.

directed to the ſheriff of *Glouceſterſhire*, reciting that foraſmuch as the late ſheriff of *Glouceſterſhire*, by virtue of a writ of *capias utlagatum* iſſued out of the common pleas againſt *Francis Creſſet* being outlawed at the ſuit of the defendant in debt in *Somerſetſhire* 12 *June* 5 *Will. & Mar.* in the ſame year 28th *December* took an inquiſition, which found, that the ſaid *Creſſet* was ſeiſed in fee of lands to the value of 55*l. per annum*, and ſeiſed them into the king's hands, *prout per* the tranſcript of the writ and inquiſition returned into the office of the remembrancer in the exchequer appears; and commanding the ſheriff, that all rents, iſſues, &c. of the premiſes from the time of the ſeiſure into the king's hands until the 25th of *March* following, ſhould be by him levied, according to the value returned by the inquiſition, &c. ſo that he ſhould have the money before the barons of the exchequer, to be paid to the defendant, &c. by virtue of which writ the ſheriff made a precept to *Antony Powell*, *John Okes*, and *Joſeph Powell*, commanding them to levy, &c. and becauſe the forty-two ſheep and two lambs were *levant* and *couchant* upon the premiſes, &c. the defendant requeſted *Anthony Powell* and *Joſeph Powell* to take and chaſe them, &c. upon which *John Powell* and *Joſeph Powell* took and chaſed them; which is the ſame treſpaſs, &c. The plaintiff demurs. And this caſe was ſeveral times argued at bar by Mr. *Northey* and Sir *Bartholomew Shower* for the plaintiff, and Mr. ſerjeant *Wright* and Mr. *Keen* for the defendant. And now *Holt* chief juſtice pronounced the opinion of the court. And the queſtion upon the plea in point of law was, if a man be outlawed, and upon a ſpecial *capias utlagatum* an inquiſition is taken, and the man's lands ſeiſed into the king's hands, and the yearly value returned into the exchequer; and then a writ of *levari facias* iſſues, commanding the ſheriff to levy the yearly value out of the iſſues and profits of the land, and by virtue of that writ the ſheriff ſeiſes the cattle of a ſtranger, being *levant* and *couchant* upon the premiſes; whether the taking of this cattle of a ſtranger be in ſuch caſe juſtifiable? and the whole court was of opinion, that it was. 1. Becauſe it is within the direct command of the writ, to levy that which is due according to the yearly value, out of the iſſues and profits of the land; for cattle *levant* and *couchant* are part of the iſſues of the land. *Weſtm.* 2. 13 *Ed.* 1 *c.* 39. is an explanatory act, and ſays that *omnia mobilia* ſhall be iſſues. 2. *Inſt.* 453. and *Flet. lib.* 2. *cap.* 68. hold cattle to be compriſed under the word *mobilia*. And that is not reſtrained to the cattle of the owner of the land, but is extenſive to the cattle of all men. 2. Becauſe the land is debtor to the king, and that makes the cattle upon it liable to this execution. For if the king ſhould not have this remedy, the pernancy of the profits of the land upon outlawry would be very ſmall, and

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it may be would be worth nothing; for then it would be in the power of the man outlawed to defraud the king of the whole, by letting of the land to paſturage; in which caſe if he could not ſeiſe the cattle *levant* and *couchant* upon the land, he could not have any remedy againſt him who ſhould hire the land for agiſtment; nor could he have the money payable by ſuch contract, becauſe it would be an agreement in groſs. If *A.* being outlawed makes a feoffment during the outlawry, the feoffer puts in his cattle, doubtleſs theſe are iſſues, becauſe the feoffee takes the land in the ſame plight as the feoffor had it, but the feoffment notwithſtanding is good. 21 *Hen.* 7. 7. a. But the intereſt of the king to take the profits continues notwithſtanding the feoffment, though the opinion in 21 *Hen.* 7. 7. *a.* is contrary. If iſſues be returned upon a juror, they ſhall be levied upon the feoffee. If *A.* be outlawed, and aliens his land before inquiſition taken, the alienation prevents the king from taking the profits, otherwiſe if the alienation were after the inquiſition found; and this is the conſtant courſe of the exchequer. For the king has nothing before inquiſition found upon outlawry as to the real chattels; but as to the perſonal chattels they are in the king without inquiſition found. If then the cattle of a feoffee, *&c.* may be taken for iſſues, why not the cattle of the plaintiff, who perhaps is the feoffee of *Creſſet*, nothing to the contrary thereof appearing here? And this plea being in bar ſhall be good to a common intent; and if the plaintiff has any ſpecial title, he ought to ſhew it. Beſides, ſuppoſe that the plaintiff has a leaſe from *Creſſet* precedent to the outlawry, if it is not found in the inquiſition, the plaintiff cannot reply it in treſpaſs, but muſt have recourſe to the exchequer, and plead it by way of *monſtrans de droit.* But if the plaintiff has no right, it would be unreaſonable that he ſhould eſcape, when he who had right could not.

Alienation of his realty before inquiſition found by a perſon outlawed in a perſonal action prevents the king's right to the iſſues. S. P. Salk. 395. Comb. 469. 12 Mod. 176. R. acc. Raym. 17. 1 Lev. 33. Hardr. 101.

An alienation afterwards does not. S. P. Salk. 395. Comb. 469. 12 Mod. 176. R. acc. Raym. 17. 1 Lev. 33. Hardr. 101.

The realty of one outlawed in a perſonal action does not veſt in the king till after inquiſition. S. P. Salk. 395. Comb. 469. 12 Mod. 176. Skinn. 619.

His perſonalty does. S. P. Salk. 395. Comb. 469. 12 Mod. 176. Skinn. 619.

A man cannot inſiſt upon a right not taken notice of in an inquiſition, except by *monſtrans de droit.* S. P. Salk. 395. Skinn. 619. Comb. 470. 12 Mod. 177.

Objection. *Cro. Eliz.* 431. *pl.* 38. Anſwer. The caſe there is of a *fieri facias de bonis et catallis*, and not of a *levari facias de exitibus terrae.* And therefore he could not in ſuch caſe take the cattle of a ſtranger; though the book ſays, that one may upon ſuch a writ ſeize the cattle of a ſtranger, but not ſell them; which ſeems very ſtrange doctrine, the writ being *fieri facias.*

There are ſeveral ſorts of executions for the king. 1. *Capias ad ſatisfaciendum*, which takes the body of the debtor. 2. *Fieri facias* to take his goods. 3. A (*a*) writ which they call long one, compriſing a *capias ad ſatisfaciendum*, *fieri facias*, and *eutendi facias.* But by virtue of that one cannot ſeize the cattle of a ſtranger, becauſe that writ does not give

Execution for the king.

(*a*) Vide Gilb. Exchequer, 117. to 125.

BRITTON v. COLE.

The forfeiture of iſſues by not ſerving on a jury charges the inheritance. S. P. Salk. 395. Carth. 442. 12 Mod. 177. Vide 5 Mod. 115. Skinn. 618. Comb. 470. D. acc. Dr. and Stud. Dial. 1. c. 22. Dalt. Sher. 330. Bro. Iſſues, pl. 23.

or by neglecting an office. S. P. Comb. 470. Vide Skin. 619.

A forfeiture by outlawry does not. S. P. Salk. 395. Carth. 442. Comb. 470. Vide 12 Mod. 177, 178.

Iſſues forfeited by the lord of a manor may be levied upon the copyholders. acc. 2 Roll. Abr. 157, 16 Vin. 513. F. 3.

The cattle of one tenant in common cannot properly be levied on a levari facias againſt the other. S. P. Salk. 395. Comb. 470. 12 Mod. 178. R. acc. Lane, 96. 2 Roll. Abr. 159, 16 Vin. 519. pl. 4.

Nor the cattle of a commoner on a levari facias againſt the tenant of the land. S. P. Salk. 395. Carth. 442. Comb. 471.

Any cattle levant and couchant may be diſtrained for a rent ſervice, or a rent charge. Vide ante 168.

any authority to the ſheriff to ſeize them. 4. A *levari facias* where the land is the debtor, in caſe of forfeiture of iſſues, or profits to be taken upon outlawry, and there the cattle of a ſtranger may be taken. The forfeiture of iſſues charges the whole inheritance, therefore if tenant for life forfeits iſſues and dies, they ſhall be levied upon the reverſioner. Becauſe ſerving on juries being a charge upon landed men for the ſervice of the publick, the whole fee is charged with it. So if an officer for life neglects his office, by which he forfeits iſſues, *&c.* that charges the reverſioner in fee. If *A.* tenant for life be outlawed, and inquiſition found, and the lands ſeized into the king's hands, and *A.* dies; it is a doubt whether the arrears of iſſues ſhall be levied upon the reverſioner; becauſe the charge ariſes upon the particular default of the tenant for life, and not from any charge upon the inheritance, as in the caſe of iſſues. But if that was the preſent caſe, the plaintiff ought to ſhew it; for tenant for life ſhall not be intended dead, unleſs it be averred. Iſſues loſt by the lord of the manor, levied upon the copyholders, *&c.* As to the caſe in *Lane* 96 2 *Roll. Abr.* 159. *pl.* 4. which is obſcurely reported, *viz.* that the cattle of one tenant in common ſhall not be taken upon a *levari facias* upon the outlawry of the other, if the eſtate of the other tenant in common be particularly found; it is good law. For if a *levari facias* be to levy the profits of a moiety, the cattle of the other tenant in common there *levant* and *couchant* cannot be taken. For the tenant in common which was outlawed can only forfeit the pernancy of the profits of his moiety. But that matter of the tenancy in common muſt be intended to be found upon the inquiſition, otherwiſe it is not law. For if *A.* hath land, in which *B.* hath common of paſture for ſheep; *A.* is outlawed; and the title of *B.* is not found upon the inquiſition; his cattle may be taken upon a *levari facias*, until he hath pleaded his title in the exchequer, and hath it allowed; *contra* if his title had been found upon the inquiſition. In 2 *Roll. Abr.* 159. there are ſome caſes which ſeem to be contrary, but they are not intelligible. As 2 *Roll. Abr.* 159. *pl.* 2, 3. *Staffrod v. Bateman.* The ſame caſe with *Cro. Eliz.* 431. which ſays, that upon a *levari facias*, the ſheriff may ſeize, but not ſell, which is a contradiction, for every *levari facias* requires a ſale as well as a ſeizure; therefore the book is falſe printed, and it ought to be a *fieri facias*, as *Cro. Eliz.* is. Now no *levari* iſſues for a debt againſt the perſon, but where the land is debtor. In all caſes where the land is the debtor, the cattle of a ſtranger are as well liable, as thoſe of the owner of the land; as cattle of a ſtranger *levant* and *couchant* are diſtrainable for arrears of a rent ſervice. So if a neighbour's cattle eſcape into land, out of which a rent-charge iſſues, and are *levant* and *couchant* (there are good authorities though

though they are not *levant* and *couchant*) they are diſtrainable for the rent-charge, and the owner ſhall not have them again, unleſs he pay the arrears; which is as hard a caſe as the preſent caſe, for the rent-charge is againſt common right, and commences by the grant of the party. Then it is very reaſonable, that the king ſhould have as good remedy as a private man. And for an authority in point *Holt* chief juſtice cited a caſe in the exchequer, *Paſch.* 18 *Car.* 2. between *Hodſon* and *Trodgin* or *Doobey*, where *Hale* chief baron took the ſame difference that is taken here, *viz.* that the cattle of a ſtranger might be taken upon a *levari facias*, *contra* upon a *fieri facias*; and *Hale* then ſaid, that the conſtant practice of the exchequer was ſo; and the plaintiff there, ſeeing the opinion of the court to be againſt him (for the caſe there was the ſame with the principal caſe here) deſiſted from his ſuit, and ſo no judgment was given. And in the caſe in 2 *Roll. Abr.* 159. *pl.* 3. it is ſaid, that it was adjudged contrary at *Reading*, becauſe the cattle were not averred to be *levant* and *couchant*. And *Rokeby* juſtice cited a caſe in corroboration of the ſaid opinion between *Wrightſon* and *Reyner*, *Mich.* 22. *Car.* 2 *Exchequer Rot.* 14. which was in point, and the court there of the ſame opinion as in this caſe, but no judgment was entered upon the roll. And for theſe reaſons the whole court held the plea good in ſubſtance. But then for other exceptions they held the plea ill. And the firſt exception was, that the defendant, not being an officer, ſhould have pleaded the record of the outlawry, eſpecially it being at his ſuit. And *Holt* chief juſtice pronounced the opinion of the court, that this was a good exception. For if a writ of *capias ad ſatisfaciendum*, &c. iſſue to the ſheriff againſt *J. S.* and there is no judgment to warrant it, the ſheriff, and the officers who act under his authority, are excuſable if they execute it; but if a ſtranger encourage the ſheriff, &c. to execute it, he cannot juſtify it. So if the plaintiff in the action perſuades and encourages the ſheriff, &c. to execute a judicial writ; if treſpaſs be brought againſt him, if he does not plead the judgment, he ſhall be a treſpaſſer. Treſpaſs lies againſt the party, after judgment is ſet aſide. Now in this caſe the defendant was either a party concerned, or not. If he was concerned as acting under the authority of the ſheriff, he ſhall be in the ſame plight, but then he ought to ſhew it. If he was concerned as plaintiff in the former action, he ought to ſhew the record of the outlawry, to warrant this execution; for if the outlawry is reverſed, and afterwards a *levari facias* is ſued, he who ſues it ſhall be a treſpaſſer. But here the defendant does not appear to be a party to the former action, except by the recital of the *levari facias*, which is not ſufficient, but it ought to have been averred. Then if he is a mere ſtranger

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Upon a fieri facias no goods can be taken which are not the property of the perſon againſt whom the fieri facias iſſued. R. acc. Cro. Eliz. 431. 11. 38.

If a plaintiff executes execution upon a judgment, and afterwards that judgment is ſet aſide, treſpaſs lies againſt him. R. acc. 1 Lev. 95. Str. 509. D. acc. 2 Wilſ. 85. 3 Wilſ. 376.

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The command is traverſable on a juſtification in treſpaſs for diſtraining cattle as bailiff either for rent. S. P. Salk. 409. Comb. 471. R. acc. 2 Leon. 196. Godb. 109. D. acc. ante 233. Cro. Eliz. 14. 13 H. 6. 3. a. or damage feaſance. S. P. Salk. 409. Comb. 471. 12 Mod. 179. or on a cogniſance for damage feaſance. S. P. Comb. 471. 12 Mod. 179. R. acc. 2 Leon. 215. R. cont. 1 Roll. Rep. 46. But on a cogniſance for rent, not. S. P. Salk. 409. Comb. 471. 12 Mod. 179. R. acc. ante 233. Cro. Eliz. 14. Semb. poſt. acc. 405. D. acc. 12 Mod. 321. R. cont. 1 Leon. 50. Salk. 107. 11 Mod. 112. Semb. cont. 3 Lev. 20. Vide 6 Co. 24. a Salk. 107. 11 Mod. 112. 1 Roll. Rep. 46. 33 H. 6. 3. a.

ſtranger, he ought not to have requeſted the bailiff to have taken the cattle, though he was in the execution of the king's writ; but he is a treſpaſſer. As if treſpaſs be brought for cattle taken, *&c.* and the defendant juſtifies as bailiff to *J. S.* and by his command, that he diſtrained them damage feaſant; if the owner did not command him, he ſhall be a treſpaſſer. The ſame law for a diſtreſs for rent arrear, for the command is traverſable. In conuſance for rent in replevin by bailiff, the command is not traverſable, becauſe that goes to the right; but in conuſance for damage feaſant the command is traverſable in replevin. The ſecond exception was, that it is not ſaid, that the writ was delivered to the ſheriff, or the warrant to the bailiff. *Sed non allocatur.* For *per curiam*, though it is the practice to ſay ſo, yet it being a plea in bar, it ſhall be good to a common intent; and if the cattle were taken before the delivery of the writ, the plaintiff ſhould have ſhewn it in his replication; for no ſpecial matter ſhall be ſuppoſed to intervene, to make a man a treſpaſſer, unleſs it be ſhewn. A third exception was, that the warrant and requeſt were made to *Antony Powell* and *Joſeph Powell*, upon which *John Powell* and *Joſeph Powell* took them. And *per curiam* it is ill for that reaſon, becauſe the treſpaſs is not confeſſed and yet juſtified, for it is no taking purſuant to the command and requeſt. For though according to *Laſhbrook*'s caſe in *Hutt.* 127. if a warrant be made to three, without joint and ſeveral authority, one of them may execute it, yet a ſtranger, who is not named in it, cannot execute it. Fourthly, the treſpaſs is for taking of forty-three ſheep, and the juſtification is but for the taking of forty-two, and nothing ſaid as to the forty-third. (But ſome of the counſel ſaid, that the record as to that was forty-three.) But for theſe reaſons and defects in the pleading, judgment was entred for the plaintiff. Note, Mr. *Keen* moved, to have liberty to amend *John*, and make it *Antony*. But becauſe it was upon demurrer, and part of the fact, *viz.* who took the cattle: the court held, that it was matter of ſubſtance, and therefore not amendable.

A warrant directed to ſeveral may be executed by one, though it contains no words giving a ſeveral authority.

The Earl of Suſſex *verſ.* Temple, *&c.*

An anſwer in Chancery is ſufficient evidence againſt any perſon actually claiming under the party who put it in. Vide 3 Mod. 9 Salk. 285.

IN evidence upon a trial at bar in ejectment, the caſe was thus. Sir *Arthur Throckmorton* ſeiſed in fee of the lands in queſtion levied a fine, to the uſe of himſelf for life, remainder to his wife for life, remainder to Sir *Peter Temple* and *Anne* ſecond daughter of Sir *Arthur Throck-*

And prima facie againſt a perſon reputed to claim under him.

Under a limitation to the uſe of the iſſues females of the body of J. S. (he then having no daughter, and the heirs of their bodies, all the daughters J. S. may have ſhall take.

And ſhall be joint-tenants for life, with ſeveral inheritances.

morton

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morton and wife to Sir *Peter Temple* for their lives and the life of the ſurvivor of them, remainder to the firſt, ſecond, third, *&c.* ſons in tail, remainder to the iſſues females of their bodies and the heirs of their bodies begotten, remainder to *Elizabeth Throckmorton* third daughter to Sir *Arthur Throckmorton* in tail, *&c.* Sir *Peter Temple* had iſſue by *Anne* two daughters *Anne* the eldeſt and *Martha*. *Martha* died without iſſue. Afterwards *Anne* died, and the earl of *Suſſex* as grandſon and heir of the body of *Elizabeth* by *Thomas* lord *Dacres*, claimed the moiety of *Martha* by virtue of the remainder limitted to *Elizabeth* in tail, and the defendant *Temple* claimed as heir at law to *Anne*, who in her life-time ſuppreſſed the deed. 1. To prove the deed the plaintiff gave in evidence an an anſwer in chancery, in which *Anne* acknowledged the deed, and referred to a ſpecial verdict for greater certainty, in which the deed was found *in haec verba*. And this was admitted as ſufficient evidence without ſcruple, to read the deed againſt *Temple*. But the other defendants, who were purchaſers under *Anne*, objected, that they had been in poſſeſſion twenty years, and therefore the credit of that poſſeſſion was ſufficient evidence for them *prima facie*, ſo as they ſhall not be compelled to ſhew their title; and therefore the anſwer of *Anne* in chancery ſhall not be read againſt them, until the plaintiff prove, that they derive their title under *Anne*. But the plaintiff proving conſtant reputation in the country, that theſe lands belonged to *Anne*, the court permitted the anſwer of *Anne* to be read againſt them alſo, unleſs they ſhewed another title from a ſtranger. 2. As to the merits of the caſe it was urged.

1. That in this caſe the remainder to the iſſue females being in contingency, the firſt daughter that was born, the remainder attached in her, and could not be diveſted by the birth of a ſecond daughter; and then *Anne* having ſuffered a recovery of the whole, her heir at law had a good title.

2. It was urged that the two ſiſters were tenants in common, and ſo the plaintiff was barred of this action by the ſtatute of limitations, *Martha* having been dead fifty years; for which *Co. Lit.* 188. *a.* 5. *Co.* 8. *a.* 13. *Co.* 57. was cited, where tenant for life, remainder to the right heirs of *J. S.* and *J. N.* *J. S.* died firſt, and afterwards *J. N.* died, their heirs are tenants in common. But *per Holt* chief juſtice, the eſtate is limited by way of uſe to the iſſues females, and iſſues females comprehend all iſſues females. Then the caſe is, tenant for life, remainder to all his iſſues females, *&c.* if the tenant for life has but one daughter, ſhe ſhall have the whole eſtate tail; if he has more daughters, they ſhall be joint-tenants for life, with ſeveral inheritances. If the contingent remainder veſts during the particular eſtate, or *ex inſtante* that it determines, it (*a*) is enough. The caſe in *Co. Litt.* 88. *a.* of a feoffment to the

(*a*) Vide 1 Co. 134. b. ante 207. poſt. 363.

Earl of Sussex v. Temple, &c.

the use of himself for life, and of such wife as he should afterwards marry, and then he marries, he (*a*) and his wife are joint-tenants, which case will rule this case in question. For it is a joint claim by the same conveyance, which makes joint-tenants, and not the time of the vesting. And he seemed to deny the case cited out of *Co. Lit.* 188. But as to the possession of one tenant in common being the possession of the other, he said that does not hold place against the statute of limitations. And besides that, if one of them only takes the profits, it is an ousting of the other. Mr. *Jacob.*

A joint claim under the same conveyance upon a limitation by way of use, makes a joint-tenancy, though the interest vests in the claimants at different periods.

(*a*) Sed vide 2 Bl. Com. 182.

R. acc. 13 Co. 56. 1. Dyer. Poll. 373. Semb. acc. 1 Co. 101. a. Vide 2. Bl. Com. 181. Yelv. 183. (*b*)

The possession of one of several tenants in common will not prevent the statute of limitations from operating against the rest.

If one only of several tenants in common takes all the profits to himself, he thereby ousts the rest. Semb. acc. Cowp. 217. Semb. cont. post. 829. Vide Burr. 2604. R. cont. Salk. 285. Burr. 2604. Bl. 690. Cowp. 217.

(*b*) The law is the same on a limitation in a will, though not by way of use. R. acc. Moor 220. Str. 1172.

On a limitation in a deed, not by way of use, otherwise. Dyer 13. Co. 57. Co. Litt. 188. a. 13th Ed. n. 13. 2 Bl. Com. 181. Semb. 1 Co. 101. a.

Taylor *versus* Jones.

Giving a soldier leave of absence at the instance of a third person is a good consideration for a promise from him to the captain to bring him back in ten days, or pay a sum of money.

Assumpsit. The plaintiff declares, that he was, and yet is, captain of a foot company of soldiers, and that one *Thomas Jones* was a soldier in his company under him; that the defendant *Francis Jones*, in consideration that the plaintiff would permit *Thomas Jones* to be absent from the company ten days, assumed to the plaintiff, to bring back *Thomas Jones*, or pay to the plaintiff 20*l.* and avers that he permitted *Thomas Jones* to be absent, &c. The defendant pleads that *Thomas Jones* died within ten days, *viz.* six days, &c. The plaintiff replies, that he did not die within six days, and tenders an issue. The defendant demurs. And *Carter* for the defendant argued, that there is not here any consideration to maintain this action; for the captain of a company has not any property in a soldier, to give him liberty to absent himself from the king's service. *Sed non allocatur.* For *per curiam*, when the captain sees that he has not occasion to use a soldier in the king's service, he may give him leave to be absent for some reasonable time; and it is lawful enough, and is a benefit to the soldier, for without the captain's leave he cannot absent himself from the company. Then *Shower* for the defendant took exception to the replication, that it was too strait and narrow; for the plaintiff tenders issue, that *Thomas Jones* did not die within six days. Now it may be, that he did not die within six days, and yet die within the ten days, which would excuse the defendant. Therefore the plaintiff should have said, that *Thomas Jones* did not die within ten days. *Sed non allocatur.* For *per curiam* the defendant has tied it to six days in his plea, and therefore the replication pursuing the plea is well enough. And judgment was given for the plaintiff, *nisi*, &c.

Where a defendant by his plea narrows the ground of his defence, it is sufficient for the plaintiff to answer it as stated in the plea. Semb. cont. Com. 148. 10 Mod. 147. S. 994. Bl. 210.

Thompso

Thompſon *verſ.* Leach.

S. C. Salk. 427. 576, Carth. 436. 12 Mod. 173. 3 Salk. 301. Holt. 357. 623. Comb. 438. 468. Comb. 45. 1 Freem. 508. Eq. Abr. Ideots. B. pl. 3 Ed. 1756. p. 278.

Intr. *Hil.* 7. *Will.* 3. Rot. 733.

EJectment. Upon trial at bar the jury find a ſpecial verdict, that *Nicholas Leach* was ſeiſed in fee of the lands in queſtion, and 9*th November* 14 *Car.* 2. made his will in writing, by which he deviſed theſe lands to *Simon Leach* for life, remainder to his firſt, ſecond, third, *&c.* ſons in tail, remainder to Sir *Simon Leach* (who is now defendant) in tail, remainder to the right heirs of * *Simon Leach*; afterwards *Nicholas Leach* died, and *Simon Leach* entered, and was ſeiſed for life; and being ſo ſeiſed by deed, bearing date the 20th of *Auguſt*, 25 *Car.* 2. purporting a ſurrender, ſurrendered that eſtate to Sir *Simon Leach*; afterwards *Simon Leach* had iſſue *C. Leach*, the leſſor of the plaintiff, and died; the jury find farther, that *Simon Leach*, at the time of the deed of ſurrender made to Sir *Simon Leach*, was *non compos*, *&c. et ſi*, *&c.* In *Michaelmas* term laſt paſt ſerjeant *Wright* argued for the plaintiff, that the deed of *Simon Leach* was abſolutely void, and ſo *nihil operatur*. Ideots and *non compos* are diſabled to alien their lands, or bind themſelves, *Bract.* 100. 120. *Britton* 88. *Fleta cap.* 11. No. 10. And if they endeavour to alien, the heir ſhall have *dum non fuit compos*, *&c.* *Reg.* 228. *b.* *F. N. B.* 202. *F. Litt. ſ.* 406. *Co. Litt.* 247. *b.* From whence it appears, that ſuch perſons are incapable to grant; for according to *Co. Litt.* 251. *b.* *Litt. ſect.* 608, 609, 610. nothing paſſes by grant, but that which may lawfully paſs, which in caſe of a *non compos* is nothing. In caſe of a feoffment and livery by the proper hand of a *non compos* the eſtate paſſes by the livery, and is only voidable by the heir; but if the feoffment be made by letter of attorney to deliver ſeiſin, it is void, 4 *Co.* 125. *a.* and all caſes of grants by them are void. As if *non compos* grants a rent charge, and delivers ſeiſin with his own hand, it is void; and if the grantee diſtrains, he is a treſpaſſer. *Perk. ſect.* 5. *ſect.* 21. And therefore the ſurrender in this caſe is void.

By the deſtruction of all the preceding freehold eſtates, and of the preſent rights of entry to ſuch eſtates, a contingent freehold, remainder is deſtroyed. Dougl. 252. acc. Fearn. 233. 241. Vide ante 203. and 807. and the caſes there cited. The ſurrender of a non compos by deed is void.

Nothing paſſes by grant but what lawfully may paſs. The feoffment of a non compos, if he makes livery perſonally, is only voidable. S. P. 3 Mod. 30. Carth. 436. D. acc. Finch's Law. 102. and vide 2 Leon. 218. If livery is made by attorney, void. S. P. 3 Mod. 304. D. acc. Finch's Law, 102. F. N. B. 202. *E.*

Northey contra for the defendant, that the deed was only voidable. 1. It is not void againſt himſelf; he could not avoid it by entry, or pleading, or by a writ of *dum non fuit compos*, *&c.* *Co. Litt.* 247. *a. b.* And it would be ſtrange, that it ſhould be void againſt all the world but himſelf, who is prejudiced by it. The law favours infants more than *non compos*, for infants may avoid their own acts; yet in caſe of a bond, becauſe it carries the conſideration upon the face of it, they ſhall not plead *non eſt factum*, and give infancy in evidence; which ſhews that it is not void. *Contra* of *femes covertes*. Suppoſe that the *non compos* had come

* This ſhould be Nicholas. Vide 3 Mod. 302. Carth. 435. 2 Vent. 198. 1 Show. 296. Com. 45. 12 Mod. 173. Sho. P. C. 150.

to

THOMPSON v. LEACH.

to his underſtanding again, and had conſented to this ſurrender, it had been unavoidable, *Co. Litt.* 2. *b.* which could not have been if the deed had been void. It appears alſo by the writ of *dum non fuit compos*, that the alienation is not void, becauſe the writ ſuppoſes that the party *dimiſit*. So by the writ *de idiota inquirendo*, and the ſtatute *de prærogativa regis*. 17 *Ed. ſt.* 1. *c.* 9. And if the deed was void, the law had no need to preſcribe theſe methods to avoid it. Then the deed was only voidable, and paſſed the eſtate for the life of *Simon Leach*, which deſtroyed the contingent remainders; and there is an end of the plaintiff's title. A future right of entry will not ſupport a contingent remainder, but a preſent right of entry will ſupport it well enough. And if the contingent remainder be once deſtroyed it will never riſe again. A man deſtroys a contingent remainder by levying of a fine, afterwards the fine is annulled by act of parliament; and it was held, that the contingent remainder was revived. But if it had been reverſed for error, it had been otherwiſe. This was cited by *Northey*, as held by *Hale* chief juſtice, *Mich.* 24 *Car.* 2. *B. R.* in the caſe of *Cole v. Leviſton*. 1 *Keb.* 87. And *per Holt* chief juſtice, if the deed is good, the contingent remainder is deſtroyed. For there ought to be, either a particular eſtate actually *in eſſe*, or a preſent right of entry, when the contingency happens, or otherwiſe it cannot veſt. If there be tenant for life with a contingent remainder; tenant for life makes a feoffment in fee upon condition; if the contingency happens before the condition is broken, the contingency is deſtroyed; but if the tenant for life enters for the condition broken, before the contingency happens, the contingent remainder ſhall be revived, and the contingency, if it happens, may veſt. But if before the contingency happens, the reverſioner enters upon the tenant for life for the forfeiture, the contingent remainder is deſtroyed.

No confirmation can make a void deed good. R. acc. Dougl. 50. Vide Gilb. Uſ. 140.

A future right of entry will not ſupport a contingent freehold remainder. D. acc. Fearn. 215.

A preſent right will. S. P. 12 Mod. 174. R. acc. 1 Vent. 188. 2 Keb. 872. 881. 2 Lev. 35. 1 Mod. 92. D. acc. Fearn. 212. Vide Cro. Car. 73.

A contingent remainder once deſtroyed cannot, generally ſpeaking, revive. D. acc. 5 Keb. 86.

But a contingent remainder deſtroyed by fine will revive, if the fine is annulled by ſtatute. Fearne. 240. If reverſed, not. Fearn. 240.

A contingent remainder deſtroyed by feoffment on condition will revive, if the particular tenant enters for the condition broken before the contingency happens. S. P. Salk. 577. Com. 46. Freem. 508. Holt. 623. Fearn. 272.

Afterwards in this *Hilary* term ſerjeant *Gould* argued for the plaintiff much to the ſame purpoſe with *Wright* ſerjeant here above. But farther he moved a new point, *viz.* admit that the deed was only voidable, whether the right remaining in the *non compos* was not ſufficient to ſupport the contingent remainder. For though the *non compos* is diſabled by a maxim of law to reveſt his right, yet the king by inquiſition might avoid the deed. And *Fitzh. remitter* 23. *F. N. B.* 203. A. it is held, that if *non compos* makes a feoffment in fee, and takes back an eſtate for life, he is remitted, as is admitted there by the iſſue.

If a non compos makes a feoffment in fee, and takes back an eſtate for life, he is remitted. Semb. 25. Aſſ. pl. 4.

Darnall, ſerjeant for the defendant, argued to the ſame purpoſe with *Northey*; but only he took a diſtinction between

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tween a grant made by *non compos*, and an authority given by him; that the grant was but voidable, but in caſe of a feoffment by letter of attorney, it was void; becauſe infants or *non compos* cannot give an authority. *Perkins ſect.* 139. 2. He ſaid there cannot be any right, nor *ſcintilla juris*, in the king to ſupport the contingent remainder; becauſe if no office be found in the life of the *non compos*, no office can be found after his death.

But as to the difference between a grant and an authority, the court ſaid, that it would be very ſtrange to allow a *non compos* power to do a greater thing, which may be prejudicial to him, and yet not to allow him power to give an authority.

And *Holt*, chief juſtice, and all the other judges, were of opinion, that this deed of ſurrender made by *Simon Leach* the *non compos* was abſolutely void. The caſes of infants and *non compos* are (*a*) parallel in all things, except that a *non compos* cannot ſtultify himſelf to avoid his grant. Now the ſurrender of an infant is judged void, *Lloyd v. Gregory*, *Cro. Car.* 360. *W. Jon.* 405. which is a caſe in point; for there is the ſame reaſon that the ſurrender of a *non compos* ſhould be void. If an infant grants a rent-charge, the grantee diſtrains, the grantor may maintain treſpaſs. The ſame law of *non compos*. *Perk. ſect.* 21. which proves the grant to be void; for if it was only voidable, ſome act ought to be done to avoid it. And where it is ſaid in 5 *Co.* 119. *a.* in *Whelpdale's* caſe, that the deed of an infant is not void, but voidable, the book only means, that the infant ſhall not plead *non eſt factum*, and give infancy in evidence, but ſhall plead his infancy ſpecially; becauſe the deed to all appearance has all things neceſſary to a deed, and ſeems to be juſtly executed, but for ſome latent cauſe has no operation in law; which cauſe ought to be ſhewn whereby it may appear to be ineffectual. In the ſame manner, if an infant makes a letter of attorney, it is void; but he cannot plead *non eſt factum*. So if *non compos* makes a letter of attorney to make livery upon a deed of feoffment, he cannot avoid it, no more than if he had made a feoffment in perſon, yet the feoffment is void. But the reaſon why feoffments of infants and *non compos* are voidable only, proceeds from the ſolemnity of livery of ſeiſin in the ſight of the country, which takes notice of the notorious alteration of the poſſeſſion. But *contra* of a deed, which may be delivered in a private manner. As to the objection of the writ of *dum non fuit compos*, &c. which hath the word *diſmiſit*. Anſwer, That means only a feoffment with livery by himſelf; for feoffments and fines were the ancient conveyances, and the only conveyances uſed in thoſe days. And for theſe reaſons all the judges were of opinion, that

A perſon who has been non compos cannot inſiſt upon his inſanity in avoidance of any act done by him while inſane. R. acc. 4 Co. 123. 6 Cro. Eliz. 398. D. acc. 5 Ed. 3. 70. b. pl. 131. Semb. acc. Litt. ſ. 401. Semb. cont. Reg. Br. 228. b. F. N. B. 202. C. D. Vide Co. Litt. 257. a. b. 2. b. and 13th Ed. n. 12. 2 Bl. Com. 291, 292.

Infancy cannot be given in evidence in avoidance of a deed. D. acc. Burr. 1805.

The feoffment of an infant, if he makes livery perſonally, is only voidable. Vide Burr. 1805.

His deed void. Sed vide Burr. 1793. Blackſt. 575. 3 Atk. 607. 1 Bro. C. C. 106. 152. 5 Bro. Parl. Caſ. 570. Co. Litt. 172. a. 9 Co. 85. b. Cowp. 289. 7 Ann. c. 19. 4 G. 3. c. 16.

(*a*) D. cont. Burr. 1807. Blackſt. 579.

this

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this ſurrender was void, and that all ſtrangers might take advantage of it, and that the eſtate remained in *Simon Leach* notwithſtanding; and ſo the contingent remainder veſted in the leſſor of the plaintiff before the particular eſtate determined.

The deſtruction of the preceding freehold eſtates, and of the preſent rights of entry thereto by a voidable conveyance, will not deſtroy a contingent freehold remainder. S. P. 3 Mod. 310. Semb. acc. ... Burr. 1807. Semb. cont. Salk. 576. Com. 45. Comb. 438.

But *Holt*, chief juſtice, as to the point made by ſerjeant *Gould* of the right in the *non compos*, &c. ſaid, that if the caſe had depended upon that, much might be ſaid in its behalf; for in the caſe in the book of *Aſſizes*, 25 *Aſſ. pl.* 4. it is admitted that it was a remitter, by the joining of iſſue upon the being *non compos*. And it is not for default of right that the *non compos* cannot avoid his own feoffment, but by reaſon of a perſonal incapacity, *viz.* that no man ſhall be admitted to ſtultify himſelf. And judgment was given for the plaintiff, *niſi*, &c. And afterwards error was brought upon it in parliament, and the judgment was affirmed. *Sho. Parl. Caſ.* 150.

A right of action will not ſupport a contingent freehold remainder. S. P. Salk. 576. 12 Mod. 174. Holt. 623. Fearne. 212. 213.

Note; It was ſaid by *Holt*, chief juſtice, in this caſe, that a right of action will not maintain a contingent remainder. Therefore if *A.* be tenant for life, remainder in contingency, *A.* is diſſeiſed, and a deſcent caſt; and now, ſince the ſtatute 32 *Hen.* 8. *cap.* 33. if five years be paſt, the right of entry is changed into a bare right of action, and the contingent remainder is deſtroyed. The caſe of *Biggot v. Smith*. Cro. *Car.* 73. is nice to an inſtant, for the right ought to be precedent to ſupport the contingency; and therefore there, becauſe the right aroſe to the wife *eo inſtante* that the contingency happened, the remainder was adjudged to be deſtroyed; and the caſe has been always held for law.

No right of entry will ſupport a contingent freehold remainder which does not exiſt before the contingency happens.

Acc. Fearn. 215.

Smith *verſ.* Weſtall.

S. C. but no judgment given. Com. 49.

If a ſtatute impoſes a regulation upon contracts for the performance of particular acts after a certain day, a contract under which the act might have been performed before the day, is not within the ſtatute, though the performance is delayed until after the day. R. acc. poſt. 673. Vide T. Jones, 108.

IN a ſtatute made the laſt ſeſſions of parliament for regulation of brokers, 8 & 9 *W.* 3. *c.* 32. there is a clauſe which makes all contracts for transferring of bank ſtock void, which, by the tenor of the agreement, ought to have been performed after the firſt of *May*, unleſs they are performable within three days, &c. Upon which this caſe was thus: An agreement was made in *February* by *A.* with *B.* that *A.* ſhould transfer bank-ſtock to *B.* upon the requeſt of *B.* at any time before the tenth of *May*. And Mr. *Northey* urged, that becauſe this contract might have been performed before the firſt day of *May*, therefore it was not within the words of the ſtatute. And he compared it to a caſe

But a contract to do the act upon requeſt, though made before the day, is within the ſtatute, if the requeſt is deferred until after the day.

A promiſe which might have been performed within a year after the making, is not within the ſtatute of frauds, though it is not performed until after the expiration of the year. S. C. 3. Salk. 9. R. acc. Skinn. 353. Holt 326. Salk. 280. Burr. 1278.

upon

upon the ſtatute of frauds, 29 *Car.* 2. *c.* 3. *ſ.* 4. *Skinn.* 353. *Holt*, 326 where the agreement was, that *A.* in conſideration of 5*l.* paid by *B.* ſhould pay to *B.* 20*l.* upon his day of marriage, and the promiſe was not in writing; and it was held by the judges at *Serjeants-inn* to be out of the intent of the ſtatute, and good, becauſe it might have been performed within the year. *Holt*, chief juſtice, granted, that the caſe of the marriage was ſo adjudged; and he ſaid, that if the marriage had taken effect within the year, they all agreed that no writing was neceſſary; but in the caſe before them the marriage did not happen within the year, but nine years after the promiſe; and therefore he was of opinion that it ought to have been in writing, becauſe the deſign of the ſtatute was, not to truſt to the memory of witneſſes for a longer time than one year; but the majority of the judges were of opinion that it was not within the intent of the ſtatute of frauds, and therefore he returned the *poſtea* accordingly, the cauſe being tried before himſelf. But to the caſe in queſtion, he was of opinion, that if the requeſt had been before the firſt of *May*, and the contract performed, it had been good; but if no requeſt was made before the firſt of *May*, the contract being performable afterwards, was within the intent of the act. And in fact no requeſt appeared to have been made before the firſt of *May*. And therefore judgment was for the defendant, who had pleaded the act of parliament.

SMITH v. WESTALL.

Morris *verſ* Gelder, &c.

S. C. Carth. 437.

REplevin. The defendant avows for rent arrear, and ſo many hens, for quit-rent. Verdict for the avowant for the rent, and damages for the hens. And now it was moved in arreſt, that it appeared upon their own avowry, that they had avowed for more hens than were due, and for this reaſon the avowry was ill. And Mr. *Hall* moved for the avowants, that releaſing the damages for the hens, they might have liberty to enter judgment for the rent and coſts. And he cited the caſe of *Buis v. Newton*, *Trin.* 28. *Car.* 2. *rot.* 728. *B. R.* Ejectment for a foreſt and other lands; upon not guilty pleaded, verdict for the plaintiff for the whole; and becauſe an ejectment did not lie *de foreſta*, the plaintiff releaſed, and entered judgment for the reſt, and his coſts. But on the other ſide, *Cro. El.* 186. *pl.* 8. was cited as in point. But, *abſente Holt* chief juſtice, the court gave leave to the avowant to enter his judgment as he deſired, *niſi*, &c. Mr. *Jacob*.

If a man avows for more than upon the face of the avowry is due, and obtains a verdict thereon, he may enter a remittitur for the exceſs, and take judgment for the reſidue and coſts, vide poſt. 815. Str. 1110. 1171. Blackſt. 1300. Com. Damages. E. 8. Ed. 1780. vol. 2. p. 626.

Brewſter *verſ.* Kitchin.

S. C. Salk. 198. Comb. 424. 466. 12 Mod. 166. Holt, 175. 669. with the arguments of counſel. 5 Mod. 360.

IN a feigned action upon the caſe, upon a wager whether it was lawful for the defendant to deduct 4*s.* in the

A covenant to pay a rent-charge without

d lucing for any taxes, ſhall extend to all taxes of a ſimilar nature, and for like purpoſes with are before impoſed, though not then ſubſiſting. S. C. Carth. 438. R. acc. Dougl. 602. D. Vaux 11 Mod. 340. Notwithſtanding a formal difference between ſuch taxes.

To other taxes not. S. C. Carth. 438.

A covenant to pay a rent charge does not bind an aſſignee of the eſtate of the covenantor.

Brewster v. Kitchin.

pound out of a certain rent-charge granted to the plaintiff's anceſtor out of certain lands in *Bucks*, of which the defendant was *terre tenant*, which tax of 4*s.* in the pound was granted to the king and queen in 4 & 5 *Will.* & *Mar.* by act of parliament; the defendant affirmed that it was lawful for him to deduct, and the plaintiff affirmed that it was not. Upon which iſſue being joined, a ſpecial verdict was found, that *Robert Langford* being ſeiſed in fee of the manor of *Ballmore* in *Bucks*, by indenture dated 26*th November* 1649, for and in conſideration of 800*l.* paid to the ſaid *Robert Langford* by *Ellen Brewſter*, granted to her a rent-charge out of the ſame manor to her and her heirs, and in the deed there was a covenant to make farther aſſurance; and this *memorandum* was indorſed upon the deed, *viz.* It is the true intent and meaning of theſe preſents, that the within named *Ellen Brewſter* and her heirs ſhall be paid the ſaid rent-charge without deduction of any taxes for the ſaid rent, &c. Afterwards *Robert Langford*, in purſuance of the covenant in the firſt deed, confirms the rent to *Ellen Brewſter* and her heirs, payable at two feaſts, with a *nomine poenae*, and covenants that he was ſeiſed of a good eſtate in fee in the lands charged, &c. free of all incumbrances (except ſome leaſes there ſpecified upon full rent reſerved, &c.) and that the rent ſhould be paid at the ſaid two feaſts, free of all taxes; and this was by deed bearing date 8 *July* 1652, *et ſi*, &c. After ſeveral arguments at the bar by Mr. *Northey* and Mr. Serjeant *Wright* for the plaintiff, and by Mr. *Cowper* and Sir *Bartholomew Shower* for the defendant, *Holt* chief juſtice pronounced the opinion of the court. And (by him) the queſtion is upon this ſpecial verdict, whether the covenant indorſed upon the deed of 26 *November* 1649, or the covenant in the deed of 8 *July* 1652, be ſufficient to bind the grantor and his heirs to pay the rent free of all taxes, hereafter to be charged upon it by act of parliament? And all the judges were of opinion, that this covenant binds the grantor and his heirs to pay the rent, free of the 4*s.* in the pound tax. And *Holt* chief juſtice ſaid, that it has been an old queſtion, whether ſuch a covenant ſhould extend to taxes to be impoſed by act of parliament? And if the covenant be underſtood in the largeſt extent of it, and as in a general caſe, he was of opinion that it would not; but as the circumſtances of this caſe are, he was of opinion that it would, for theſe reaſons. 1. When taxes are generally mentioned, they muſt be underſtood parliamentary taxes, if the ſubject matter will ſuffer it, *Brook quinzime* 9. There are other impoſitions which are called taxes, as rates for the poor, by 43 *Eliz. c.* 2. 5 *Co.* 66. *b. Jeffery's* caſe; and aſſeſſments by commiſſioners of ſewers, 23 *H.* 8. *c.* 5. and generally any thing that affects any part of the goods of a man, or the rents of his lands, by taking them away, as it is explained by my lord *Coke* upon the ſtatute *de tallagio non concedendo.* 2 *Inſt.* 532.

Taxes, what. Salk. 615. 5 Mod. 369. 372. 12 Mod. 167. Vide Salk. 24. 12 Mod. 54. Holt 549.

Another

Another reaſon that influences this caſe, is the time when this rent was granted, *viz.* 1649, at which time taxes of this nature had obtained in the kingdom; for the manner of taking by monthly aſſeſſments began ſince the civil wars; for in 1642 men were taxed by monthly aſſeſſments, and there was the ſame clauſe in thoſe acts for the tenant to deduct as in theſe of this time. But if the covenant had been made in 1640, it had not extended to theſe taxes, becauſe then this ſort of taxes was not known in the kingdom, and therefore a man cannot be ſuppoſed to comprehend them in a covenant, without the ſpirit of prophecy; but this way being introduced, it is natural to ſuppoſe that the party made proviſion againſt them by this covenant. BARWICK v. KITCHIN.

The old methods of taxing were,

1. By tenths and fifteens.
2. By ſubſidies, ſpecially ſo called.
3. By aſſeſſments and royal aids, which are different names for the ſame thing.
4. And at laſt by a pound rate.

The different kinds of taxes. Salk. 615. 12 Mod. 167. Vide 1 Bl. Com. 309.

Tenths and fifteens were the moſt ancient, as appears in *Spelm. gloſſar. quindecima.* 4 *Inſt.* 34. 2 *Inſt.* 76, 77. They were anciently taxed upon the head of every one. And afterwards in 8 *Edw.* 3. this was altered, and valuations were made upon all the cities, towns, and boroughs in *England*; and this valuation was returned into the exchequer; and that was made the certain rule for the taking of every town, *&c.* ſo that when a tax was granted, they might compute by the roll in the exchequer to what ſum it would amount. When the towns were taxed by parliament, they among themſelves taxed all the occupiers in the town (who were taxed as they held at rack-rent) according to the value of the land which they had within the towns, for raiſing the tax upon ſuch town. 11 *Hen.* 4. 35. *b. Brook quinzime.* 9. And this was the general uſage, though it was not univerſal. Now this preſent covenant could not have affected that ſort of taxes; for the rent was not taxed, but the land only as part of the town, to complete the value of the town, and the *terre tenant*, as he who was in poſſeſſion, to pay the tax. Tenths and fifteens, how taxed.

Afterwards ſubſidies were introduced, the firſt mention of which is 32 *H.* 8. *c.* 50. which were taxes impoſed upon the perſon for his land and goods according to the beſt value; which being paid by the perſon where he lived, could not affect this covenant, for the grantee ought to pay for the rent where he lived, and ſo there could be no deduction for the tenant. And this ſort of taxes continued until 17 *Car* 1. and an endeavour was made to introduce them again in 15 *Car.* 2. but they were found to be leſs beneficial to the king than the aſſeſſments uſed in the civil wars. But in thoſe aſſeſſments there was always this clauſe about deductions. So that this deed being made in 1649, the Subſidies.

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the intent appears to have been to make provision for ever after against deduction to be made by the tenant. These assessments were frequent before the making of this deed. There was one in *February* 1642, another *February* 1644, and two others in 1649. and one which was in force at the time of the making of this deed, another 1653, another 1656. And it is no objection to say that these assessments were not created by lawful authority; for they had the reputation of legality, and the people submitted themselves to them, which might be sufficient reason to induce the grantee to secure himself against them.

Taxes can only be imposed by statute. S. P. 12 Mod. 168. Vide 1 Bl. Com. 140. 169. 11 Mod. 239.

2 Though taxes cannot be granted but by act of parliament, and though they have no formal existence until they are granted, yet they have a virtual existence before, and are known in law: for it is well known, that the constant revenues of the crown are not sufficient to supply all the extraordinary exigencies and emergencies of the crown without these aids, to grant which is part of the constitution of the government; and therefore it was natural to suppose that such a thing might happen, and to provide against it. For taxes upon necessary occasions are (*a*) due to the crown *ex merito et debito*; and though they cannot be levied in any other manner than as the parliament appoints, as appears by 1 *Ed.* 3. *st.* 2. *c.* 6. yet supplies are due to the king. 19 *Hen.* 6. 68. 38 *Hen.* 6. 10. 21 *Edw.* 4. 45. where it is held, that a grant by the king to *J. S.* to be discharged of taxes, to be imposed at any time after by parliament, is good. For unless taxes had *had* a virtual existence in the constitution of the government, the king's grant could have nothing upon which it might operate, and would have been void; but the contrary is adjudged, that the grant was good; and the reason is given in *Dyer* 52. *a. pl.* 2. because the king hath an inheritance in taxes and subsidies to be afterwards granted.

(*a*) D. acc. 11 Mod. 239.

A grant by the crown to be discharged from future taxes, is good. S. P. Comb. 466. 12 Mod. 168. The crown has an inheritance in taxes to be afterwards granted.

All covenants which import to be co-extensive with the estate granted, run with the estate.

3. This covenant extends to all future acts, for it is, that *Ellen* and her heirs should be free, which is in fee; and her assigns of the rent might take advantage of it; for as the estate was in fee, so the covenant is co-extensive with the estate, and is in fee also. And therefore it is as strong, as if it had been to be free from all taxes to be imposed by any act whatsoever.

If a tenant covenants to pay a rent without deducting taxes, a statute authorizing tenants to deduct will not repeal the covenant. S. P. 12 Mod. 169. Semb. acc. 11 Mod. 240.

A doubt has been conceived, that the clause in these new acts, for the tenant to deduct, &c. would have destroyed such a covenant as this, if it had not been provided by the acts, and this clause should not extend to make void any covenants or agreements between landlord and tenant; but he was of opinion, that such provision was not absolutely necessary, 1. Because these taxes lately assessed are subject matter for the covenant, and therefore, though the act allows the tenant to make a deduction, that could never be a

repeal

repeal of the covenant, becauſe it is the thing upon which the covenant is grounded, and againſt which it provides. 2. This proviſion for the tenant to deduct is for his advantage, which he might well waive by covenant, ſince he might well foreſee it by the uſage of the times; and a man may as well waive the benefit of a future law, as of a law already made. 3. The tenant might well pay his rent without deduction, and not violate the law. For the difference, where an act of parliament will amount to a repeal of a covenant, and where not, is this; where a man covenants not to do a thing which was lawful for him to do, and an act of parliament comes after and compels him to do it; there the act repeals the covenant; and *vice verſa*. But where a man covenants not to do a thing, which was unlawful at the time of the covenant, and afterwards an act makes it lawful, the act does not repeal the covenant. So here, ſince the act does not compel the tenant to deduct, the act leaves the covenant in full force. 4. This clauſe was only inſerted to expedite the payment to the crown; and where an act of parliament is made for a particular purpoſe, it will not extend to collateral qualities. 8 *Co.* 138. *a. Barrington's* caſe, 19 *H.* 6. 62. a ſtrong caſe, where a grant to be free from a future tax was allowed by all the judges. And in the ſeveral acts for ſubſidies in 37 *H.* 8. *c.* 25. and 1 *Ed.* 6. *c.* 12. ſuch grants are mentioned, and ſaved to the grantees for the future. This covenant was diſpenſed with by the 22 *Car.* 2. in which there was a clauſe for deduction notwithſtanding any covenant, *&c.* but there are no ſuch words in the act which concerns this caſe.

The benefit of a future law may be waived. S. P. Comb. 467.

A ſtatute making unlawful an act which before was otherwiſe, repeals a covenant to do that act. S. P. Salk. 198. Comb. 467. 12 Mod. 169. R. acc. Dyer 26. b. pl. 172. But a covenant not to do an unlawful act, is not repealed by a ſtatute making the act lawful. S. P. 198. Comb. 467. 12 Mod 169. R. acc. Dyer 48. b. pl. 5. 6.

A clauſe in a ſtatute made for a particular purpoſe ſhall not enure to any other. S. P. 12 Mod. 170.

Objection. General words ſhall not extend to any thing provided to be done by a ſubſequent act of parliament. 2 *Co.* 47. *a.* The caſe of the archbiſhop of *Canterbury*.

Anſwer. That the ground of *Coke* is not univerſal; and the reaſon of the caſe there was, becauſe thoſe monaſteries that come by 1 *Ed.* 6. *c.* 14. were veſted in poſſeſſion by the act of *Ed.* 6. excluſive of any other act; and therefore it is in that reſpect a repeal of 31 *H.* 8. *c.* 13. though it might have been well enough done within the general words [of means], and that is the reaſon of the caſe aforeſaid, as is ſaid in the caſe of *Whitton v. Weſton*, *W. Jon.* 185. and if theſe words [ſhall be by the authority of this preſent parliament veſted, *&c.*] had been omitted, thoſe lands would have been exempt from payment of tithes by 31 *H.* 8.

General words may in ſome caſes extend to things provided for by ſubſequent ſtatutes. S. P. 12 Mod. 170.

Objection. It is a tax by the pound-rate, and not by way of aſſeſſment; and therefore it is a new tax, and could not be provided againſt.

BREWSTER v. KITCHIN.

Anſwer. It is the ſame ſort of tax; though it is not a monthly aſſeſſment; and differs not in ſubſtance, but in form. The ſame things are taxed; there is the ſame clauſe of deduction; and the tax is for the ſame purpoſe, for the king's ſupply. If it had been for rebuilding *Paul*'s church, then it had been out of this covenant; but ſince it is as it is, he was of opinion, that the covenant extended to theſe taxes, and the grantor and his heirs ought to pay the rent without deduction.

But he then made another queſtion, which was not obſerved at the bar, nor by any of the other judges, viz. whether the *terre tenant* is liable to an action upon this covenant; and he was of opinion, that he was not. For (by him) if tenant in fee grants a rent-charge out of lands, and covenants to pay it without deduction, for himſelf and his heirs, you may maintain covenant againſt the grantor and his heirs, but not againſt the aſſignee; for it is a mere perſonal covenant, and cannot run with the land. Warranty, which is a real covenant, will never bind the land of the warrantor, until judgment had in *warrantia chartæ*; much leſs will this perſonal covenant bind the land. And for a caſe in point, he cited *Hardr.* 87. *pl.* 5. *Coke* and the earl of *Arundel*. In replevin, if the defendant had avowed for arrears of this rent, and the plaintiff had pleaded in bar, *riens arrere*; the avowant could not have replied this covenant againſt the *terre tenant*; but if the avowry had been upon the grantor, or his heirs, the avowant might have replied this covenant againſt them, to avoid circuity of action. Therefore, ſince it does not appear that the defendant is bound by this covenant (for *non conſtat* whether he is *terre tenant* or not, or what he is) for this reaſon he was of opinion, that judgment ought to be given for the defendant. But the other three judges ſeemed to be in a ſurpriſe, and not in truth to comprehend this objection, and therefore they perſiſted in their former opinion, talking of agreements, intent of the party, binding of the land, and I know not what They gave judgment for the plaintiff, againſt the opinion of *Holt* chief juſtice, for the reaſon aforeſaid.

Warranty binds not the land of the warrantor, until after a judgment in a warrantia chartæ. S. P. Salk. 198. 12 Mod. 171.

Rex

Rex *verſ.* Sanchee.

S. C. 12 Mod. 165. Holt, 657.

SANCHEE and others, quakers, were cited into the eccleſiaſtical court, to anſwer there upon their ſolemn affirmation, *&c.* concerning tithes withheld by them from the parſon of the pariſh; and for not anſwering the commiſſary, according to the ſtatute of 27 *H.* 8. *c.* 20. certifies their contumacy to two juſtices of peace, by whoſe warrant they were ſeized, and committed to priſon; and being brought by *habeas corpus* into the king's bench, Mr. *Robert Eyre* moved, that they might be diſcharged. Becauſe the new act concerning the affirmation of quakers 7 *&* 8 *W.* 3. *c.* 34. *ſ.* 4. gives the parſon a remedy to recover ſuch tithes by diſtreſs by virtue of a warrant of a juſtice of peace, then where a ſtatute gives remedy, the juriſdiction of the ſpiritual court is taken away, unleſs it be ſaved by the ſame ſtatute, 5 *Co.* 73. *b. W. Jones* 320. And he cited ſeveral ſtatutes, where the juriſdiction of the ſpiritual court was ſaved, as 23 *El. c.* 1. 1 *El. c.* 2. In the ſame manner in the ſtatute againſt uſury, 13 *El. c.* 8. 3 *Inſt.* 152. 2 *Inſt.* 657. And from thence he inferred, that it was the opinion of thoſe parliaments, that the ſpiritual juriſdiction would have been taken away by theſe acts, if it had not been ſaved by them. But *per curiam* this laſt act ſeems to be only an accumulative remedy, and not to repeal the act of *H.* 8. And in many caſes the common law and eccleſiaſtical courts have concurrent juriſdiction; as if a penſion be payable out of a parſonage by preſcription, the remedy for this is either in (*a*) the ſpiritual court, or annuity lies (*b*) for it at common law; though *Coke* ſays the contrary in his ſecond Inſtitute in his comment upon the ſtatute *de circumſpecte agatis*, 13 *Ed.* 1. *ſt.* 4. *c.* 1. 2 *Inſt.* 491 But where the nature of the offence is altered by a ſtatute, and a new penalty inflicted; then after the party has been tried at common law and condemned, the eccleſiaſtical court ſhall not proceed againſt him. As if a man be convict at common law for having two wives, or hath been adjudged the reputed father of a baſtard ſon, *&c.* But then *Northey* took exception to the return, becauſe it is ſaid, that *Sanchee, &c.* were impriſoned for contempt in a ſuit for detention of tithes or other eccleſiaſtical duties; and it ought to appear, for which the ſuit was, ſpecially. For though the ſtatute that gives this remedy is in general words, yet in the return the cauſe of impriſonment ought to be certainly expreſſed, to the end that it may appear to the court, that it was an eccleſiaſtical duty, for which they are impriſoned. And of this opinion was the whole court, and therefore the quakers were diſcharged out of cuſtody.

A ſtatute ſimply giving remedy at common law for a thing before recoverable in the ſpiritual court only, does not take away the juriſdiction of the ſpiritual court. A ſtatute altering the nature of the offence and inflicting a new penalty does.

A commitment under 27 H. 8. c. 20. for a contempt in a ſuit in the ſpiritual court of eccleſiaſtical dues, muſt ſpecify the kind of dues for which the party was ſued.

(*a*) R. acc. 1 Vent. 3. 265. 1 Mod. 218. D. acc. 1 Vent. 120. vide Cro. Eliz. 675.

(*b*) Acc. 1 Mod. 218. 1 Vent. 120. Cro. Eliz. 675.

Petray *verſ.* Sir Auſtin Palgrave.

After judgment on a bond a defendant cannot ſuggeſt a neglect to ſpecify it according to the capitation act. Vide poſt. 1055. 1243.

SIR *Auſtin Palgrave* recovered judgment in debt *in C. B.* againſt *Petray* upon a bond; upon which *Petray* brought error. And now Sir *William Williams* moved, that the plaintiff in error might have liberty to ſuggeſt, that the bond was not ſpecified according to the capitation act. But per *Holt* chief juſtice, he ſhould have pleaded it in the common pleas before judgment, but now after error brought he comes too late; and therefore the motion was denied.

Burgeſs *verſ.* Periam.

The memorandum of a bill cannot be amended after a plea in abatement reſpondeas ouſter and demurrer. Sed. vide poſt. 683. 1 Wilſ. 78. Str. 583. 1 Term. Rep. 116.

THE plaintiff brought a ſpecial action for not delivering bank bills upon the firſt of *May* in purſuance of an agreement; but the *memorandum* was general of *Eaſter* term laſt paſt, which referred to the firſt day of the term; and ſo the action appeared to be brought before the cauſe of action accrued. Wherefore Mr. *Northey* moved for leave to amend the *memorandum*, and make it, *die Mercurii proxime poſt menſem paſcha* (which was after the cauſe of action accrued) upon affidavit, that all the proceſs iſſued after the firſt day of *May*. And this motion was made after the defendant had pleaded in abatement, and a *reſpondeas ouſter* awarded upon it, and demurrer by the defendant for this cauſe. But the motion was denied by the court, becauſe it comes too late, though all was in paper.

Miller *verſ.* Trets.

Mich. 9 Will. 3. Exchequer Chamber.

A verdict muſt comprehend the whole iſſue. R. acc. Str. 1089. 3 Lev. 55. Cro. Eliz. 133. D. acc. Gilb. C. L. 3 Ed. 156. vide Com. Plead. S. 19. 2d. Ed. vol. 5, p. 161. If it does not, a judgment entered thereon will be erroneous.

INFORMATION was exhibited againſt the defendant by the plaintiff in the court of exchequer, for ſelling lace and ſilks, *&c.* Upon iſſue joined the jury finding the defendant guilty as to the ſelling the lace, *&c.* but ſay nothing as to the ſilks. And judgment in the exchequer for the informer. And upon error brought this omiſſion of the jury in the verdict was aſſigned for error. Upon which a motion was made in the exchequer for leave to amend; but denied, becauſe it was not amendable. And therefore the judgment was reverſed here.

R. acc. Str. 1089. 3 Lev. 55. Cro. El. 133. D. acc. Gilb. C. B. 3d Ed. 156. q. v. and the court cannot amend it.

Hilary

Hilary Term

9 Will. 3. C. B. 1697.

Sir George Treby *Chief Juſtice.*

Sir Edward Nevill
Sir John Powell
Sir John Blencoe
} *Juſtices.*

Ayres *verſ.* Falkland.

S. C. Salk. 231.

EJECTMENT. Upon a ſpecial verdict the caſe was thus. *A.* poſſeſſed of a term for ninety-nine years deviſed it to *B.* for life, and after to ſix others ſucceſſively for their lives, if the ſaid term ſhould ſo long continue. All the ſeven perſons being dead, and the term continuing, the queſtion was, whether the reſidue ſhould go to the executors of the teſtator, or to the executors of the laſt deviſee. It was objected, that as there cannot be a remainder of a term; for the ſame reaſon there cannot be any reverſion left in the firſt teſtator, but that the entire term was in the laſt deviſee, and conſequently would deſcend to his executors.

A term for years may be deviſed to ſeveral ſucceſſively for their reſpective lives. R. acc. 1 Sid. 450. 1 Brownl. 41. acc. Fearne, 3d Ed. 304. In ſuch caſe the reverſion expectant upon thoſe eſtates will belong to the perſonal repreſentative of the deviſor. S. C. cit. Fearne, 3d. Ed. 375. D. acc. 1 Sid. 37. Semb. Semb. cont. 2 Sid. 135. 151. vide Hetl. 163. Litt. 348. 1 Roll. Abr. 611. 8 Vin. 92. pl. 1. Fearne. 3d Ed. 342, 343, 344, 345. acc. 1 Sid. 451.

Sed tota curia contra. For *per Treby* chief juſtice and *Powell* juſtice, theſe executory deviſes depart from the rules of the common law, and are allowed in compaſſion to families, for whom proviſion is now generally made by terms and leaſes; therefore one muſt not have too great retroſpect, to ſearch for rules and conſtructions in ſuch caſes. At the beginning the deviſes were oppoſed; for when *A.* poſſeſſed of a term for years deviſed the term to *B.* for life, remainder to *C.* the remainder to *C.* was held void, becauſe the term was intire, and compriſed the whole intereſt, as much

AYRES v. FALKLAND.

much as if he had deviſed a fee; and ſo the term being intirely in the firſt deviſee, nothing was left to remain to the ſecond; beſides that a term for years was looked upon as a leſs intereſt than an eſtate for life. Afterwards to ſurmount this difficulty, this expedient was found out in *Matthew Manning*'s caſe, that there ſhould be a tranſpoſition, and that the latter deviſe ſhould be conſtrued to paſs firſt; for doubtleſs a man might deviſe a term to *A.* after the death of *B.* and upon ſuch a limitation the deviſor is not excluded from the diſpoſition of the mean intereſt, which he has not diſpoſed of, for the interval of the life of *B.* And therefore if a term for years be deviſed to *A.* for life, remainder to *B.* by conſtruing this a deviſe to *B.* after the death of *A.* and that *A.* ſhould have it in the mean while, it was allowed good. But if *A.* deviſes a term for years to *B.* in tail, remainder over, this remainder is limited to commence upon a poſſibility too remote, and therefore the law will not wait for it. The ſame law if *A.* deviſes a term to *B.* and if he dies without iſſue, remainder to *C*, this remainder is alſo too remote. But when the limitation is to *A.* for life, remainder to *B. A.* in probability may die before the term determined. And therefore all the remainders in the preſent caſe at bar were held good. But foraſmuch as the firſt, and afterwards every one of the ſeven deviſees in their reſpective turns had the intire term, during the life of the firſt deviſee, the whole term was in him, and the ſecond had but a poſſibility, *et ſic de ceteris*. For as there might be a poſſibility of reverter at common law, ſo in theſe caſes there is a poſſibility of remainder. Then as a poſſibility of remainder may be limited over in theſe caſes; ſo it may be reſerved; and if it be not diſpoſed, it ſhall be left in the deviſor; for that which a man has in him, and does not diſpoſe from him, remains ſtill in him. Beſides, that a man may have a poſſibility of reverter, where he cannot limit a remainder; as if *A.* gives lands to *B.* and his heirs during the time that ſuch an oak ſhall grow, he hath a poſſibility of reverter, though no remainder can be limited. From whence it follows, that the reſidue of the term in this caſe after the death of all the ſeven deviſees muſt revert to the teſtator and his executors. And judgment was accordingly for the defendant, *&c.*

After the limitation of perſonality to one and the heirs of his body, a limitation over is too remote. R. acc. 1 Sid. 37, 2 Bro. Ch. Caſ. 33. acc. 3 Roll. Abr. 611. 8 Vin. 92. pl. 1. D. acc. 1 Sid. 451. vide Fearne, 3d Ed. 342. ſed vide Salk. 225. pl. 3, 3 P. Wms. 258. 1 Term Rep. 596. The limitation of an executory deviſe after failure of iſſue indefinitely, is too remote. R. acc. 1 Sid. 451. 1. Bro. Ch. Caſ. 187. acc. Fearn. 3d Edit. 322. Sed vide Dougl. 470. 3 Bro. Ch. Caſ. 171, 172. 188, 189, 190. 3 Term Rep. 597. A poſſibility of reverter may exist, where a remainder cannot be limited.

Bates *verſ* Bates. *Dower.*

S. C. Salk. 254. more at large Lutw. 729.

Pleadings and Special Verdict, 719. poſt. vol. 3. 192.

Of an eſtate of which her huſband was ſeiſed for life, with remainder after a term for years to him in tail, a woman ſhall be endowed. vide Ann 13. 2 Bl. Com. 131.

DOWER. The tenant pleads, that the huſband *ne unques juit ſeiſie que dower*. Upon which iſſue being joined, the jury find, that *Ralph Bates*, huſband of the demandant, was ſeiſed of the lands now demanded for life, remainder to *A.* and *B.* truſtees for ninety-nine years, remainder

mainder to the heirs of the body of *Ralph Bates*, &c. *et ſi*, &c. And it was argued for the demandant, that the huſband died ſeiſed of an eſtate tail executed; for the intervening eſtate being for years, ought not to be regarded. That the feoffment of the huſband would have diſcontinued the intail, which proves that he was ſeiſed of it. See 2 *Bulſtr.* 29, 30. *Cro. Car.* 233, 234. 1 *Roll. Abr.* 632. 8 *Vin.* 516. *B. pl.* 2. and that his warranty would have been lineal to a ſon, which proves that the ſon is in by deſcent. *E. contra* it was argued for the tenant, that dower was allowed by the law for the ſupport of the wife and her children; and therefore where by ſuch allowance the wife and her children cannot be ſupported, no dower can be allowed, for *lex non facit inutilia*. Then dower in theſe caſes, where the *meſne* term might be for a thouſand years, would be ſo remote, that it would be of no avail to the wife. And as to the objection, that the heir was in by deſcent; it was anſwered, that that ſignifies nothing, becauſe if the intervening eſtate had been for life, the heir had been in by deſcent, and yet in ſuch caſe without doubt the wife is not dowable. This caſe was thrice argued at bar, and at the firſt argument the court doubted, becauſe the eſtate tail is ſo disjoined by the intervening leaſe, and though it be veſted, it is not executed; and perhaps (they ſaid) the feoffment of the huſband would not have diſcontinued the intail. At the ſecond argument *Treby* chief juſtice was of opinion for the demandant, becauſe at the inſtant of the death of the huſband there was but an eſtate for years in the truſtees, and the eſtate tail was in the huſband; and (by him) the inſtant ſhould be divided in favour of dower, as *Cro. Eliz.* 503. *Broughton v. Randall.* But upon the third argument judgment was given for the demandant upon this reaſon, becauſe the huſband had a freehold and inheritance in him, and the intervening eſtate, being only for years, ought not to be regarded. For at common law ſuch a term was a precarious thing, the freeholder might have deſtroyed it at his pleaſure by a feigned recovery. A deſcent, which tolls an entry, does not diſturb a term; and if tenant for life commits waſte, ſuch an intervening term will not obſtruct the action of waſte, as an intervening eſtate of freehold would do. And therefore all the court was of opinion, that ſuch intervening term would not hinder dower, as it would have done if it had been an eſtate for life, according to the opinion of *Perkins* 336. the only authority in the books for that reſolution. Judgment was given for the demandant.

An intervening eſtate for years between that of the tenant in poſſeſſion and that of him who is entitled to the next eſtate of inheritance, will not prevent the latter from maintaining an action of waſte. D. acc. Co. Litt. 54. a. 2 Inſt. 301. An intervening eſtate of freehold will. D. acc. Co. Litt 54. a. 2 Inſt. 301.

Eaſter

Eaſter Term

10 Will. 3. B. R. 1697.

Sir John Holt *Chief Juſtice.*

Sir Thomas Rokeby
Sir John Turton
Sir Samuel Eyre
} *Juſtices.*

Burr *v.* Atwood, *and* Drue *v.* Atwood.

S. C. Litt. Ent. 225. 290. Carth. 447.

Bail cannot bring error upon the judgment againſt the principal. S. C. 5 Mod. 397. R. acc. Cro. Car. 300. 481. A writ of error may be quaſhed as to part. Vide Cro. Car. 481.

ATWOOD obtained judgment in an action againſt *J. S.* in which *Burr* was bail; and afterwards he obtained judgment in *ſcire facias* againſt *Burr*; upon which *Burr* brought a writ of error; *tam in redditione judicii quam in adjudicatione executionis*; which was ill, becauſe the bail cannot maintain error upon the principal judgment. Upon which Mr. *Carthew* moved, that the writ of error ſhould be quaſhed as to the principal judgment, and ſtand good as to the judgment upon the *ſcire facias*. And he cited a caſe adjudged in this court, *Paſch.* 5 *Will. & Mar.* between *Brook* and Sir *William Ellis*, where Sir *William Ellis* obtained judgment in debt againſt *Brook* and *J. S.* two executors of *J. N.* and upon a *ſcire fieri* inquiry awarded, and *devaſtavit* returned againſt *Brook*, judgment was given againſt *Brook* upon the *devaſtavit*; upon which *Brook* ſued a writ of error without his co-executor *J. S.* to reverſe the principal judgment in the action of debt, and to reverſe the judgment of the *devaſtavit* againſt himſelf; and becauſe he alone without *J. S.* could not ſue error upon the principal judgment, the writ of error was quaſhed as to that, and ſtood good as to the judgment in the *ſcire facias* upon the *devaſtavit* againſt himſelf; which caſe *Holt* chief juſtice remembered well. And therefore in the principal caſe the writ of error was quaſhed as to the principal judgment, and was retained for the reſidue.

On a judgment againſt ſeveral perſons one alone cannot bring a writ of error. R. acc. Ann. 135. 1 Wilſ. 88. 2 T. R. 737. ante 71. and ſee the caſes there cited and Com. Plead. 3 B. 9. 2d. Ed. vol. 3. p. 191.

Acourt *v.* Swift.

Paſch. 5 Will. & Mar.

UPON error brought in like manner by the bail upon a judgment *in B. R.* in *Ireland* held ill. But the court refuſed to quaſh it, becauſe the tranſcript was not returned and filed. *Ex motione m'ri Northey.*

A writ of error cannot be quaſhed before the tranſcript is returned and filed.

Brasfield *v.* Lee.

IN treſpaſs, aſſault, battery, and falſe impriſonment, the plaintiff declares, that the defendant aſſaulted, beat, and impriſoned the plaintiff, the firſt of *October* 9 *W.* 3. and detained him in priſon for four months. Upon not guilty pleaded, verdict for the plaintiff and entire damages were given by the jury. And now Serjeant *Darnall* moved in arreſt of judgment, that the declaration was a declaration of *Michaelmas* term 9 *W.* 3. and therefore the damages being intire and given for the impriſonment of four months from the firſt of *October*, it appears that the damages were given for impriſonment after the action was commenced. And judgment was arreſted.

Damages cannot be given for an injury done after the commencement of the action. R. acc. 1. Vent. 103. 2 Saund. 169. poſt. 1382. ſed vide Hob. 284. Com. 231. Str. 1095. where intire damages are given and the court cannot give judgment for the whole, it will arreſt the judgment, vide poſt. 1382. Dougl. 696.

Doberteen *v.* Chancellor.

Saturday, May 21.

S. C. 5 Mod. 399. 12 Mod. 189. Carth. 447. cit. Imp. B. R. 3d edit. 243.

IN *aſſumpſit* the defendant pleads in abatement. And upon demurrer *reſpondes ouſter* was awarded. And then the defendant pleads the general iſſue. And the *niſi prius* roll was prepared, omitting the plea in abatement. And being brought to the aſſizes, verdict was given for the plaintiff. And now a motion was made to ſet aſide the trial, becauſe the plea in abatement was not entered in the *niſi prius* roll, and ſo the juſtices of aſſiſe had not proceeded upon the right record. And this being referred to the maſter to examine it, he made a report as aforeſaid. And the verdict was ſet aſide by all the judges upon examination of all the practiſers of the king's bench, and all the prothonotaries of the common pleas, what was the practice in ſuch caſe; who all certified, that the conſtant practice is to have the plea in abatement entered in the *niſi prius* roll *(a)*.

In a cauſe in which the defendant has pleaded in abatement, and the court has awarded a reſpondeat ouſter, the plea in abatement and reſpondeat ouſter muſt be entered on the niſi prius roll.

(a) According to 5 Mod. 399. and Carth. 447. the plea in abatement and reſpondeat ouſter was entered on the plea roll, and the court grounded their determination upon the variance between the rolls.

Canter

Canter *v.* Shepheard.

S. C. 12. Mod. 189. 5 Mod. 398. Salk. 507. Comb. 475.

If a man who goes to receive money in a shop is desired to take in part money which another is come to pay, and counts out any part of it, puts it into a bag, and lays it on the counter, this is so far an appropriation of the money put into the bag, that if it is stolen from the counter he must bear the loss.

IN trover and conversion for a goldsmith's note of 100*l.* upon the general issue pleaded, upon evidence at the trial, the case appeared to be thus. *Canter* had a note for 100*l.* of *Shepheard*, which *Canter* carried to *Shepheard*, and delivered it to him, to receive the 100*l.* At the same time Mr. *Dale* brought 80*l.* to *Shepheard*, to pay to him. *Shepheard* prayed *Canter* to count the 80*l.* and receive it as part of payment, while *Shepheard* counted 20*l.* out of another bag. *Canter* counted 50*l.* out of the 80*l.* and drew a bag out of his pocket, and put the 50*l.* into the bag, and laid the bag with the 50*l.* in it upon the counter by him, and proceeded to count the residue, during which *J. S.* took up the bag and ran away with it; upon which *Canter* supposing that this was not any payment to him, because the money was not carried out of the shop, and because it was liable to be counted again by *Shepheard*, refused to take the other 50*l.* and brought trover for the note of 100*l.* The matter appearing thus upon the evidence, it was reserved as a point by the lord chief justice *Holt*, before whom the cause was tried; and it was moved *in B. R.* and argued by counsel. After which all the judges were of opinion, that the plaintiff *Canter* ought to bear this loss of the 50*l.* because the putting the 50*l.* into his own bag was an appropriation of the money to himself; and the plaintiff might have brought detinue for the 50*l.* in the bag. And therefore the verdict was for the plaintiff for 50*l.* only, and judgment accordingly. Note, *per Holt*, chief justice, at the trial the opinion of the jury was against the defendant for the whole 100*l.* conceiving that this was no payment in the way of trade; and therefore they were ready to give a verdict for the plaintiff for the 100l. if the chief justice had not been dissatisfied with it.

Sir Richard Leving *v.* Lady Calverly.

S. C. Carth. 448.

An issue joined upon a fact locally confined to another county than that in which the venue is laid in the declaration, ought to be tried in the county to which the fact is so confined. S. C. 5 Mod. 405. But a trial in the county in which the venue is laid in the declaration cannot be objected to after verdict. R. acc. 1 Saund. 248. 1 Vent. 22. 3 Lev. 394. 12 Mod. 7. R. cont. 3 Keb. 654. 675. 691.

IN an action of covenant the plaintiff declares upon an indenture made in the county palatine of *Chester*, whereby houses in the city of *Chester* were demised to the defendant: and the breach assigned was, in not repairing the houses. The defendant pleads, that he repaired the houses in the city of *Chester*. And issue thereupon being joined, the record was sent by *mittimus* to the chief justice of *Chester*, and it was tried in the county at large. And after verdict for the plaintiff, it was moved by Sir *Bartholomew Shower*, that this was a mis-trial; and being in a wrong

county

county it was not aided by 16 & 17 *C.* 2. *c.* 8. *ſ.* 1. But the record ſhould have been ſent by *mittimus* to the chamberlain of *Cheſter*, and he ſhould have ſent it by *mittimus* to the mayor of *Cheſter*, and ſo the trial ſhould have been in the city. But Mr. *Cheſhyre e contra* argued, that this was aided by the 16 & 17 *C.* 2. *c.* 8. *ſ.* 1. And for authority he cited the caſe of *Craft v. Boyte*, 1 *Saund.* 246. 1 *Vent.* 22. and a caſe between *Jew and Briggs* adjudged ſince the revolution, *B. R. T.* 3 *W. & M. Rot.* 1763. 12 *Mod.* 7. *cit.* 3. *Lev.* 394. where an action was brought for an eſcape againſt the warden of the *Fleet* in *Middleſex*; the defendant pleaded a recaption of the priſoner by freſh purſuit in *Surrey*; and iſſue being joined upon this, it was tried by a jury of *Middleſex*; and verdict for the plaintiff; and it was adjudged by three judges againſt the opinion of *Holt* chief juſtice, that this was aided by the ſtatute; and afterwards error was brought upon this judgment in the exchequer chamber, and this miſ-trial aſſigned for error; and all the judges, except *Treby* chief juſtice of the common pleas, *Powell* and *Lechmere* were of opinion to affirm the judgment, and the judgment was affirmed; and afterwards *Treby* chief juſtice declared in the common pleas, that he would ſubmit to the opinion of his brothers; and therefore though this conſtruction was very difficult to be maintained, if it were *res integra*, yet ſince theſe authorities, and others which he cited, were ſo, he deſired that the plaintiff might have his judgment. And afterwards *Holt* chief juſtice ſaid, that he would conform to ſo many authorities, though he believed they could not be maintained by reaſon. For (by him) the intent of the ſtatute was according to the diſtinction in *Saunders* 246. But in reſpect to the multitude of caſes he complied. And judgment by the whole court was given for the plaintiff.

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Kent. v. Briggs, Hil. 3 Will. & Mar. Rot. 326.

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Intr. *Hill.* 9 *Will.* 3. B. R. Rot. 747.

S. C. Comb. 476. Carth. 444. Holt 610. 12 Mod. 190. Salk. 562.

REPLEVIN. The defendant made conuſance as bailiff to *John Treaceagle*, and ſaid, that the 31ſt *July*, 1645, *Joſeph Treaceagle*, grandfather to *John Treaceagle* aforeſaid was poſſeſſed of and in one meſſuage, *&c. pro quodam termino quingentorum annorum computandorum a triceſimo die Julii anno illo*; and that he being ſo poſſeſſed, the ſaid 31ſt day of *July* made a leaſe of the ſaid meſſuage for the term of 499 years, three quarters of a year, two months, and three weeks, to *John Carter* and *Richard Carter*, their executors and adminiſtrators, rendering rent; that *John Treaceagle* made his will, and *J. N.* his executor, and died; that *J. N.* made his will, and *John Treaceagle* (to whom the defendant is bailiff) executor; and for rent arrear the defendant avows the taking of the cattle, being upon the

Where it is neceſſary to ſhew a title, the commencement of all particular eſtates muſt be ſtated. R. acc. 3 Wilſ. 65. D. acc. Co. Litt. 303. b. Semb. acc. Cro. Car. 571. March 1. 6 Mod. 223. poſt 923. 12 Mod. 188. 3 Salk. 306.

In an avowry for rent it is neceſſary to ſhew a title, R. acc. Str. 796. 1 Barnard. B. R. 46. Semb. acc. 3 Salk. 306. 12 Mod. 188. 6 Mod. 222. q. v. 11 G. 2. c. 16. R. cont. 2 Show 484. Comb. 27. Semb. cont. 2 Vent. 281. Put now ſee ſ. 22.

premiſſes,

1 Ld Raym 213 · 26.

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premisses, as a distress, &c. The plaintiff demurs. And Mr. *Carthew* for the plaintiff argued, that the conusance is ill, because the commencement of this term is not shewn, *viz.* out of what estate it was derived; for when a particular estate is pleaded in a plea, avowry, or replication, the commencement of it ought to be shewn. 2 *Edw.* 4. 11. 9. and in a case between *Langford* and *Webber*, *intr. Hil.* 2. & 3 *Jac.* 2. *B. R. Rot.* 965. *Carth.* 9. 3. *Salk.* 356 *(a)*, in trespass for cattle taken, the defendant pleaded, that he was possessed of a close for a term of years, and took the cattle there damage feasant; the plaintiff demurred generally; and it was adjudged for him, because no issue could be taken upon the *possessionatus*; which is a case in point. So in a case between *Saunders* and *Hussey*, *intr. Trin.* 8 *Will.* 3. *C. B. Rot.* 466. *Lutw.* 1231. *Carth.* 9. Replevin; the defendant avowed, that he at the time of the taking of the cattle *seisitus fuit & adhuc seisitus existit* of the place where, &c. and that he took the cattle there damage feasant, &c. The plaintiff demurred specially, because it was not said, of what estate he was seised; and (by him) the opinion of the court was, that the avowry for this reason was ill; and therefore the avowant paid costs, and amended; he was counsel in the case.

In trespass, a defendant cannot justify distraining cattle for damage feasance without shewing a title. R. cont. 2 Mod. 70. D. cont. 2 Wilf. 261. and vide note *(a)* infra.

Note, I was present in court in the common pleas *Mich.* 8 *Will.* 3. 1699, when the case of *Saunders v. Hussey* was argued; and the case was thus: *Saunders* brought replevin for a taking of the plaintiff's cattle by the defendant in a place called *Eastfield in S.* The defendant avowed, that he at the time of the taking *seisitus fuit & adhuc seisitus existit de tribus acris terræ in Eastfield in quo* the taking is supposed to have been made, and that he took them there damage feasant. The plaintiff demurred specially, and shewed for cause, that the avowant had not shewn of what estate he was seised. And serjeant *Gould* for the plaintiff took exception to the avowry, that it did not answer the plaintiffs declaration; for the plaintiff declared of a taking in *Eastfield*, which extends to all the place called *Eastfield*, but the avowry was of a taking in three acres in *Eastfield*; so that the defendant (it may be) took the cattle in a part of *Eastfield* not parcel of the three acres, which the defendant could not justify. But the defendant should have said, that the *locus in quo*, &c. *continet tres acras*, and then have shewn his seisin of them, &c. and he cited a case between *Bradburne* and *Keneda*, *intr Mich.* 4 *Jac.* 2. *B. R. Rot.* 640. and adjudged *Hill* 2 *Will* & *Mar.* which was a case in point; and there the court held it well enough upon a general demurrer, but that upon a special demurrer it had been ill. *Sed non allocatur.* For *per curiam* perhaps the very spot of ground, where the taking was had no name, and therefore it was sufficient for the plaintiff to shew

In replevin, if the defendant avows the caption in parcel of the place mentioned in the declaration, without giving it a particular name or description, no objection can be taken to it unless upon a special demurrer.

(a) This case is also reported in 3 Mod. 132. where it is stated that the court gave judgment for the defendant, and according to the modern precedents, it is sufficient to shew a possession. Vide 3 Wilf. 21. Pl. Aff. 485. Morg. Prec. 638.

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the name of the whole, which in fact was a common field, which he could not diſtinguiſh in parts. Then when the defendant juſtifies, he juſtifies the taking in the very ſpot by the number of acres, and he could not juſtify it otherwiſe, and therefore *per curiam* the avowry was well enough. Then *Gould* king's ſerjeant took another exception to the avowry, that the avowant had ſaid that he was ſeiſed, but did not ſay of what eſtate. Upon which *Girdler* ſerjeant argued, that the avowry was well enough notwithſtanding that exception. Becauſe, 1. *Additio probat minoritatem*, and therefore that ſeiſin ſhould be intended of a fee. But, 2. If it ſhould not be intended a fee, yet it ſhould be intended a freehold, for of a leſs eſtate a man could not be ſaid to be ſeiſed. In *quare impedit* if a man declares, *quod ſeiſitus fuit de manerio*, to which the advowſon was appendant. it is good, 8 *Hen.* 5. 4. *b.* So in *quo warranto* the defendant ſays, *quod libertat. praedict. legitime habuit et graviſus fuit*, and good, 9 *Co.* 29. *a.* But admit that *ſeiſitus* ſignifies *poſſeſſionatus*; yet it would be good, becauſe the avowant has the prior poſſeſſion. And therefore it was adjudged, *Wright verſ. Hardcaſtle*, *B. R.* lately, where the plaintiff brought treſpaſs for taking his cattle, the defendant pleaded, that he was poſſeſſed of a market at *Leddenhall*, and ought to have toll, *&c.* and becauſe the plaintiff did not pay the toll, he diſtrained the cattle; and there exception was taken to the plea, that the defendant did not ſhew any title to the market; but becauſe there was no title in the plaintiff, and a poſſeſſion in the defendant; that was held good until a better title was ſhewn, and therefore the plaintiff there was barred of his action; but *per Powell* juſtice, the caſe of *Wright v. Hardcaſtle* could not be law, for the difference is of a declaration againſt a wrong doer, there *poſſeſſionatus* is well enough, but in a plea in bar the defendant ought to ſhew his title; ſo in replevin the avowant ought to make title, and cannot ſay *ſeiſitus fuit*, without ſhewing the eſtate, for it may be in fee, tail, or for life; but in replevin the avowant may ſay that he was ſeiſed *de libero tenemento*, though that is againſt the common rule of pleading, yet becauſe it is a form that has been conſtantly uſed, the courts allow it; but the courts will not admit this general way of pleading to be enlarged, and therefore (by him) this *ſeiſitus*, without more ſaying, would be ill upon a general demurrer. But *per Treby* chief juſtice this pleading *ſeiſitus* without more ſaying is but form, for no man can be ſeiſed of a leſs eſtate than of a freehold; and therefore for the ſame reaſon that *liberum tenementum* is good in avowry, for the ſame reaſon *ſeiſitus* is good.

In treſpaſs a defendant cannot juſtify diſtraining cattle for toll without ſhewing a right to the toll.

In a declaration againſt a wrong doer for an injury to the plaintiff's poſſeſſion, it is ſufficient for him to ſhew that he was poſſeſſed. Vide ante 266. and the caſes there cited, and Com. Pleader. C. 39. 2d Ed. vol. 5. p. 39.

In an avowry for damage feaſance, it is ſufficient for the avowant to ſtate that he was ſeiſed as of freehold. R. acc. Ow. 51. Vide Gilb. 191, 2 Wilſ. 269. Pl. Aſſ. 471. 475. Morg. Prec. 600. To ſtate generally that he was ſeiſed, not.

Nr *Northey* for the avowant argued, that the avowry was good, becauſe it is in nature of a declaration, and therefore

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In debt for rent the leſſor need ſhew no title. S. P. Comb. 467. R. acc. Str. 230, 231. D. acc. Yelv. 148. 2 Vent. 181.

it ſhall be admitted into the rules of declarations. In debt for rent the plaintiff may declare, *quod cum ille demiſit to J. S.* and the intereſt thereof came to the defendant, and it is good. Indeed if the plaintiff ſhews a title in the declaration, there it is reaſonable that the defendant make a better title, to anſwer that of the plaintiff: but here the plaintiff makes no title but to the goods, and therefore the title need not be preciſely ſhewn. And *W. Jon.* 453. gives the reaſon of the judgment in the caſe of *Scavage v. Hawkins*, becauſe the land was not in demand, which will be an authority here, for no title is made to the place where, &c. And he cited a caſe in point between *Paſhley* and *Seymour*, 2 *Jac.* 2. *B. R.* 2 *Show.* 484. *Comb.* 27. where in replevin the defendant avowed, that he was poſſeſſed of an inn called *The Bull and Mouth* for the term of 91 years, to commence in the year 1666, and that in the year 1683 he demiſed it to *Kingdom* rendering rent, and for rent arrear he avowed the taking of the plaintiff's goods being upon the premiſes, and judgment there was given for the avowant. But by the whole court in this caſe judgment was given for the plaintiff. For *per curiam* an avowry differs from a declaration; for in debt for rent, &c. one plea will anſwer the whole declaration, *viz. nil debet*, but in avowry no ſingle plea will go to the whole, for the avowry muſt be traverſed, but no traverſe can be taken to the poſſeſſion of the term. Beſides, that it is an eſtabliſhed rule, that the commencement of all particular eſtates ought to be ſhewn in pleas, avowries, &c. But where the action is brought upon privity of contract, there it is not material to ſhew the commencement. If a termor makes an under-leaſe rendering rent, and dies, the executor may bring an action, and ſay that the teſtator was poſſeſſed, &c. and well. So the caſe of *Cro. Car.* 571. *W. Jones* 453. *Scavage v. Hawkins* was well enough. But *per Holt* chief juſtice it is a queſtion, if the iſſue in the laſt caſe had brought an action againſt the aſſignee of the term, whether he ought not to have ſhewn the commencment of the eſtate tail. And *per Holt* chief juſtice the caſe in *Yelv.* 147. was a hard caſe, becauſe the plaintiff in his replication had confeſſed and avoided the defendant's plea. And all the court denied the caſe of *Paſhley v. Seymour*, 2 *Show.* 484. *Comb.* 27. to be law. And judgment was entered for the plaintiff (*a*). Note, *Carthew* ſaid, that *Wright* chief juſtice, *Holloway* and *Allibon* juſtices *in B. R.* declared, when they gave judgment in the caſe of *Paſhley v. Seymour*. 2 *Show.* 484. *Comb.* 27. that they did not underſtand pleading. And *Rokeby* juſtice made the ſame declaration in the reſolution of this caſe. Note, A like judgment was given this term between *Challoner v. Clayton*, 3 *Salk.* 306. 12 *Mod.* 188. *Intr. Hill.* 9 *Will.* 3. *B. R. Rot.* 408. See 10 *Hen.* 7, 8.

In debt for rent by the perſonal repreſentative of a termor, the plaintiff need not ſet forth the termor's title. S. P. Carth. 445.

But in debt for rent on a demiſe by tenant in tail at the ſuit of his iſſue againſt the aſſignee of the term. Q. Whether the plaintiff muſt not ſhew the commencement of the eſtate tail.

(*a*) This judgment was afterwards affirmed in parliament. Vide 1 Bro. Parl. Caſ. 74.

Cromwell

Cromwell *verſ.* Grumſden.

Pleadings. 5 Mod. 278.

The concluſion of a ſpecial verdict may be amended after argument without coſts.

THE plaintiff brought debt upon a bond againſt the defendant as executor to *Urlwin*, in which the plaintiff declared that *Urlin alias Urlwin* the defendant's teſtator bound himſelf to the plaintiff, in the ſum of 40*l.* by bond (which he produces in court) *cujus datus eſt* 1 *Julii anno domini* 1674, *&c.* The defendant pleads, *quod non eſt factum* of the teſtator. And iſſue being joined thereupon, the jury find a ſpecial verdict; they find the bond *in haec verba*, which was, *noverint univerſi per praeſentes nos* ——— *Urlin et* ——— his wife *teneri et firmiter obligari* to *Cromwell in prae Mid viginti in quadrans libris bonae et legalis monetae, &c. dat.* 1 *Julii anno regni Caroli ſecundi milleſimo ſexcenteſimo ſeptuageſimo quarto*; and the condition of this bond was for payment of 20*l.* and that it was ſigned and ſealed by the huſband and wife, and ſubſcribed by the name of *Urlwin*; *et ſi ſuper totam materiam* the court ſhould adjudge this the deed of the teſtator, they find that the defendant detains the debt; which was an ill concluſion, for the point in iſſue was, *factum* or *non*; but liberty was given to amend the concluſion without payment of coſts after the ſpecial verdict had been argued at the bar. And after ſeveral arguments at the bar *Holt* chief juſtice this term delivered the opinion of the court, and ſaid, that though this was a very inſenſible obligation, yet ſince the intent of the parties appeared plainly, that it ſhould be a ſecurity for 20*l.* by the penalty of 40*l.* the judges were therefore unanimouſly of opinion, to give judgment for the plaintiff. And as to the firſt objection, that the teſtator was not bound in any ſum certain, to that he anſwered, that as to the words [*in quadrans*] if they were alone, they would be inſenſible; but ſince they ſignify ſomething of four, and the condition is for payment of 20*l.* that ſhews that *quadrans* was put for *quadraginta*. And there are caſes as ſtrong; *quamquegenta* for *quingentis*, *Hob.* 119. *quantogint.* for *quinquaginta*, good. But he ſaid, that he could not agree the caſe in *Hob.* 19. where *octigent.* is adjudged *octoginta*; for the *gent.* ſignifies always *centum*. And moreover the caſe there cannot be law, becauſe coſts are given to the defendant. And the words *prae mid vigenti* are inſenſible, and therefore the ſenſe being complete without them, they ſhall be rejected.

Any bond from which the intent of the parties can be collected, is good, notwithſtanding the moſt groſs incorrectneſs in the language. S. C. Salk. 462, Comb. 477. Holt 522, 12 Mod. 193. and with the arguments of counſel more at large, 5 Mod. 281. vide ante 38. Yelv. 193. Cro. Jac. 116. 208. Hob. 116. 119 8 Mod. 342. 2 Roll. Abr. 146. 16 Vin. 51. 3 Bac. 692. Com. Obligation, D. 1, 2, 3. 2d. Ed. vol. 3. p. 278.

A deed with an impoſſible date may be ſtated to have been made at any time. S. C. Salk. 462. Comb. 477. Holt 522, 12 Mod. 193. 5 Mod. 281.

And no objection can be taken to an allegation that the date *thereof* is on a particular day: for the date ſhall be intended to mean the delivery. S. C. Salk. 462. Comb. 477. Holt 522. 12 Mod. 193. 5 Mod. 281. vide poſt. 1076. But an allegation that it *bears date* on a particular day, is bad. S. C. Salk. 462. Comb. 477. Holt, 522. 12 Mod. 193. 5 Mod. 281. A bond is good though the name of the obligor be ſpelt differently in the body of the bond and in the ſignature. S. C. Salk. 462. Comb. 447. Holt, 522. 5 Mod. 281.

2. It was argued in this caſe by the defendant's counſel, that the plaintiff by the *cujus datus* in his declaration has confined himſelf to the very date of which he has declared, becauſe it is the very deſcription of the bond; and

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and therefore a bond of another date cannot be intended to be the ſame bond with that upon which he declares, nor could the plaintiff give any ſuch in evidence in this action by reaſon of the variance. And therefore it is the ſame thing, as if he had ſaid *gerens datum*, which doubtleſs had been fatal. Where a bond has no date, or an impoſſible date, the plaintiff may declare that the defendant bound himſelf ſuch a day, for the day is not material, but is only mentioned, becauſe ſome time muſt be laid in the declaration. If a bond has a poſſible date, and a man declares of another date, it is ill, though he doth not apply ſo particularly to the date of the bond, as by *cujus datus*, or *gerens datum*. If a man declares upon a bond dated 1 *May*, and in fact it was delivered 1 *June* following, it is ill; becauſe upon a general declaration it ſhall be intended to be delivered upon the ſame day that it bears date, and therefore the declaration ought to have mentioned, that it was firſt delivered *primo Junii*. But if a bond bears date ſubſequent to the delivery, then a man cannot ſay in his declaration, that it was *primo deliberatum* ſuch a day, becauſe he is eſtopped by the bond to ſay, that it was delivered before it was dated. If a man declares upon a deed, *cujus datus eſt primo Maii*, and that it was *primo deliberatum primo Junii* after; he may give the bond in evidence, though delivered at another day; but *contra*, if it bears another date. If a man declares upon a bond made ſuch a day, and upon *oyer* it bears date of a precedent date; yet it is well enough, becauſe the declaration does not mention the date, but the making. But if a deed recites another deed, and miſrecites the date of the former deed, it is fatal. But notwithſtanding this objection, *Holt* chief juſtice delivered the opinion of the court, that judgment ought to be for the plaintiff. For (by him) the date is an impoſſible date; and then the plaintiff might have averred it to be made when he pleaſed. And though by the *profert in curia* he has confined himſelf to a date, yet the *cujus datus* ſhall be intended of the delivery. But if it had been *gerens datum*, there could not have been room for ſuch an intendment, and therefore it had been ill. But now it ſeems well enough, and is no more nonſenſical than the caſe in *Yelv.* 193. And judgment was given for the plaintiff.

If a deed is ſtated to have been dated on one day, and was in fact delivered on another, it is ill. Vide poſt. 349. R. cont. Cro. Jac. 136.

A party to a deed cannot aver that it was delivered before the day on which it bears date. D. acc. 2 Co. 4 b. poſt. 356.

If a deed is ſtated to have been made on a particular day it is well, though in fact it bears date on a prior day. R. acc. Hob. 249. Vide poſt. 349.

Thomee *verſ.* Lloyd

IN debitatus aſſumpſit. The defendant *venit et dicit*, that he is an officer of the exchequer, and pleads privilege. The plaintiff demurs. And exception was taken to the

An officer of any of the courts at Weſtminſter may plead his privilege without producing at the time his writ of privilege under the ſeal of the court. R. acc. poſt. 1172. Salk. 545. pl. 7. But if he does produce it, his privilege cannot be traverſed. D. acc. poſt. 1173. Salk. 545. pl. 7. Skinn. 582. pl. 2. In the beginning of a plea to the juriſdiction the defendant need not inſiſt that the court ought not to have cognizance. Vide 2 Wilſ. 251. Fort. 334. A defendant is not entitled to coſts upon a judgment in his favour on a demurrer to a plea in abatement. S. C. Comb. 482. 12 Mod. 195. Salk. 194. pl. 3. R. acc. poſt. 992.

plea

plea, because he pleads this privilege by writ, but not under seal of the court. *Sed non allocatur.* For *per Holt* chief justice, if a man pleads privilege, and at the time of pleading he produces a writ testifying that he is an officer, the plaintiff cannot deny the privilege. But if he pleads it without a writ, the plaintiff may deny it, but the plea is good without shewing the writ. A second exception was, that it is not said that the court ought not to have conusance in the beginning of the plea, but he says it in the end of the plea. *Sed non allocatur.* For *per curiam* the conclusion makes the plea. For if a man begins in bar, and concludes in abatement, it is a *(a)* plea in abatement. *Rast. Entr.* 178. 472. 3. *Old Book of Ent.* 62. *b.* 128. *Thomps. Ent.* 3, 4. And therefore judgment was given for the defendant. And afterwards in *Trinity* term motion was made, that the defendant should have costs upon the new *(b)* act. But it was denied, because the plaintiff could not have had costs before final judgment, if the judgment had been given for him.

THOMAS v. LLOYD.

(a) Vide post. 593.

(b) 8 & 9 W. 3. c. 11. s. 2.

Cox *vers.* Copping.

S. C. 5 Mod. 395.

EJECTMENT for a house by the impropriator against the church-wardens of the parish of *Aldgate*. *Eyre* for the plaintiff moved, that he might have a rule to see the parish books, upon suggestion that they would make the title appear, and that they were common books belonging to all the parish, and that it did not differ from the cases, where a rule is granted for the defendant to see court rolls, and the books of a corporation. But denied *per curiam*. For where the parson claims a distinct interest from that of the parish, it is not reasonable to compel the parish to discover their title by shewing the books, which are kept only for their own use. But the title of the copyholder depends upon the court-rolls. So of corporation books, which differ from the present case.

In an action in which the question is, whether an estate belongs to the parson or impropriator of a parish or to the parish at large, the parson or impropriator has no right to see the parish books. Vide ante 252, and the cases there cited.

Rex *vers.* Morris.

Mandamus and return post. vol. 3. p. 203.

A QUAKER sued a *mandamus* directed to the mayor and burgesses of the city of *Lincoln* in the county of *Lincoln*, to command them to admit him *ad locum et officium* of a freeman of the said city, having served seven years apprenticeship. They return, that he refused to take the oaths of office. And the court after argument at the bar was of opinion, that he might take the solemn affirmation instead of the oaths prescribed by the act of 7 & 8 *W.* 3. *c.* 34. and that his freedom could not be taken within the words of the exception in the same act, *viz.* to be a place of profit in the government; though the return shews, that every freeman has a right to give a vote for electing members to serve in parliament, and to have common for certain

The freedom of a corporation is not so properly a place or office, as a privilege. It is not a place in the government within 7 & 8 *W.* 3. *c.* 34. *s.* 6. though it intitles the party to vote for members of parliament, and gives him a right of common. S. C. 5 Mod. 402. Carth. 448. 12 Mod. 190. cit. & adm. Burr. 1004. Therefore a quaker is admissible thereto on his solemn affirmation. S. C. 5 Mod. 402. Carth. 448. 12 Mod. 190. A peremptory writ cannot be granted upon a mandamus which is improperly directed, though a return has been made thereto. S. C. 12 Mod. 190. R. acc. T. Jon. 52. Vide Salk. 701. pl. 6. Vide Com. Mandamus. C. 1. 2d. Ed. vol. 4. p. 211.

REX v. MORRIS.

cattle. But the *mandamus* was quashed, because it was to the mayor, &c. of the city of *Lincoln* in the county of *Lincoln*, whereas it should have been, in the county of the city of *Lincoln*. But *Holt* chief justice was of opinion, that the writ should have been, to admit him *ad privilegium* of a freeman, and not *locum et officium*.

Atkinson *vers.* Cornish.

S. C. Carth. 446. 5 Mod. 395. Comb. 475. 12 Mod. 194. Holt. 43.

An administration durante minori ætate of an executor determines when the executor attains the age of seventeen R. acc. 5 Co, 29. a. Cro. El. 602. 2 Brownl. 247. 2 Sid. 60. post. 409. Semb acc. Yelv. 128. Cro. Car. 240. pl. 25. Hob. 251. D. arg. Com. 139. An administration durante minori ætate of an administrator continues until the administrator attains the age of twenty-one. R. acc. post. 667. Com. 159. Vide T. Jon. 48.

THE plaintiff brings an action as administrator to *J. S. durante minoritate* of *A. B.* and *C.* administrators of *J. S. cum testamento annexo*; and he avers that *A.* is within the age of 21 years. The defendant pleads that *A.* is of the full age of 21 years. The plaintiff tenders issue. And the defendant demurs. And it was objected, that judgment ought to be given for the defendant; for if *A.* be of 17 years, the administration granted during his minority ceases. And therefore the plaintiff could not have an action after. But *per Holt* chief justice, the difference is thus: If administration be granted *durante minoritate* of an executor, the administration ceases when the executors attains the age of 17 years; but if administration be granted *durante minoritate* of a man who is not executor, but only administrator, the administration does not cease until the administrator comes to the age of 21 years. And therefore in this case judgment for the plaintiff. Between *Thomas* and *Freak*, *P.* 13 *Will.* 3. *B. R. post.* 667. it was adjudged accordingly, that the administration *durante minoritate* of an administrator does not cease until the administrator comes to the age of 21 years; where the plaintiff brought his action as administrator during the minority of an administrator, and averred, that he was under the age of 21. years, *viz.* of 18. And upon demurrer to the declaration, judgment for the plaintiff.

Bonner *vers.* Hall.

S. C. but differently reported, Carth. 433. *Holt.* 557.

Intr. 9 *Wil.* 3. B. R. Rot 558.

A plea in abatement "that another action is depending for the same cause in *our* court of common bench." is bad. A replication to a plea in abatement, traversing any of the facts in the plea, may pray a judgment in chief. S. C. Comb. 479. D. acc. post. 594. 1022. acc. Rast. Ent. 681. b. Co. Ent 160. a. A replication confessing and avoiding them only, not. R. acc. Carth. 137. 3 Mod. 281. Salk. 177. pl. 1. D. acc. post. 393. 594. 1022. A replication praying a judgment which the court cannot give, occasions a discontinuance. R. acc. Carth. 137. Salk. 177. pl. 1. Say. 46. D. acc. arg. post. 1054. and vide post. 393.

IN *indebitatus assumpsit* the defendant pleads another action depending in *curia nostra de C. B.* for the same cause; and he pleads this in abatement. The plaintiff replies, that there was not any action depending for the same cause; and therefore *petit judicium de debito et damnis*. The defendant demurs. The plaintiff joins, and concludes rightly. And it was admitted, that the plea was ill; because he pleads a cause depending in his court of *C. B.* and for other reasons. But then Mr. *Ward* moved, that there was a discontinuance; and for that he cited

a case between *Bisse* and *Harcourt*, adjudged *Hill.* 1 *Will. & Mar. B. R. Carth.* 137. 3 *Mod.* 281. *Salk.* 177. *pl.* 1. where *indebitatus assumpsit* was brought for 400*l.* the defendant pleaded in abatement, that the plaintiff was convict of felony; the plaintiff replied a pardon, *et petit judicium de debito et damnis*; the defendant demurred; and the plaintiff joined, and concluded rightly; and it was adjudged, that the plaintiff by his prayer of judgment of his debt and damages in his replication had discontinued the whole. But Mr. *Broderick* argued, that the demurrer would govern the case; and therefore since that concluded in abatement, it is good. And for that he cited *Moor* 692. *Onley v. Fontleroy. Co. Entr.* 158. *Dier* 227. 1 *Anderf.* 30. *Yelv.* 5. 138. *Allen* 17. *Shalmer v. Slingsby.* But *per Holt* chief justice, this case differs from the case of *Bisse v. Harcourt*, for there the plea was good; and then when the plaintiff replied new matter to maintain his writ, then he should have made his conclusion accordingly. But where the plaintiff traverses the defendant's plea in his replication, and offers an issue, he may pray judgment *de debito et damnis*, because if it be tried, peremptory judgment ought to be given. But in this case the first fault is in the defendant, for the plea is ill. And therefore judgment was given, *quod respondeat ulterius.*

Bonner v. Hall.

Fetter *verf.* Beal.

S. C. 1 Mod. 542. Salk. 11.

SPECIAL action of trespass and battery for a battery committed by the defendant upon the plaintiff, and breaking his skull. The plaintiff declares of the battery, *&c.* and that he brought an action for it against the defendant and recovered 11*l.* and no more; and that after that recovery part of his skull by reason of the said battery came out of his head, *per quod*, *&c.* The defendant pleaded the said recovery in bar. Upon which the plaintiff demurred. And *Shower* for the plaintiff argued, that this action differed from the nature of the former, and therefore would well lie, notwithstanding the recovery in the other; because the recovery in the former action was only for the bruise and battery, but here there is a maihem by the loss of the skull. As if a man brings an action against another for taking and detaining of goods for two months, and afterwards he brings another action for taking and detaining for two years, the recovery in the former action is not pleadable in bar of the second. If death ensues upon the battery of a servant, this will take away the action *per quod servitium amisit.* And then if a consequence will take away an action, for the same reason it will give an action. If a man brings an action for uncovering his house, by which his goods were spoiled, and afterwards by reason of the said uncovering new goods are spoiled, he shall have a new action. *Quod Holt negavit.* And *per totam curiam*, the jury in the former action considered the nature of the wound, and gave damages for all

After a recovery in an action for an injurious act, no action can be maintained on account of any consequences occasioned by that act. Therefore a recovery in an action for an assault and battery is a bar to an action for a subsequent loss in consequence of the battery of a part of the skull.

PETTIT v. BEAL.

the damages that it had done to the plaintiff; and therefore a recovery in the said action is good here. And it is the plaintiff's fault, for if he had not been so hasty, he might have been satisfied for this loss of the skull also. Judgment for the defendant, *nisi &c. Post.* 692.

Martin *verf.* Crompe.

Intr. *Mich.* 9 *Will.* 3. B. R. Rot. 475.

S. C. Comb. 474. Salk. 444.

The survivor of two joint merchants may sue on the partnership account without the personal representative of the deceased partner. Semb. acc. 3 Keb. 798. R. cont. 2 Lev. 188. See also 2 Lev. 228. 1 Freem. 468. pl. 641. Com. Merchant D. 2d. Ed. vol. 4. p. 229. 3 Bac. 589.

IN account the case was thus: The plaintiff and *A.* being joint merchants, delivered goods to the defendant as their factor. *A.* died intestate, and administration of his goods, *&c.* was granted to *D.* The plaintiff brought account against the defendant without joining *D.* And the defendant pleaded this matter in abatement. The plaintiff demurred. Sir *Bartholomew Shower* argued for the plaintiff, that the plea was ill. For though amongst merchants the *(a)* interest did not survive, yet the remedy would survive. For the books give account to the executor of the dead man against the surviving partner, which argues that the remedy in law is in the survivor. *Reg.* 135. *a. F. N. B.* 117. *E.* 3 *Leon.* 264. If a man has a demand upon two joint traders, and one of them dies, he cannot sue the other and the executor of the deceased. It would then be difficult to enable the survivor and the executor to join. And no inconvenience will follow, if the survivor sue alone and recover, for he will be accountable to the executor. The law must be understood, that between themselves there is no survivorship; but that as to strangers it is otherwise. And he cited *Cro. Ja.* 410. as an apposite case; and a case between *Kemp* and *Andrews, intr. Mich.* 2 *Will. and Mar. B. R. rot.* 289. 3 *Lev.* 290. *Carth.* 170. where a survivor merchant (who claimed a joint interest in a ship with another who was dead) brought an action against the defendant for detaining the ship, and the defendant pleaded this plea in bar, and judgment for the plaintiff. And it is consistent with the rules of law, that the one should have the interest and the other the remedy. As the heir of the part of the father shall enter for a condition broken, and the heir of the part of the mother shall have the land. *Northey e contra* for the defendant argued, that the plea was good, for tenants in common ought to join in personal actions; but between joint merchants there is no survivor, then the executor and the survivor are tenants in common, and ought to join. He agreed, that it is but a plea in abatement, and therefore distinguishable from the case of *Kempe v. Andrews*, where it was pleaded in bar. And the cases in the *Register* and *Fitzherbert's Natura Brevium* are for him; for if the right had survived, the executor of the dead trader could not have had account against the survivor. And *Cro. Jac.* 410. is for the defendant; for the objection there is, if it had been brought for the

(a) D. acc. Co. Litt. 182. a. Winch. 52. Vide 2 Bl. Com. 399. Com. Merchant. D. 2d Ed. vol. 4. p. 229.

whole,

MARTIN v. CROMPE.

whole, they ought to have joined, and here it is brought for the whole. And he cited *Moor* 188. *Pl.* 235. *and* 3 *Keb.* 737. 798. 2 *Lev.* 188. *intr. Mich.* 28 *Ca.* 2. *B. R. rot* 546. as a caſe in point; but his own report is, that the plaintiff had leave to diſcontinue. *Holt* chief juſtice, There is here a joint conſtituting of a bailiff, and therefore the contract will ſurvive; and the bailiff ſhall have an action againſt the ſurvivor for his wages. If the bailiff accounts, he ſhall deduct his charges out of the effects of both; but that which is clear upon the account ſtated, will belong to the adminiſtrator and the ſurvivor, but the ſurvivor ſhall take the whole, and allow a moiety to the adminiſtrator. It would make ſtrange confuſion, that the one ſhould ſue in his own right, and the other in another's right. And of that opinion the whole court ſeemed to be. But *quere*, if any judgment was given? And *Holt* chief juſtice ſaid in this caſe, that if there are two tenants in common of a reverſion expectant upon a leaſe for years, upon which a rent is reſerved, they may join in debt for the rent, or ſever; and the one of them may have an action for the moiety of 20*l.* rent, but not for 10*l.* and ſo it has been adjudged. Afterwards judgment was given in this caſe according to the opinion aforeſaid, and upon error brought in the exchequer-chamber the ſaid judgment was affirmed.

Tenants in common of a reverſion expectant on a leaſe for years upon which a rent is reſerved, may either join in debt for the rent, or ſever.

Aſtill *verſ.* Clerk.

P. 10 *Will.* 3. C. B. 3 Vol. 310.

S. C. more at large, Lutw. 1235. 17 Vin. 73. pl. 4. Pleadings. Lutw. 1232. poſt. Vol. 3. 207.

REPLEVIN. The queſtion was upon the pleadings between the earl of *Nottingham* and the corporation of *Daventry*, whether the king can grant a fair within the duchy of *Lancaſter*, and out of the county palatine, under the great ſeal of *England?* And after ſeveral arguments at the bar it was adjudged *Paſc.* 10. *Will.* 3. *C. B.* that he well might; becauſe it is a new royal franchiſe of a new creation, and was not at any time an inheritance in the duke of *Lancaſter*. *Moor* 167. the caſe of *Saffron Walden*. *Raſt. Entr.* 524. *quare impedit*, *treſpaſs*, 635.

The king may grant a franchiſe within the duchy of Lancaſter, and out of the county palatine under the great ſeal. Vide Moor, 874. Pl. 1221. Dyer, 232. a. pl. 7. Keilw. 90. b. pl. 14. Noy, 53. 1 Lev. 28. 3 Salk. 111. 2 Roll. Abr. 182. 17 Vin. 70, 71, 72, 73. Com. Patent. c. 2, 3, 4, 5, 6, 7. 2d. Ed. vol. 4. p. 393.

Rex *verſ.* Saliſbury. B. R.

IF a man prefers a ſcandalous petition to the houſe of lords, or makes an *affidavit* containing ſcandal againſt *J. S.* in *B. R.* a man cannot juſtify the publication of this, but it will be an offence indictable, becauſe it tends to the breach of the peace. *Per Holt* chief juſtice, And ſuch an indictment was denied to be quaſhed, upon a motion made for quaſhing it.

Publiſhing a ſcandalous petition preſented to the houſe of lords, or a ſcandalous affidavit made in a court of juſtice, is an indictable offence. &c.

1 Hawk. c. 73. ſ. 12. and ſee 1 Hawk. c. 73. ſ. 8. &c.

Term

Anonymous.

Term 10 *Will.* 3. C. B.

Secundum leges & ſtatuta, is an expreſſion properly applicable to things at common law confirmed by ſtatute. Not to things depending only on a ſtatute. In caſe for the reſcue of a diſtreſs, the plaintiff is not intitled to treble damages and coſts, unleſs he ſhews that the diſtreſs was appraiſed. Sed vide ante 170. and refers expreſsly to the ſtatute. Vide ante 150.

IN an action upon the caſe the plaintiff declared, that he diſtrained certain cocks of hay as a diſtreſs for arrears of rent, in order to ſell them *ſecundum leges et ſtatuta regni Angliae*; and that the defendant being conuſant of the premiſes, reſcued them, *&c.* Not guilty pleaded. Verdict for the plaintiff. Upon which the plaintiff prayed his triple damages upon the ſtatute of 2 *W. & M. ſ.* 1. *c.* 5. For though the plaintiff does not recite the ſtatute, nor conclude *contra formam ſtatuti*, yet it is well enough; becauſe it is a general ſtatute, and the diſtreſs is of ſuch a thing as was not diſtrainable for rent at common law; and therefore *ſecundum leges et ſtatuta* refers to this ſtatute of *W. & M. Sed non allocatur.* For per *curiam* the plaintiff does not bring himſelf within the compaſs of the ſtatute; for he does not ſhew that the diſtreſs was appraiſed, nor conclude *contra formam ſtatuti.* And then *ſecundum leges et ſtatuta* is rather where a thing is proper by the common law, and confirmed by ſtatute. And adjudged accordingly. *Ex relatione m'ri Daly*

Jolliffe *verſ.* Langſton.

A charter of ſtatute directing that particular perſons ſhall be ſued in a particular court, will not, if ſuch perſons were before ſuable generally anywhere, extend to perſons particularly privileged elſewhere. R. acc. Litt. Rep. 304. Cro. Eliz. 180. Vide 3 Leon 149. pl. 198. Str. 837. Bl. 1325. Gilb. C. B. 211. If they were not ſo ſuable, it will.

AN attorney of the common pleas ſued a member of the univerſity of *Oxford*, who prayed his *(a)* privilege, which is, not to be ſued in another place. And *per Powell* juſtice, the general words of the ſtatute will not extend to take away a privilege before *in eſſe*, but will extend to other perſons. If the ſtatute had not had any conſtruction, unleſs extended to perſons who had privileges before; then it would take away their privilege. But here the ſtatute may have another conſtruction, and the words of the ſtatute are not in the negative. See *Harris's caſe*, *Cro. Eliz.* 180. And it is a reaſonable conſtruction to ſay, that the general words will take away the general liberty which every one hath to ſue where he pleaſes; and not take away the ſpecial liberty that a man hath to ſue *in C. B.* And adjudged accordingly. Mr. *Daly.*

(a) This privilege was granted by patent 14 H. 8. which patent was confirmed by parliament, 13 Eliz. c. 29. See the terms of the patent, Litt. Rep. 304.

Ward *verſ.* Bendall.

A ca. ſa. may be ſued out for the purpoſe of charging the bail, notwithſtanding a writ of error may be depending on the judgment againſt the principal. R. cont. Str. 867 bl. 1263. Vide Str. 2166. 1 Wilſ. 16. poſt. 1250.

SCIRE *facias* againſt bail. The defendant pleads, that no *capias* iſſued againſt the principal. The plaintiff replies, that a writ of error was ſued, and therefore he could not ſue a *capias*, *&c.*

The

The defendant demurs. And *per Powell* juſtice, error upon the principal judgment is no bar to hinder the ſuing of a *capias*, in order to charge the bail. And it was ſo adjudged in this court very lately. Judgment for the defendant. Mr. *Daly*.

WARD v. BENDALL.

Birt qui tam, &c. v. Rothwell. Ante 210.

THE court delivered their opinion, that judgment ought to be arreſted for the miſrecital of the ſtatute againſt non-reſidence; for it was no offence at common law. Then there ought to be ſome ſtatute to ſupport the plaintiff's action. But there is no ſuch ſtatute as the plaintiff has ſhewn in his declaration. For though the ſtatute of *Henry* VIII. is a general ſtatute, yet the plaintiff has confined himſelf to the ſtatute upon which he declares, by the words *contra formam ſtatuti praedicti*; and therefore his declaration is vitious. The precedents are generally that this parliament was held at *Weſtminſter*, but they do not ſay what day. *Co. Entr.* 158. 203. *Raſt.* 599. *Winch.* 535. *Dugdale's ſummons to parl* 496. 8. which is good authority. *Hollinſhead* 909. Now the courts at *Weſtminſter* ought to take notice of the beginning of all parliaments. The principal of the parliament is the king; and when he comes to meet the two houſes, then the parliament begins. And this reſembles the holdings of other courts, *viz.* when the judges come, the court is ſaid to begin to be held. The adjournment of the houſes is the act of each houſe; but when the parliament is adjourned by the king, they call it a prorogation. Heretofore adjournments and prorogations were looked upon as the ſame thing, but the effects of them are very different at this day. Now this parliament was held at *London* the third of *November*, and adjourned to *Weſtminſter*; and it was pleaded in that manner in the old precedents, but it was not well pleaded, for the adjournment ſhould not be mentioned. And in probability it was only an adjournment to *Weſtminſter*, ſo that the books are wrong that ſay adjourned and prorogued; for when a ſeſſion of parliament is held after a prorogation, then they ſay that it was held by prorogation ſuch a day; but they never ſay held the day of the adjournment; but ſuch a day of the ſeſſions, without taking notice of the adjournment, which is a continued act. Now in this caſe the parliament being pleaded to be held *apud Weſtmonaſterium tertio Novembris*, it is ill; for it was the third of *November* held at *London*; but if the plaintiff had omitted the words *tertio Novembris*, it had been well enough, for this parliament was held at *Weſtminſter* after the third of *November*. Judgment *quod quereus nil capiat, &c.* Mr. *Daly*.

The falſe deſcription of a public ſtatute is fatal even after verdict, if the party expreſsly refers to the ſtatute he has deſcribed. Vide ante 210. and the caſes there cited

Miſtating the place of holding the parliament at which a ſtatute was made, is a falſe deſcription of the ſtatute. Vide ante 210. and the caſes there cited.

Courts are bound to take notice of the beginning of parliaments. R. acc. 1 Lev. 296. 2 Keb. 686. and ſee Doug. 93. n. 41.

Trin.

Trinity Term

10 Will. 3. B. R. 1698.

Sir John Holt *Chief Juſtice.*

Sir Thomas Rokeby
Sir John Turton
Sir Samuel Eyre
} *Juſtices.*

Ellis *verſ.* Ellis.

S. C. 12 Mod. 197. and with ſome difference Comb. 482.

Intr. *Hill.* 9 *Will.* 3. *B. R.* Rot. 190.

An action will lie againſt an infant for money lent him to buy neceſſaries with if he does buy neceſſaries with ſr. S. C. 3. Salk. 197. pl. 11 Vide Salk. 279. 386. pl. 2. 10 Mod. 67. otherwiſe not, D.acc. Salk. 386. 6 Pl. 2. adm. arg. 10 Mod. 67. A replication to a plea of infancy, "that money lent was ſent to buy neceſſaries with, and laid out accordingly, muſt ſhew where it was laid out, Vide Com. 145. Poſt. 1005. 1505. Str. 827. Com. Abatement. H. 13. 2d. Ed. vol. 1. p. 45.

THE plaintiff brought *indebitatus aſſumpſit* againſt the defendant, as executrix to Sir *John Ellis* her huſband, for money lent to her huſband in his life-time. The defendant pleads, that her teſtator was an infant at the time of the money lent. The plaintiff replies, that he lent 40*l.* part of the ſum in demand to the teſtator, to buy neceſſaries for himſelf his wife, his children, and his family; and ſo they were expended. The defendant demurs. And it was argued for the defendant by Sir *Bartholomew Shower* and Mr. *Selby*, that the plaintiff has not avoided the plea of infancy in the teſtator. For, 1. If a man lends money to an infant, in order to buy neceſſaries, this will not charge the infant, but the debt muſt be for the very things themſelves. 2. It is not ſufficiently averred, that the neceſſaries were bought. 3. There is not any *venue*, where the 40*l.* were expended in the buying of neceſſaries. But *Northey* for the plaintiff confeſſed, if *A.* lends money to an infant to buy neceſſaries, and the infant does not lay out the money in buying neceſſaries, it will be at the peril of *A.* But here it is averred, that the 40*l.* were expended for him, his wife, children and family. And neceſſaries for his family will bind an infant. 1 *Sid.* 112. But to this the court gave no opinion; but for want of a *venue*, where the neceſſaries were brought, judgment was given for the defendant.

IN

IN ejectment the defendant pleaded not guilty. And then *relicta verificatione*, confeſſed the action. And the defendant's attorney ſubſcribed the declaration accordingly. Upon which Mr. *Mulſo* moved, that the court would permit the plaintiff to enter judgment for himſelf. But *per curiam* the defendant's attorney ought to come in proper perſon before the maſter of the office, and do it there. And though it was urged, that the attorney could not come by any poſſibility; yet the motion was denied.

A relicta verificatione, and a confeſſion of the action, cannot be entered unleſs the defendant's attorney appears in perſon for the purpoſe before the maſter. D. acc. Imp. B. R. 3d Ed. 309. and vide Imp. C. B. 2 Ed. 359.

Sir Henry Bond's Caſe.

SIR *Henry Bond* was outlawed for high treaſon, and was brought to the bar in order to reverſe his outlawry. And error was aſſigned, that the exigent had not any addition. And upon reading the record, it appeared, that the indictment had not any addition. And therefore the queſtion was, if the outlawry ſhould be reverſed, whether Sir *Henry Bond* ſhould be arraigned upon the indictment. And *Holt* chief juſtice thought he ſhould not, becauſe the indictment appeared to be void. But afterwards at another day the reverſal of the outlawry being pronounced for the error aforeſaid, *Holt* chief juſtice told Sir *Henry Bond*, that he had liberty, either (*a*) to take exception to the indictment for want of addition, or to wave the exception, and plead his pardon; for without exception by the ſtatute of 1 *Hen.* 5. *c.* 5. the indictment is not void. And Sir *Henry Bond* waived the exception, and pleaded his pardon, as was done in the caſe of lord *Dover*. And the court gave leave to Sir *Henry Bond* to ſtand during the reading of his pardon.

The omiſſion of the defendant's addition in an exigent makes an outlawry thereon erroneous. S. C. 12 Mod. 198. 1 H. 5. c. 5. But the omiſſion of the defendant's addition in an indictment does not make the indictment void. S. C. 12 Mod. 198. cit. Andr. 140. R. acc. 2 Roll. Rep. 225. acc. 2 Inſt. 670. 2 Hawk. c. 23. ſ. 123. D. acc. Andr. 146. 148. 149.

D. Cont. Latch. 109. Vide 4 Leon. 121. Sty. 26. 1 Vent. 338. Andr. 137. If a perſon indicted for treaſon pleads a pardon, the court may give him leave to ſtand while the pardon is read.

(*a*) Vide Kel. 25.

Owen *verſ.* Butler.

S. C. Comb. 483.

DEBT upon bond. upon *oyer* the condition was, that (*a*) the defendant ſhould pay three ſums of money at three ſeveral days. The defendant pleads, that he hath paid the money due at the two firſt days, and that the third day of payment is not yet come. And this is pleaded in abatement. The plaintiff demurs. *Ward* for the defendant argued, that matter of bar may be pleaded in abatement, 1 *Mod.* 214. as (*b*) outlawry, 24 *Hen.* 6. 1. Receipt of part of the debt pleaded in abatement. And it is not material, whether it be a plea in bar or abatement, becauſe the plaintiff has confeſſed by his demurrer, that one day is not yet come. *Northey* for the plaintiff, the plaintiff by his demurrer confeſſes only (*c*) that which is well pleaded, *Cro. Car.* 253

Matter in bar cannot be pleaded in abatement. R. acc. poſt. 693. R. cont. 1 Mod. 214. Upon a plea in abatement it ought to appear that the plaintiff may have another action. R. acc. Turtle v. Lady Worſley. B. R. M. 24 G. 3. 3 Bl. Com. 302.

Vide Com. Abatement. I. 1, 2. 2d. Ed. vol. 1. p. 65.

(*a*) Vide 1 Wilſ. 80. (*b*) Vide poſt. 1056. (*c*) D. acc. poſt. 1056. in marg. and vide ante 18. and the books there cited.

Money

OWEN v. BUTLER.

Money paid after the action brought ought to be pleaded in bar. *Holt* chief juſtice. If a man pleads in abatement, it ought to appear, that the plaintiff may have another action, *Ward*. That does not hold in the caſe of the plea of outlawry. *Holt*. That is only in diſability of the perſon. Judgment that he anſwer over.

Pullen *verſ.* Purbecke.

If a writ of execution appears by the return to have been improperly executed, the court will quaſh it the term the return is filed. But not afterwards.

THE plaintiff having recovered judgment againſt the defendant for ———, he ſued an *elegit*, commanding the ſheriff to deliver all the goods and chattles of the defendant, and the moiety of his lands, to the plaintiff. To which writ the ſheriff returned, that he had delivered goods to the value of 60*l.* to the plaintiff; and that the inquiſition found, that the plaintiff was ſeiſed of two farms, the one of 60*l. per annum*, and the other of 40*l.* and that he had extended the one farm of 60*l. per annum*, being an entire moiety. And now it was moved at bar, that the court would quaſh this *elegit*, and grant a new writ; becauſe it appeared that the ſheriff had extended more than a moiety. And Mr. *Northey* ſaid, that if the plaintiff comes in at the return of the *elegit*, and ſhews to the court that there was partiality in the execution of the writ, the court will award a new writ, and entry ſhall be made, *quod vicecomes non miſit breve*. *Townſh. Judgm.* 259. 3 *Keb.* 313. See 1 *Sid.* 21, 239. *Littlet. Rep.* 77. And *per Holt* chief juſtice, if a writ of *elegit* is awarded, and it appears to the court that the ſheriff hath not executed it, the court will award a new writ, and ſet aſide the old writ. But *elegit* differs from a *fieri facias* as to goods, though it has been ſaid that an *elegit* as to goods is but a *fieri facias*. For upon *elegit* the ſheriff may deliver the goods to the party, but not upon a *fieri facias*. If this motion had been made in the ſame term in which the return was filed, the court might have quaſhed it; but as there are ſeven years elapſed ſince, the court will not intermeddle. *Vide poſt.* 718.

Upon an elegit the ſheriff may deliver the goods he ſeizes to the plaintiff. D. acc. Cro. Jac. 246. 2 Bac. 349. in marg. Semb. acc. 1 Keb. 465. pl. 68. 556. pl. 72. On a fieri facias he cannot.

Cook *verſ.* Licence.

A defendant cannot move for a prohibition before he has appeared in the court to which he prays the prohibition. R. acc. poſt. 931. The garniſhee upon a foreign attachment in an inferior court may plead that the cauſe of action againſt the principal aroſe out of the juriſdiction.

MOTION was made for a prohibition, to be directed to the ſheriff's court in *Briſtol* upon ſuggeſtion, that cauſes of action ariſing out of the juriſdiction of the ſheriffs court ought not to be ſued there. And this motion was made in behalf of the defendant in the action, before he had appeared, to ſtay the proceedings of the court, who proceeded to attach his goods in the hands of a garniſhee. And Sir *Bartholomew Shower* oppoſed the motion, becauſe the

Vide ante 56. 3 Lev. 23. A ſimple contract debt may be attached upon a foreign attachment, though it aroſe out of the juriſdiction of the court from which the attachment iſſues.

defendant

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defendant cannot pray a prohibition upon ſuggeſtion of a matter which he could not plead. Now here he cannot plead this before appearance, and therefore he ought not to make ſuch a motion before appearance. And *per Holt* chief juſtice, a man ſhall not plead to the juriſdiction until he appear. But if the original cauſe of action aroſe out of the juriſdiction of the court, the garniſhee may plead it; and of that opinion was *Hale* chief juſtice. But if it was debt upon a ſimple contract, it is attachable where the perſon of the debtor is. And *Shower* ſaid, that in the caſe of *Clerk v. Andrews, Paſch.* 1 *Will. & Mar. B. R. Shower* moved for a prohibition to the court of the ſheriffs of *London*, to ſtay proceedings, where they attached the debt of the garniſhee, becauſe it aroſe out of the juriſdiction: but it was denied, becauſe the debt was upon ſimple contract, which follows the perſon of the debtor.

Hunt *verſ.* Lawſon

14 Vin. 9. pl. 25. 91

A writ of error to remove a record between A. plaintiff and B. defendant will remove a record between A. plaintiff and B. together with others defendants. Vide Str. 200.

A Writ of error was brought to remove a record out of the common pleas of a *querela* between *A* plaintiff and *B.* defendant, and the record certified was between *A.* plaintiff and *B. ſimul cum D. E. &c.* defendants. And it was moved, that this was not the ſame record; for a record between *A.* and *B.* cannot be the ſame as a record between *A.* and *B. ſimul cum D. E. &c.* But adjudged no variance, and the precedents are agreeable.

Theobald *verſ.* Long.

S. C. Holt. 557. Carth. 453.

Vide Str. 823. Carth. 517. poſt. 551. Salk. 566.

IF the defendant pleads another action depending for the ſame cauſe in the ſame court, the plaintiff may pray (*a*) *oyer* of the record, being in the ſame court; and if there is no *oyer* of the record, the plaintiff may ſign judgment by default. For in all caſes where a deed or record is pleaded, and *oyer* prayed, if *oyer* is not granted, the plea is as no plea. *Keilw.* 95, 96.

(*a*) If by "praying oyer" in this caſe is meant "demanding a note of the roll on which the other action is entered," this caſe may be law. Vide note on Rule Trin. 5 & 6 G. 2. otherwiſe it cannot; becauſe a party is not entitled to oyer of a record. Vide Ford v. Burnham. Barnes, 4to. Ed. 340. Dougl. 315. 459. 1 Term Rep 149.

Rex *verſ.* Savage et al'.

For an offence newly created by a ſtatute which impoſes a forfeiture for it, and points out the mode for recovering ſuch forfeiture, an indictment will not lie. R. acc. Cro. Jac. 643. pl. 4. D. acc. Salk. 460. pl. 7. 10 Mod. 337. Burr. 803. 2 Hawk. c. 25. ſ. 4. Vide Burr. 543. 832.

SAVAGE and two others were indicted upon the 8 & 9 *W.* 3. *c.* 25. for licenſing hawkers and pedlars, in as much as they ſold glaſſes without licence. And it was moved, that the indictment ſhould be quaſhed, becauſe it does not lie for this offence; for it is an offence created by the ſaid ſtatute, which ſtatute directs a forfeiture for it, and the remedy how it ſhall be recovered and beſtowed;

and

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and therefore the offence is not punishable any other way not directed by the said statute. And the court seemed to be of that opinion. For by *Rokeby* justice, this act is designed to raise money by the licenses of hawkers, &c. not to prohibit hawking as unlawful, for it is not prohibited, but only enacted that there shall be licences taken. But the court refused to quash it. *Ex relatione m'ri Place.*

Wilkins *verf.* Mitchel.

The court will not grant a mandamus to compel an inferior court to give a judgment. S. C. 12 Mod. 196. 3 Salk. 229. pl. 1. R. cont. Raym. 214. 1 Vent. 187. Str. 113. 530. cont. 3 Bac. 535. 3 Bl. Com. 110, 111.

THE plaintiff was nonsuit in the town court of *Cambridge* held before the mayor there, and the nonsuit entered and recorded. The defendant prayed to have judgment for his costs, but the mayor refused it. Upon which it was moved to this court, to have a *mandamus* to compel the said mayor to give judgment for the defendant upon the nonsuit. But it was denied *per curiam*, for the defendant may have a writ *de executione judicii*, and a *mandamus* shall not be granted where the party hath another remedy. *E. R. m'ri Place.*

A mandamus will not lie where there is other remedy (*a*) (*b*). R. cont. Str. 159. D. cont. 3 Bl. Com.

(*a*) But nota in the case The king v. Bishop of Ely, it was said *per Law* chief justice, that the law had been contrary ever since Easter term 11 Geo. 2. Dr. Bentley's case.

(*b*) In Rex v. Langston, a case precisely like the present, this was expressly over-ruled. Vide Rex v. Bishop of Salisbury, B. R. Tr. 10 G. 2.

Mich.

Mich. Term

10 Will. 3 B. R. 1698.

Sir John Holt *Chief Juſtice.*
Sir Thomas Rokeby } *Juſtices.*
Sir John Turton }

Sir Samuel Eyre *died the laſt vacation in the Northern circuit at* Lancaſter, 10 Sep.

Matthews *verſ.* Erbo.

S. C. Carth. 459. quod vide.

MR. *Dee* moved to ſet aſide an execution upon an outlawry againſt the defendant, upon *affidavit* that the defendant was an alien merchant, and lived beyond the ſea, and was commorant there during all the time that the plaintiff proceeded to outlaw him. But it was denied by the whole court; becauſe by this means any perſon may contract debts, and then go beyond ſea, and ſo he will be out of the reach of the law. But the defendant may bring error, and reverſe the outlawry, if he pleaſes.

The court will not ſet aſide an execution on an outlawry upon an affidavit that the defendant is an alien living abroad, and that he was commorant there during all the proceedings towards the outlawry. Vide 2 Crompt. 54.

Pullein *verſ.* Benſon.

Intr. *Trin.* 10 *Will.* 3. B. R. Rot. 102.

Pleadings poſt. Vol. 3. 256.

Eborum ſſ. *Memorandum quod alias ſcilicet termino Paſchae ultimo praeterito coram domino rege apud Weſtmonaſterium venit Thomas Pullein armiger nuper vicecomes comitatus praedicti per Carolum Sanderſon attornatum ſuum, et protulit in curia dicti domini regis tunc ibidem quandam billam ſuam verſus Johannem Benſon alias dictum Johannem Benſon de*

An allegation that J. S. on 20th Nov. by his writing obligatory, the date whereof is the day and year aforeſaid, acknowledged himſelf to be bound to J. N. is equivalent to a direct averment, that the bond was delivered on that day. S. C. Salk. 628. 12 Mod. 204. Holt, 558. 3 Salk. 352. R. acc. Yelv. 138. 1 Brownl. 104. Cro. Jac. 263. Semb. cont. 2. Keb. 108. Vide ante 336. And a plea that it was firſt delivered on a ſubſequent day, without a direct traverſe, that it was delivered then, is bad. S. C. Salk. 628. 12 Mod. 204. Holt, 558. 3 Salk. 352. R. acc. Yelv. 138. 1 Brownl. 104. Cro. Jac. 263. Semb. 1. Sid. 300. 301. 2 Keb. 124. In a plea that it was firſt delivered on a ſubſequent day et non antea, the non antea is not a ſufficient traverſe. S. C. Salk. 628. Vide Com. Pleader. G. 2d. Ed. vol. 5. p. 109. A ſtranger to a writ need not ſet it forth at large. In debt upon a bail bond at the ſuit of the ſheriff, the plaintiff need not in his declaration ſhew that he took it by the name of his office. Vide Cro. Eliz. 800. 2 Roll. Rep. 365. Str. 893.

eadem

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eadem yeoman in cuſtodia marreſcalli, &c. de placito debiti et ſunt plegii de proſequendo ſcilicet Johannes Doe et Richardus Roe quae quidem billa ſequitur in haec verba ſſ. Eborum ſſ. Thomas Pullein armiger nuper vicecomes comitatus praedicti queritur de Johanne Benſon alias dictum Johannem Benſon de eadem yeoman in cuſtodia marreſcalli marreſcalſiae domini regis coram ipſo rege exiſtente de placito quod reddat ei quadraginta libras legalis monetae Angliae quas ei debet et injuſte detinet pro eo videlicet quod cum praedictus Johannes viceſimo die Novembris anno regni domini Willelmi tertii nunc regis Angliae, &c. nono apud Barnſley in comitatu praedicto per quoddam ſcriptum ſuum obligatorium ſigillo ipſius Johannis ſigillatum curiaeque dicti domini regis nunc hic oſtenſum cujus datus eſt eidem die et anno cognovit ſe teneri et firmiter obligari eidem Thomae per nomen Thomae Pullein armigeri vicecomitis comitatus praedicti in praedictis quadraginta libris ſolverdis eidem Thomae cum inde requiſitus eſſet, praedictus tamen Johannes licet ſaepius requiſitus, &c. praedictas quadraginta libras eidem Thomae Pullein nondum ſolvit ſed illas ei hucuſque ſolvere omnino contradixit et adhuc contradicit ad damnum ipſius Thomae Pullein decem librarum et inde producit ſectam, &c.

Et modo ad hunc diem ſcilicet diem Veneris proxime poſt craſtinum ſanctae Trinitatis iſto eodem termino uſque quem diem praedictus Johannes habuit licentiam ad billam praedictam interloquend' et tunc ad reſpondendum, &c. coram domino rege apud Weſtmonaſterium venit tam praedictus Thomas per attornatum ſuum praedictum quam praedictus Johannes per Willelmum Manlove attornatum ſuum. Et idem Johannes defendit vim et injuriam quando, &c. et petit auditum ſcripti praedicti et ei legitur, &c. petit etiam auditum conditionis ejuſdem ſcripti et ei legitur in haec verba ſcilicet conditio iſtius obligationis talis eſt quod ſi ſupra obligatus Willelmus Benſon compareat coram domino rege apud Weſtmonaſterium die lunae proxime poſt quindenam ſancti Martini ad reſpondendum Johanni Brook gen. roſo de placito tranſgreſſionis ac etiam billae ipſius Johannis verſus praefatum Willelmum pro duodecim libris de debito quod tunc haec praeſens obligatio vacua fuerit alioquin ſtabit et permanebit in ſuo pleno robore vigore et effectu quibus lectis et auditis idem Johannes dicit quod ipſe de debito praedicto virtute ſcripti praedicti onerari non debet quia dicit quod per quendam actum parliamenti domini Henrici nuper regis Angliae ſexti apud Weſtmonaſterium in comitatu Middleſex viceſimo quinto die Februarii anno regni ſui viceſimo tertio tenti editum ex conſideratione regis de magnis perjuriis extorſionibus et oppreſſionibus quae fuerunt et fuiſſent in hoc regno per ejus vicecomites ſubvicecomites et eorum clericos coronatores ſeneſcallos franchefiarum ballivos et cuſtodes priſonarum ac alios officiarios in diverſis comitatibus hujus regni ordinatum exiſtit et enactitatum fuit auctoritate ejuſdem parliamenti inter alia quod dicti vicecomites et omnes alii officiarii et miniſtri praedicti dimittent extra priſonam omnimodas perſonas per ipſos aut eorum aliquem arreſtatas vel exiſtentes

Stat. 23 Hen. 6. pleaded.

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existentes in sua custodia virtute alicujus brevis seu warranti in actione personali aut per causam indictamenti de transgressionibus super ratienabilem securitatem sufficientium personarum sufficiens habentium infra comitatus ubi tales personae sic forent dimissae ad ballium sive manucaptionem Angliae to bail or mainprize *ad custodiendum suos dies in talibus locis qualia dicta brevia billae vel warranta requirerent (talibus persona seu personis quae fuerunt vel forent in sua custodia Angliae* ward *per condemnationem executionem capias utlagatum sive excommunicatum securitatem de pace ac omnibus talibus personis quae fuerunt vel forent commissae custodiae per speciale mandatum aliquorum justiciariorum et vagabundis renuentibus deservire secundum formam statuti de laboratoribus tantummodo exceptis) Et quod nullus vicecomes nec aliquis officiarius seu minister praedictus caperet aut capi causaret seu faceret aliquam obligationem pro aliqua causa praedicta vel colore officii sui nisi tantummodo sibimetipsis de aliqua persona nec per aliquam personam quae foret in sua custodia per cursum legis nisi per nomen officii sui et sub conditione scripta quod dicti prisonarii comparerent ad diem in dicto brevi billa sive warranto ac in talibus locis qualia dicta brevia billae seu warranta requirerent, Et si aliqui dictorum vicecomitum vel aliorum officiariorum sive ministrorum praedictorum caperent aliquam obligationem in alia forma colore officiorum suorum quod esset vana prout per eundem actum inter alia plenius apparet Et idem Johannes ulterius dicit quod scriptum praedictum primo deliberatum fuit per ipsum Johannem tricesimo die Novembris anno nono supradicto quodque praedictus Willelmus Benson in conditione praedicta superius nominatus dicto tempore deliberationis et confectionis scripti illius apud Barnsley praedictam fuit in custodia praedicti Thomae ut vicecomitis praedicti comitatus Eborum existens per ipsum Thomam captus et arrestatus praetextu cujusdam brevis domini regis eidem vicecomiti directi et returnabilis coram domino rege apud Westmonasterium certo die termini sancti Michaelis tunc ultimo praeterito ipsoque Willelmo Benson sic in custodia dicti Thomae ut praefertur existente ipse idem Thomas dicto tricesimo die Novembris anno nono supradicto et non antea scriptum obligatorium praedictum cum conditione praedicta colore officii sui vicecomitis comitatus praedicti de dicto Willelmo Benson ac de ipso Johanne ut ejus fidejussore contra formam statuti praedicti capit videlicet apud Barnsley praedictam Et sic scriptum illud vigore statuti illius vacuum et nullius effectus in lege fuit et existit Et hoc paratus est verificare unde petit judicium si ipse de debito praedicto virtute scripti praedicti onerari debeat, &c.*

L. Agar.

Et

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Et praedictus Thomas dicit quod ipſe per aliqua per praedictum Johannem Benſon ſuperius placitando allegata ab actione ſua praedicta inde verſus ipſum Johannem habenda praecludi non debet quia dicit quod placitum praedictum per ipſum Johannem modo et forma praedictis ſuperius placitatum materiaque in eadem contenta minus ſufficientia in lege exiſtunt ad ipſum Thomam ab actione ſua praedicta inde verſus praefatum Johannem habenda praecludendum ad quod ipſe idem Thomas neceſſe non habet nec per legem terrae tenetur aliquo modo reſpondere Et hoc paratus eſt verificare unde prò defectu ſufficientis reſponſionis in hac parte ipſe idem Thomas petit judicium et debitum ſuum praedictum una cum damnis ſuis occaſione detentionis debiti illius ſibi adjudicari Et pro cauſa morationis in lege ſuper placito illo idem Thomas ſecundum formam ſtatuti in hujuſmodi caſu nuper editi et proviſi oſtendit et curiae hic demonſtrat has cauſas ſubſequentes videlicet quod placitum praedictum eſt incertum duplex et caret forma et non reſpondet narrationi ipſius Thomae praedictae. E. Northey.

Et praedictus Johannes dicit quod placitum praedictum per ipſum Johannem modo et forma praedictis ſuperius placitatum materiaque in eodem contenta bona et ſufficientia in lege exiſtunt ad ipſum Thomam ab actione ſua praedicta inde verſus praefatum Johannem habenda praecludendum quod quidem placitum materiamque in eodem contentam ipſe idem Johannes paratus eſt verificare et probare prout curia, &c. Et quia praedictus Thomas ad placitum illud non reſpondet nec illud hucuſque aliqualiter dedicit ideſt idem Johannes ut prius petit judicium ſi ipſe de debito praedicto virtute ſcripti praedicti onerari debeat, &c. Sed quia curia dicti domini regis nunc hic de judicio ſuo de et ſuper praemiſſis reddendo nondum adviſatur dies deinde datus eſt partibus praedictis coram domino rege apud Weſtmonaſterium uſque diem proximè poſt de judicio ſuo de et ſuper praemiſſis illis audiendo eo quod curia dicti domini regis nunc hic inde nondum, &c.

The queſtion in law intended by this plea was, if a ſheriff arreſt a man by virtue of a *capias*, &c. to him directed, and afterwards detain him in his cuſtody until the return of the writ be expired, and then take bond of him, with condition that he ſhall appear *in B. R. &c.* at the day of the return of the writ which is there paſſed, whether this bond is made void by the ſtatute of 23 *Hen.* 6. *cap.* 10? The words of which ſtatute as to this purpoſe are; "And if any of the "ſaid ſheriffs, or other officers or miniſters aforeſaid, take any "obligation," (which is to be underſtood of obligations taken of thoſe who are in ward of the ſheriff, though the words are general, 10 *Co.* 100. *a. Beawfage's* caſe, "in other form (which words relate to the form preſcribed by the former clauſe) "by colour

A bond conditioned for the appearance of a perſon at the return of a writ taken by a ſheriff after the return of the writ, is void. Vide 2 Wilſ. 347. Dougl. 93.

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"their offices, that it shall be void." And it seems that such bond taken as aforesaid is void by the statute. For 1. The obligor was in ward of the sheriff. And though it may be objected, that he ought to be in lawful ward, and this ward being after the return of the writ was false imprisonment, and therefore such bond might be avoided by duress of imprisonment; yet it may be answered, that for any thing that appears to the contrary, this was a lawful ward. For suppose the sheriff arrests a man upon a *latitat* or *capias*, and the prisoner does not find sufficient surety, the sheriff is not bound to let him go at large; then at the return of the writ the sheriff returns *cepi corpus*, and at the return has not the body in court, the sheriff is amerceable, but yet he ought to continue the prisoner in his custody; for if he suffer him to go at large, it would be an escape; so that the sheriff may be said to have a man lawfully in his ward after the return of the writ. 2. In 2 *Leon.* 107. *pl.* 136. by *Fenner* and *Gawdy* justices it is held, that it is not absolutely necessary that the obligor be in actual ward at the time of the bond made, to bring it within the compass of the 23 *H.* 6. *c.* 10. for by them, if a man be in prison in execution, and makes a promise to make a bond to the sheriff, in consideration of which he is enlarged, and within an hour after he makes the bond, this bond is within the 23 *H.* 6. *c.* 10. 3. He was once in this case lawfully in his custody; but in the case in *T. Jones* 76, lord *Suffolk* against *Burkett*, it appeared, that the defendant was never in custody of the sheriff lawfully. 4. In 2 *Sid.* 129, *Jenkins v. Hatton*, the sheriff arrested a man by virtue of a writ returnable in the vacation, and took a bond conditioned for his appearance at the return of the writ; and in debt brought upon this bond it was adjudged, that the bond was void by the statute, but that the sheriff should not be amerced for the non-appearance of the defendant, nor liable to false imprisonment, [But note, there was no default in the sheriff.] 2. This bond is taken in another form than the statute prescribes; for the statute prescribes a bond with condition, &c. but this bond is single, for a bond made with a condition that is impossible to be performed at the time of the making of the bond is single, and a single bond is void by the statute. 10 *Co.* 100. 3. This bond was taken by the sheriff *colore officii*, for it was made to him *quatenus* sheriff, to let the obligor go at large. 4. In 2 *Keb.* 108, 109, 122. 1 *Sid.* 300. *Courtney v. Phelps*, such a bond is admitted by the court to be within the statute. But *quaere* of that; for though I was prepared to have offered this matter aforesaid in behalf of the defendant in this case, yet exceptions were taken to the form of the plea, so that the matter of law did not come in question. And Mr. *Northey* told me, he was of opinion, that such a bond was not within the statute 23 *H.* 6. *c.* 10. And note, that the objection, that the obligor was not

If a man who is arrested cannot find bail before the return of writ, the sheriff must detain him in custody afterwards.

A bail bond is within the 23 H. 6. though the person for whose appearance it was given was not in actual custody when it was given.

If a man is arrested on a writ returnable in vacation, any bail bond which may be given for his appearance is void. R. acc. Str. 399. But the sheriff cannot be amerced for his non-appearance. Nor is he liable to an action for false imprisonment. Semb. acc. Bl. 847. A bond with a condition *ab initio* impossible is a single bond, D. acc, Co. Lit, 206. a. Yelv. 139. Brownl. 105. Vide 1 Bac. 412, 413.

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in lawful ward of the ſheriff at the time of the bond made, is very material; for doubtleſs the detaining after the return of the writ was falſe impriſonment in the ſheriff. And though perhaps the ſheriff in ſome particular caſe may juſtify a detainer in cuſtody after the return of the writ, as in the caſe put before, yet no ſuch thing appearing in the plea, it muſt be taken moſt ſtrongly againſt the pleader.

The court will take notice of the beginning and end of the fixed terms. Vide ante 154. 343. poſt. 791. 794. 854. 856. 869. 980. 1342. 1379. Str. 469. Burr. 811. 6 Vin. 486. 491.

2. It ſeems the court would have taken notice, that this bond was made after the return of the writ; for it was made the thirtieth of *November*, and the writ was returnable *die lunae proximae poſt quindenam ſancti Martini* in *Michaelmas* term; and the court will take notice, that the thirtieth of *November* is always after the end of *Michaelmas* term; for they will take notice of the beginning and end of the fixed terms, if they will not of the moveable terms. See for this, 1 *Sid.* 308. 1 *Ventr.* 264. 3 *Keb.* 385. *Cro. Car.* 38. *Latch.* 11. 118. 1 *Roll. Abr.* 525. 6 *Vin.* 493. *pl.* 12. 14. 1 *Sid.* 300. 2 *Keb.* 108, 109. 122. *ante* 4. But this matter was not drawn in queſtion, no more than the former.

But Mr. *Northey* for the plaintiff took exceptions to the plea. 1. That the plaintiff has declared upon a bond bearing date the twentieth of *November*, which ſhall be intended to be delivered at the ſame time, and to be then a perfect and complete deed. Then when the defendant comes and ſays, that the bond was *primo deliberat.* the thirtieth, he ought to have traverſed, that it was delivered the twentieth, or at any time before the thirtieth of *November*. And for want of ſuch traverſe the plea is ill, for no anſwer is given to the deed upon which the plaintiff declares. And for authority in point he cited *Yelv.* 138. 1 *Brownl.* 104. *Cro. Jac* 263.

A man cannot confeſs and avoid and traverſe. *R. acc. ante* 237. *and ſee the caſes there cited.* Semb. acc. 1 Saund. 23

Againſt which it was argued by myſelf, that the defendant had no need to traverſe the delivery ſuppoſed by the plaintiff in his declaration. 1. Becauſe it is a rule, that when the defendant confeſſes and avoids the matter charged by the plaintiff in his declaration, he has no need to traverſe it. And farther, if in ſuch caſe he takes a traverſe, it will vitiate his plea. Then to prove, when the defendant pleads *primo deliberat. &c.* of a deed at another day than is ſuppoſed by the plaintiff in his declaration, that this *primo deliberat.* has confeſſed the very deed upon which the plaintiff declares, I cited *W. Jones* 66. *Latch.* 59. the biſhop of *Norwich* againſt *Cornwallis*, where debt was brought upon a bond dated the thirtieth of *November*, conditioned to perform an award to be made before the firſt of *June* next following, the defendant pleads, that he cauſed this bond to be written the thirtieth of *November*, but that he afterwards

wards delivered it as his deed the twenty-eighth of *April*, and that no award was made between the twenty-eighth of *April* and the firſt of *June*, *abſque hoc quod ille per praedictum ſcriptum obligatorium cognovit ſe teneri* to the plaintiff, as he has declared; and upon ſpecial demurrer adjudged for the plaintiff. And in 2 *Keb.* 108. the judges gave the reaſon of the ſaid judgment, *viz.* becauſe the traverſe was repugnant; for he had confeſſed the bond, upon which the plaintiff had declared, by his plea of *primo deliberat.* for if he had not confeſſed it, the traverſe had not been repugnant. Then if the *primo deliberat.* confeſſes the ſame bond, it ſufficiently avoids it; and therefore there is no need of a traverſe.

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2. It is a rule, that a man ſhall never traverſe the bare ſuppoſal of a writ or declaration. 1 *Edw.* 4. 9. *a.* 5 *H.* 7. 13. 6 *H.* 7. 6. 1 *Leon.* 79. Now here it is only ſuppoſed, that the bond was delivered the twentieth. But if it had been expreſsly averred, that the deed was delivered the twentieth, the defendant, if he had pleaded as here, ought to have traverſed. 18 *H.* 6. 8. *Fitzh. bar.* 131. 8 *H.* 6. 6. *b.* Therefore in this caſe I cited 5 *H.* 7. 26. as an authority in point *per Brian* and *Townſhend*, who were the judges there; where the caſe was thus: *A.* brings *quare impedit* againſt *B.* and declares that *C.* was ſeiſed of the advowſon in fee, and preſented *J. S.* his clerk, *&c.* and afterwards by his deed bearing date the firſt of *May*, *&c.* granted the next avoidance to *A. J. S.* died, and *B.* hinders *A.* from preſenting; *B.* ſays, that well and true it is, that *C.* granted to *A.* the next avoidance by his deed bearing date the firſt of *May*, *&c.* but that it was delivered to him the fourth day, and before the fourth day *C.* granted to *B.* by his deed which here is, *&c.* and adjudged that the plea was good without taking a traverſe. And there the diſtinction is taken, where the delivery is expreſsly alledged in the declaration, and where it is only ſuppoſed or intended. See alſo 2 *Keb.* 108, *Courtney v. Phelps*, by the opinion of the judges there is no need of a traverſe. But note, *Siderfin* 301, who reports the ſame caſe, is *contra*. See *Noy* 43. And afterwards *Wright* king's ſerjeant at another day argued to the ſame purpoſe; and alſo, that if a man traverſes matter not alleged, it will vitiate the plea. And he inſiſted upon the difference between matter taken by ſuppoſal, and matter expreſsly alleged. And he argued, that where a deed is produced, the law intends and ſuppoſes that the grantor was of capacity; yet if debt be brought upon a bond, and the defendant pleads infancy, he ſhall never traverſe that he was of full age. The ſame law of coverture. Yet in both the caſes the law intends *prima facie* that the grantor was of capacity to grant or bind himſelf. And he relied ſtrongly upon 5 *H.* 7. 26. which caſe he ſaid was not diſtinguiſhable from the caſe in queſtion.

The bare ſuppoſal of a writ or declaration cannot be traverſed. Vide Com. Pleader. G. 13. 2d. Ed. vol. 5. p. 137.

Upon a plea of infancy or coverture the defendant ſhall take no traverſe.

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Sed non allocatur. For *per Holt* chief juſtice there is here an averment by implication at leaſt, that this bond was delivered the twentieth of *November*; for the date of a bond is the delivery of the bond, and ſhall be always taken ſo, if the plaintiff does not ſhew the contrary in his declaration. And then if the defendant varies from it in his plea, he ought to take a traverſe, if the time of the delivery be material. *Yelv.* 138. *Green v. Eden* is a caſe in point. But the caſe of 5 *H.* 7. 26. is good law, but diſtinguiſhable from this caſe; for there the defendant who pleads, is a ſtranger to the deed ſhewn by the plaintiff, and therefore he is not bound to anſwer to the circumſtances of the deed, but only the priority of the grant. A ſtranger to the deed may plead *non conceſſit*, and not *non eſt factum*. *Contra* of him who is party to the deed. A ſtranger to a deed may aver delivery of the deed before the date; but a party cannot. But in this caſe the defendant is party to the deed. And as to the objection, that if a man pleads infancy in debt upon bond, he ſhall never traverſe that he was of full age, he anſwered, that though the plaintiff has expreſsly averred that the defendant was of full age when he delivered the bond, yet the defendant may plead infancy, and ſhall not traverſe that he was of full age; becauſe it was alleged out of time, and a man ſhall never traverſe matter alleged out of time. 2. It ſeemed to the court, that there was here an expreſs averment, that the bond was delivered the twentieth of *November*; for the words of the declaration are, that the defendant *viceſimo Novembris, &c. per quoddam ſcriptum ſuum obligatorium ſigillo* of the defendant *ſigillatum cujus datus eſt eiſdem die et anno cognovit ſe teneri et obligari* to the plaintiff, *&c.* ſo it is averred, that the defendant acknowledged himſelf to be bound to the plaintiff the twentieth of *November*, which could not be if the deed was not then delivered.

A ſtranger to a deed may plead non conceſſit, or that it was delivered before the day on which it bears date.

A party cannot. Ante 336.

Matter alleged out of time cannot be traverſed. D. acc. Bro. Traverſe. pl. 111. Bl. 1090.

But then it was argued by the defendant's counſel, that there was a traverſe; for (by them) the eſſential part of a traverſe is but the denial of a material matter alleged by the plaintiff or defendant reſpectively, the formal part is *abſque hoc*; but that a traverſe is good without the words *abſque*, is expreſsly reſolved 1 *Saund.* 22. *Bennet v. Filkins.* Then here is an averment, that the bond was delivered the thirtieth of *November* and not before; which is as expreſs a denial, as if the defendant had ſaid, that the bond was firſt delivered the thirtieth of *November*, *abſque hoc* that it was delivered the twentieth of *November*, or at any other time before the thirtieth. But as to this the chief juſtice ſaid, that *non antea* would be a traverſe in ſome caſes *, but not here. 2. There

* Mr. Jacob ſaid, that the reaſon he gave was, that in this caſe one cannot conclude to the country, becauſe there ought to be other matter alleged to make the date material; otherwiſe where that is the ſingle matter of the plea.

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is here a ſpecial demurrer, and *(a) caret forma* ſhewn for cauſe. And *Rokeby* juſtice ſaid, that if a man ſhews any thing for cauſe of demurrer upon record, he *(b)* may aver other matters *ore tenus*.

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(a) Vide Poſt. 802.

(b) Vide 4 Ann. c. 16. ſ. 1.

Another exception to the plea was, that the defendant has not ſhewn the writ, by which the ſheriff arreſted *William Benſon*, at large. But to that it was anſwered, that the defendant is a ſtranger to the arreſt, and therefore cannot know at whoſe ſuit the writ iſſued, but the plaintiff himſelf has it in his cuſtody, and therefore it is well enough. But to this point the court gave no opinion.

Another exception was, that the plea is double, for the defendant pleads the ſtatute, and alſo has pleaded matter to avoid it at common law; for he ſays, that the ſheriff took the bond of *William Benſon adtunc et ibidem capto et arreſtato*, which appears to be after the return of the writ, and therefore falſe impriſonment, and ſo avoidable by dureſs. But to this it was anſwered, that it is one intire plea, and intirely upon the ſtatute; for a man cannot avoid a bond by dureſs of impriſonment of a ſtranger, and he is a ſtranger who was impriſoned. But to this point the court gave no opinion. Then I took exception to the declaration, that it is ſaid, that the defendant bound himſelf to the plaintiff *per nomen (c) Thomae Pullein vicecomitis comitatus praedicti*, and it does not ſay of what county he was ſheriff; and the *per nomen* is to be taken to be the ſpecifick words of the bond; and ſo it is not taken by the name of office, as the ſtatute requires. But the court did not regard this objection, becauſe it appears upon the whole declaration, that he was ſheriff of *Yorkſhire*; and if there was ſuch omiſſion in the bond upon the *oyer* the bond ought to have been entered at large, and then advantage might have been taken of it, but not now. Judgment for the plaintiff by the whole court for want of the traverſe.

A deed cannot be avoided for dureſs of impriſonment on a ſtranger.

(c) Vide Palm. 378. 2 Roll. Rep. 365.

Waters *verſ.* Glaſſop.

THE plaintiff declares, that the defendant's ſon was indebted to him in ———, and that he had a deſign to arreſt him for it; that the defendant, in conſideration that the plaintiff at the ſpecial inſtance and requeſt of the defendant would forbear to arreſt the defendant's ſon until after the twenty-third of *October*, the defendant aſſumed to pay to the plaintiff on or before the twenty-third of *October* ſo much as the defendant's ſon ſhould be indebted to the plaintiff upon the balance of the account to be ſtated between the defendant's ſon and the plaintiff, and the plain-

Forbearance to arreſt a debtor until after a particular day is a good conſideration for a promiſe by a third perſon to pay the debt on or before the day. Vide Com. Action on the Caſe upon Aſſumpſit. B. 1.

2d Ed. vol. 1. p. 138. F. 8. 2d. Ed. vol. 1. p. 149. In an action upon a promiſe to pay what a debtor of the plaintiff ſhould owe him upon the balance of an account to be ſtated between them, an averment that an account was ſtated of all debts owing by the debtor to the plaintiff and that the debtor was thereupon found to owe 20*l.* is unexceptionable after verdict.

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tiff averred, that an account was ſtated of all debts owing by the defendant's ſon to the plaintiff, and upon that account the defendant's ſon was found indebted to the plaintiff in 20*l.* and avers, that he forebore to arreſt the defendant's ſon from the time of the promiſe *hucuſque*; and that the defendant did not pay the 20*l.* &c. Upon *non aſſumpſit* pleaded, verdict for the plaintiff. And *Ward* moved in arreſt of judgment, that the conſideration was not good; becauſe ſince the plaintiff was to forbear until after the twenty-third of *October*, and the defendant to pay the money on or before, it might be, that after the defendant had paid the money the plaintiff would not perform his part, but arreſt the defendant's ſon, before the time agreed by the promiſe. *Sed non allocatur*. For *per curiam* the conſideration is well enough, for the defendant has to the laſt inſtant of the twenty-third of *October* to pay the money, and the next inſtant for forbearance the plaintiff has performed his part, for he is not bound to forbear but only one inſtant after the twenty-third of *October*, and therefore it is well enough. A ſecond exception was, that the defendant aſſumed to pay all that ſhould appear to be due by the defendant's ſon to the plaintiff upon the balance of the account to be ſtated between them, which is to be intended of all debts due as well of the one ſide as of the other, and there is here an averment only, that an account was made of all debts due by the defendant's ſon to the plaintiff, but perhaps if an account had been ſtated of all debts due on both ſides, the plaintiff might have been found debtor to the defendant's ſon, and not *vice verſa*; and therefore the defendant aſſumed to pay only what ſhould be due upon ſuch account; and therefore for want of ſhewing, that ſuch an account was ſtated, the plaintiff has not intituled himſelf to his action againſt the defendant. *Sed non allocatur*. For *per curiam*, they will not intend after a verdict, that any thing was due from the plaintiff to the defendant's ſon. And judgment for the plaintiff.

Hill *verſ.* Vaux.

S. C. Carth. 461.

A cuſtom that the parſon ſhall ſend for his tithe milk is good, S. C. 12 Mod, 206. Holt, 672. Vide ante 129, and the caſes there cited.

MOTION was made, that the king's bench would grant a prohibition to the ſpiritual court, where the defendant *Vaux* libelled againſt the plaintiff for tithes of milk. And it was grounded upon a ſuggeſtion of a cuſtom, that every inhabitant in the pariſh, who kept cows there, had uſed time whereof, &c. to ſet out the whole meal of milk upon the ninth day of *May* at night, and upon the

A modus to pay part of the thing which is tithe is not good unleſs it is to be paid in a more beneficial manner than that which the law preſcribes. S. C. Salk. 656. 12 Mod. 206. Holt, 672. R. acc. Cro. Jac. 47. pl. 17. Cro. Eliz. 609. pl. 15. 1 Mod. 229. Poſt. 504. 677. Bunb. 307. D. acc. 1 Anderſ. 199. pl. 234. A modus in lieu of tithe of milk to pay the whole evening's meal on 9th of May, and the whole morning's on the 10th, and ſo on every ninth evening and morning until a lamb yeaned in the enſuing year ſhould be heard to bleat there, is unreaſonable.

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tenth day of *May* in the morning, *et ſic ſuper quemlibet nonum diem tunc proximè ſequentem*, until one lamb yeaned in the next year following ſhould be heard to bleat there; and the milk ſet out in ſuch manner the vicar for the time being had uſed to ſend a ſervant to bring to him; and that was in ſatisfaction of all tithes of milk. And a rule was made, that a prohibition ſhould be granted, *niſi cauſa*, &c. Upon which *Wright* king's ſerjeant at the day appointed argued, that the rule ought to be diſcharged; becauſe unreaſonable cuſtoms are void. *Hob.* 175, *Topſall v. Ferrers*, 329. *Barker v. Cocker*. Then this cuſtom is unreaſonable, becauſe it forces the parſon to ſend for the milk where it is milked; and then if it be a great pariſh, he muſt keep more ſervants than his vicarage will ſuſtain. And in *Raym.* 277, *Dodd v. Ingleton* it is held, that tithe milk ought to be brought to the parſon's houſe. And of this opinion was *Rokeby* juſtice. But *Holt* chief juſtice *contra*. For (by him) if a pariſhioner ſets forth a cuſtom, to pay the tithes to the parſon at his houſe, though he preſcribes to pay them in kind; this will be a good cuſtom. And for that he cited the opinion of *Popham* chief juſtice, *Cro. Eliz.* 609. *Auſtin v. Lucas*, where he ſays that a preſcription, to pay to the parſon the tenth quart of milk at the parſon's houſe, would be a good *modus*. And *per Holt*, the reſolution in *Raym.* 277, is an equitable reſolution, founded upon the uſage of the neighbouring pariſhes. See *Palm.* 341, 381, *Wiſeman v. Denham.* 2. *Wright* king's ſerjeant argued, that this cuſtom is a plain preſcription *in non decimando* for a great part of the year. For the preſcription is in truth to pay leſs in the compaſs of the whole year than a tenth part. And then no cuſtom is good to pay the ſame thing in kind, unleſs it be to be paid in a more beneficial manner, than that which the law preſcribes. But where there is ſome alteration in the payment of that which the law appoints for the advantage of the parſon, though the advantage be ſmall, yet the cuſtom ſhall be good. *Hob.* 250. *Hetl.* 133.

But againſt this *Coniers* king's counſel argued, that the cuſtom was good. For (by him) the uſual time for ceaſing from this payment in this pariſh is the middle of *March*; for being in *Lincolnſhire*, there are no lambs yeaned before that time. Then for the days in which the parſon is deprived of the tithe which the law gives him, he receives very great recompence, in receiving the whole meal of milk every ninth day, when the cows give more milk than they do in *March* and *April*. And he cited the caſe of *Lee v. Collins*, 1 *Roll. Abr.* 648. 9 *Vin.* 8. *pl.* 3. where it is ſaid, that it is a good *modus* for tithes of eggs, to pay in *Lent* thirty eggs for all tithes of eggs. *Sed non allocatur*. For *(per totam curiam)* the cuſtom is ill, and it is a plain *non decimando*. For ſuppoſe a lamb bleats there at the end of *December*,

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December, or at the beginning of *January*, the parſon ſhall loſe tithes for four months and more. Then a man cannot preſcribe to pay leſs of the ſame thing; but ought to preſcribe, to pay ſome other thing in lieu of it, or to pay it in ſome other manner than the law preſcribes. And *per Holt* chief juſtice, this does not reſemble the caſe of the thirty eggs in *Lent*, for there the cuſtom binds the pariſhioner to the payment of ſo many at that time; and whether he has hens or not, he is obliged to it; ſo that he may be obliged to buy eggs to pay the parſon; and that makes it a good cuſtom. But if the cuſtom was that he ſhould pay thirty eggs of his own hens, the cuſtom would be ill. The rule for the prohibition was diſcharged.

A modus in lieu of tithe of eggs to pay thirty *generally* in Lent, is good.

A modus to pay thirty eggs *of his own hens*, not.

Hawkins *verſ.* Cardy.

S. C. Carth. 466.

THE plaintiff brought an action upon the caſe upon a bill of exchange againſt the defendant, and declared upon the cuſtom of merchants, which he ſhewed to be thus; that if any merchant ſubſcribes a bill, by which he promiſes to pay a ſum of money to another man or his order, and afterwards the perſon to whom the bill was made payable indorſes the ſaid bill, for the payment of the whole ſum therein contained, or any part thereof, to another man, the firſt drawer is obliged to pay the ſum ſo indorſed to the perſon to whom it is indorſed payable; and then the plaintiff ſhews, that the defendant *Cardy*, being a merchant, ſubſcribed a bill of 46*l.* 19*s.* payable to *Blackman* or his order; that *Blackman* indorſed 43*l.* 4*s.* of it payable to the plaintiff, &c. The defendant pleaded an inſufficient plea, The plaintiff demurred, and the defendant joined in demurrer. And adjudged *per totam curiam*, that the declaration is ill. For a man cannot apportion ſuch perſonal contract, for he cannot make a man liable to two actions, where by the contract he is liable but to one. As if *A.* grants a rent charge of 20*l.* *per annum* to *B. B.* grants 10*l.* to *C. C.* (*a*) cannot compel the terretenant to attorn. So if lands are conveyed with warranty to *A.* and *B.* their heirs and aſſigns, if partition be made, the warranty is extinct. See *Hob.* 25, *Roll.* and *Oſborne's* caſe. But if in the principal caſe the plaintiff had acknowledged the receipt of the 3*l.* 15*s.* the declaration had been good. And though it was objected by Mr. *Northey* for the plaintiff, that the plaintiff has made payment of a part to be part of the cuſtom, and therefore it was well enough by the cuſtom. *Holt* chief juſtice anſwered, that this is not a particular local cuſtom, but the common cuſtom of merchants, of which the law takes notice; and therefore the court cannot take the cuſtom to be ſo. And the whole court were of opinion that judgment ought to be entred for the defendant. But upon the importunity of Mr. *Northey* leave was given to the plaintiff, to diſcontinue upon payment of coſts.

A perſonal contract cannot be apportioned. S. C. Salk. 65. vide 3 Bulſtr. 232. 3 Vin. 4. Therefore a bill of exchange cannot be indorſed over for a part only of the money due thereon. S. C. Salk. 65. 12 Mod 213. The law takes notice of the cuſtom of merchants. Vide ante 175. And therefore will not attend to a falſe deſcription of it.

(*a*) Vide 4 Bac. Abr. 368, 369. 2 Lev. 240.

Rex

Rex *verſ.* Sir Richard Raines.

S. C. Salk. 299. 3 Salk 162. Carth. 457. Holt. 310. 12 Mod. 205.

A *Mandamus* was directed to Sir *Richard Raines*, to command him to grant probate of the will of *Edith Pinfold* to one *Richard Watts*, who was made executor of it. Sir *Richard Raines* makes return to it, and admits, that *Edith Pinfold* made her will, and *Watts* executor of it; but ſays farther, *quod luculenter et judicialiter fuit probatum, et conſtat* to him, that *Watts* is worth nothing, but abſconds for debt; and therefore that it is lawful to him to defer the granting of the probate, untill *Watts* find ſufficient ſecurity to perform the intent of the will. And it was argued by Sir *Bartholomew Shower*, Mr. *Montague*, and Dr. *Waller*, the king's advocate general, a civilian, that this return was good, and that a peremptory *mandamus* ought not to be granted. And Dr. *Waller* ſaid, that in fact the caſe was thus; *Edith Pinfold* made her will, and *Richard Watts* her nephew her executor, and deviſed to him 100*l.* for a legacy, and ſome cattle; ſhe deviſed alſo to *Baines* her brother 500*l.* and the reſidue of her perſonal eſtate to the ſon of *Baines*; the will was brought by *Baines* to the prerogative court to be proved; and it was oppoſed by *Huntley*, but was not promoted at all by *Watts*; ſentence paſſed in the prerogative court for *Baines*; upon which *Huntley* appealed to the delegates, and the ſentence there was confirmed; whereupon the will was returned into the prerogative court, and then *Watts* claimed probate; but upon examination it appeared to the judge, that he was an inſolvent and neceſſitous man, and had received his legacy, and therefore the judge required caution; upon which *Watts* obtained this *mandamus*, and to it the judge made this return, which (by Dr. *Waller*) is good. For 1. if there is any default in the judge in the adminiſtration of his office, it is a proper ſubject for an appeal; for this will, being of chattels, is altogether of eccleſiaſtical conuſance; and therefore as the ſpiritual judge ſhall judge of the validity of the will, ſo he ought to make a judgment, whether he ought to grant probate of it or adminiſtration, or if the executorſhip be conditional, as it may be, whether the condition be performed, *&c.* in all which caſes if he makes a falſe judgment, the proper remedy is appeal, and not to come in this manner for remedy to the king's bench.

A mandamus lies to compel the ordinary to grant the probate of a will to an executor. R. acc. 1 Vent. Str. 857. Fitzg. 125. 1 Barnard. B. R. 280 Andr. 365. 2 Kel. 159. D. acc. poſt. 544. Gilb. Eq. Rep. 208.

The Ordinary cannot refuſe probate becauſe the executor is inſolvent and will not give caution. S. C. 11 Vin. 359. pl. 12. Semb. acc. 1 Show. 293. 1 Salk. 36. Comb. 185. Skinn. 299. Holt. 305. 12 Mod. 9. Str. Fitzg. Barnard. B. R. Andr. and Kel. ubi ſupra.

2. He argued that the judge has done nothing but what in ſuch caſes he ought to do; for in ſuch caſes he may properly require caution. In the time of the heathen emperors the teſtaments were repoſed in the colleges of the *pontifices*, and from the firſt *chriſtianity* of the *Roman* emperors the biſhops

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biſhops were intruſted with them. Now the civil law was, that ſecurity ſhould not be demanded *de haerede*, which at that time included what we now call executor, unleſs he was inſolvent; and then it was lawful to demand caution or ſecurity. But after this the canon law followed, and then they made uſe of the word executor, which was before included in the word heir; and of them there are three ſorts. 1. *Legitimus*, *viz.* the ordinary. 2. *Datus*, *viz.* he whom the ordinary appoints, and he always gives ſecurity. 3. *Teſtamentarius*, who came inſtead of the heir, which is he whom we call executor κατ' ἐξοχην. And then as the heir before, if he was inſolvent, always gives caution; ſo for the ſame reaſon an inſolvent executor always gives caution. To ſay the truth, there is a difference made, when the teſtator knew at the time of the making his will, that the perſon, whom he conſtituted executor, was then inſolvent, and when the executor is become inſolvent by matter *ex poſt facto*; but at what time *Watts* became inſolvent, does not appear in this caſe; and therefore to juſtify the acting of a judge, the court will intend, if it be material, that he became inſolvent ſince the death of the teſtatrix, rather than at the time of the will made, *Linw. provinc. lib.* 3. *tit.* 13. *c.* 3. *tit. de teſtamentis*, it is ſaid, that no religious man ſhall be executor, unleſs his ſuperior takes care to give caution for the due execution of the will, and for the loſs that may happen by his adminiſtration; and *Linwood* gives the reaſon of it, becauſe it appears that ſuch a perſon is inſolvent; which proves that inſolvent perſons ought to give caution. So *Linw. lib.* 3. *tit.* 13. *c.* 5. before the executor be admitted by the ordinary to execute the will, he ought to take an oath, *&c.* (which is the conſtant practice, and yet no mention is found of ſuch oath, before that which theſe conſtitutions in *Linwood* make of it; and yet before the new ſtatute if quakers refuſed to take ſuch oath, no probate of any will uſed to be granted to them,) *et ſi oporteat*, ſays *Linwood*, he ſhall give ſufficient caution. To the ſame purpoſe *Swinb. 6 part*, *par.* 14. *f.* 6. *pag.* 363. 464. To which Sir *Bartholomew Shower* added, that if an executor is *non compos*, the ordinary is not bound to grant probate to him, becauſe he hath apparent diſability to execute the will, which ſtrongly reſembles this preſent caſe. 2. He ſaid, that if the executor refuſes to take the oath, this amounts to a refuſal of the office, and the ordinary may grant adminiſtration *cum teſtamento annexo*. Why then ſhall not the refuſal to give ſecurity amount to a refuſal of the office of executor; ſince there is no poſitive law, that in ſuch caſe the ordinary ſhall adminiſter an oath, more than in this caſe that he ſhall demand caution? 3. He ſaid, that *mandamus*'s are granted oftentimes, to compel the granting of adminiſtration; and rightly, becauſe they ſeem to be founded upon the act of parliament, which appoints

Probate may be refuſed to an executor *non compos*. D. acc. Salk. 36. Holt, 305. 12 Mod. 9. Skinn. 299.

appoints the granting of administrations; but one cannot find any (a) precedents of *mandamus*, to compel the judges of the civil law, to execute their law, which seems to be the present case.

(a) Vide post. 539.

But against this it was argued by Mr. *Northey* and Mr. *Eyre*, that a peremptory *mandamus* ought to be granted. For (by them) the return is not sufficient, because it is, *quod constat*, &c. which is no positive averment. *Raym.* 153. 2. They argued, that the prerogative court cannot in such case require caution, for the same reasons that the court afterwards gave for the ground of their judgment, and therefore unnecessary to be repeated.

Per Holt chief justice. Wills and testaments are of ecclesiastical conusance, not by force of the civil or canon laws (for (b) they bind no farther here, than as they have been received here) but by the law of the land. Then if the ecclesiastical courts proceed to enlarge the power of the judge, contrary to that which the common law allows, the king's bench will prevent all sorts of encroachments. As if an executor be sued in the ecclesiastical courts to make distribution, he not being residuary legatee; though that were allowed by the canon law, yet the king's bench would grant a prohibition to stay any such suit; for all suits for distribution were prohibited by the king's bench, until the 22 & 23 *Car.* 2. *c.* 10. made them lawful. Dr. *Waller* has not quoted any canon law, that the ordinary in such case ought to take caution; and the common law will not permit him to exact security for the insolvency of the executor. For suppose in this case (as the fact is) the executor will not give security, and yet will not renounce the executorship; the ordinary cannot compel him to give security. What must be done? Though the refusal of the oath amounts to a refusal of the office of executor (because the oath is allowed by the common law, for it is proper to take a promissory oath, that he will execute the office justly which he is going to execute) yet the refusal to give security will not amount to a refusal of the office of executor; because it is against common right to require collateral security. Then the testament will continue in force, the ordinary cannot grant administration *cum testamento annexo*, and so there will be a failure of justice, no body being capable to sue the testator's creditors. One half of what one finds in *Linwood* is not the law of the land. And as to the case of religious persons, objected out of *Linwood*, he said, that if a monk may be made an executor, he cannot accept the office without leave of his superior; and then if the superior gives him leave to be executor, without giving other collateral security, the superior by his leave given is become security; and if the monk commits a *devastavit*, the suit shall be against the abbot and the monk, and the execution will be of the goods of the house. And *Turton* justice

(b) D. acc. ante 7.

Spiritual court cannot compel an executor to make distribution. R. acc. ante 86.

Refusal by an executor to take his oath, is a refusal of his office.

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juſtice agreed with *Holt* chief juſtice *in omnibus*. But *Roke by* juſtice ſeemed to be of opinion, that the grievance in the preſent caſe would be properly remedied by appeal. And he ſaid, that in the province of *York* ſecurity was always given upon the granting of the probate of a will, without any diſpute made about it. Upon which a day was given to Dr. *Waller*, to certify the king's bench, by producing precedents, whether the practice had been in the prerogative court to take caution in ſuch caſe. At which day no precedent of it being ſhewn, nor ſatisfaction thereof given to the court, *Holt* chief juſtice with the concurrence of the other judges pronounced the opinion of the court, that a peremptory *mandamus* ought to be granted in this caſe; becauſe the eccleſiaſtical court cannot require caution in this caſe. 1. For when a man is made executor, no body can add qualifications to him, other than thoſe which the teſtator has impoſed; but he ſhall be who, and in what manner, the teſtator ſhall judge proper. 2. The executor has a temporal right, of which he is barred by the refuſal of the probate, inaſmuch as he cannot before probate ſue in *Weſtminſter-Hall*. 3. There are no precedents in the canon law to warrant this; and the practice has been always contrary. And if any caſes happen, in which equity may be requiſite; there is another channel here, where it runs without reſorting to the ſpiritual court, *viz.* chancery (*a*). A peremptory mandamus was granted. And note, Mr *Robert Eyre* told me, that the lord chancellor *Somers* well approved this reſolution.

Executor cannot ſue before probate. Semb. acc. 9 Co. 38. a. Com. 151. 1 T. R. 480. 3 T. R. 130. Sed vide 3 Lev. 57. Skinn. 23. 87. 1 Roll. Abr. 917. l. 7. 11 Vin. 203. pl. 2. 3. Danv. 369. pl. 2. Comb. 371. Salk. 302, 303. 306. 3 P. Wms. 351.

(*a*) The court of chancery did accordingly on a bill filed reſtrain Watts from intermeddling until he ſhould have given ſecurity. Carth. 458. Holt. 310. Vide 2 P. Wms. 163. 3 P. Wms. 337.

Jackſon *verſ.* Pigott

S. C. 12 Mod. 212.

Aſſumpſit upon a bill of exchange. The plaintiff declares that *J. S.* drew a bill of exchange upon the defendant, dated the twenty-fifth of *March* 1696, payable within one month after; that afterwards, *viz.* ſuch a day in *April* 1697 he ſhewed the bill to the defendant, and he promiſed to pay it *ſecundum tenorem et effectum billae praedictae*. *Non aſſumpſit* pleaded, and verdict for the plaintiff. Sir *Bartholomew Shower* moved in arreſt of judgment, that the promiſe was void, becauſe impoſſible to be performed, the day of payment being paſt at the time of the acceptance of the bill, and ſo impoſſible to be performed *ſecundum tenorem et effectum billae praedictae*; all which appears upon the plaintiff's declaration. To which Mr. *Northey* for the plaintiff anſwered, that it will amount to a promiſe to pay generally. Of which opinion was the whole court. And *Holt* chief juſtice took the diſtinction, where the day of payment is paſt at the time of the

An acceptance to pay a bill of exchange according to its tenor made after the time appointed for its payment, is a general acceptance to pay it on demand. S. C. Salk. 127, Carth. 459. R. acc. poſt. 574. Salk. 129. By an allegation that a bill of exchange was accepted before the time appointed for its payment a man precludes himſelf from giving in evidence an acceptance afterwards. Vide Dougl. 640. 1 T. R. 235.

the

the acceptance, as it was in this caſe, and where the day of payment is to come. In the former caſe acceptance to pay *ſecundum tenorem et effectum billae* will amount to a general acceptance to pay the money; *contra* in the latter caſe. For in the former caſe it is impoſſible to pay the money as the bill appoints. But he ſaid, that it had been better in this caſe, to have declared of a general promiſe, without having reſtrained it by the *tenorem et effectum billae*. And (by him) in ſuch caſe the acceptance of a bill amounts to an expreſs promiſe to pay it. But (by him) if the plaintiff declares, that the acceptance was before the day appointed for the payment, and that he accepted to pay it *ſecundum tenorem et effectum billae praedictae*; and it appears upon the evidence, that the acceptance in fact was after the day of payment; that would be againſt the plaintiff. Judgment for the plaintiff.

Anonymous.

A covenant in a ſettlement that "the lands ſo limited in jointure," ſhall for ever continue of a certain yearly value, will extend to all the eſtates raiſed in thoſe lands by the ſettlement, if any other lands are mentioned therein. Vide Com. covenant. D. 2d. Ed. vol. 2. p. 565. Particularly if the firſt eſtate is limited to the huſband. If no other lands are mentioned therein, it muſt perhaps be confined to the eſtate of the wife.

COVENANT. The plaintiff declared upon an indenture of ſettlement upon marriage, by which the father ſettled certain lands to the uſe of *J. S.* for four years, and afterwards to the uſe of the ſon for life, and then to the daughter for life, and then to the firſt, ſecond, *&c.* ſons of their two bodies in tail, *&c.* and the father covenanted, that the lands ſo limited in jointure, after the expiration of the four years, ſhould be, and for ever continue of the annual value of 200*l. per annum*; and the breach was aſſigned, that the lands were not of ſuch value. This action was brought by the ſon againſt the executor, who demurred to the declaration. And Mr. *Ward* took exception, that this covenant did but extend to the eſtate for life limited to the wife for her jointure, and then the ſon cannot have an action. For the words (eſtate ſo limited in jointure) reſtrained it to this eſtate only; and the ſecurity muſt be intended to have been for the benefit of the wife only, to the end that ſhe might be certain of a jointure of ſuch a value. And it cannot be intended, that the father meant to oblige himſelf to ſecure it to his ſon. And he cited *Hob.* 273. 329. 2 *Saund.* 413, *Alleyn* 10. 2 *Ventr.* 140. caſe where covenants are reſtrained by the intent of the parties. That the words [for ever continue] cannot be conſtrued, to make a perpetual covenant, but muſt have ſome reſtriction; and that which he had mentioned, ſeemed to be the moſt proper; and that if this conſtruction were not made, the words [ſo limited in jointure] would be idle and of no effect; for it does not appear, that there were any other lands compriſed in the deed. But *Northey* for the plaintiff argued, that the covenant is, that after the four years the lands ſhould be and continue for ever, *&c.* Now the ſon having by the limitation of the deed the next immediate eſtate after the four years expired, if this covenant is not conſtrued to extend to him, it will be deſtroyed; ſince his eſtate commences immediately

Anonymous. mediately upon the expiration of the four years. Which *Holt* chief juſtice granted, and ſaid, that the words [lands ſo limited in jointure] were only a deſcription of the lands to which the covenant ſhould extend; and it is advantageous to the wife that the lands ſhould be of ſuch value to the ſon of her huſband, for ſhe may live in a more plentiful manner. And as to the objection, that the words would be idle and of no effect, he anſwered, that notwithſtanding any thing to the contrary appearing to the court, there might be other lands mentioned in the deed; and if the defendant would have taken advantage of this exception, he ſhould have prayed *oyer* of the deed, to the end that it might have appeared, that there were no other lands compriſed; for the plaintiff has no need to ſhew more of the deed in his declaration, than concerns his caſe. And as to the extenſiveneſs of the covenant he took this difference, that it would extend to all eſtates raiſed by the deed. As if *H.* limits an eſtate to *A.* for life, remainder to *B.* for life, remainder to the firſt, ſecond, *&c.* ſons of their two bodies, remainder to his own right heirs, with ſuch a covenant annexed to it, it will extend to the eſtates for life, and the eſtates tail; but if for default of iſſue of the bodies of *A.* and *B.* the reverſion deſcends to the collateral or lineal heir of *H.* he ſhall never take advantage of it, becauſe he is not privy to the conſideration of the deed, nor party to the deed, (*a*) nor is his eſtate raiſed by the deed. But if in ſuch caſe the remainder had been limited to the right heirs of *A.* or *B.* or of *J. S.* they might ſue upon this covenant, becauſe they had taken by the limitation of the deed, and are privy to it. Judgment was given for the plaintiff by the whole court. *Ex relatione m'ri Jacob.*

(*a*) Vide 2 Bl. Com. 276.

Rex *verſ.* Bradford.

S. C. 3. Salk. 389. pl. 13.

An indictment will not lie for the mere non-performance of a promiſe. Vide Str. 893. Burr. 1125. See alſo ante 213.

MR. *Upton* moved to quaſh an indictment, in which *Bradford* was indicted, for not curing the pox of *J. S.* in three weeks, contrary to the promiſe of the defendant, he being a phyſician; and the whole fact ſpecially ſet forth in the indictment. And it was quaſhed *niſi*, *&c.* by *Rokeby*, and *Turton*, juſtices, *abſente Holt* chief juſtice.

Cook

Cook *verſ.* Harris.

Intr. 10 *Will.* 3. B. R. Rot. 490.

THE plaintiff brought debt againſt the defendant as aſſignee of a term, being executor of the firſt leſſee; in which the plaintiff declared, that he demiſed a meſſuage to *John Harris* for the term of twenty one years, rendering 60*l. per annum* rent, *et quod poſtea, viz. primo Julii totum reſiduum termini praedicti annorum devenit per aſſignationem* to the defendant; and this action was brought for rent due at the *Michaelmas* following. The defendant pleads, *quod ante diem ſolutionis redditus praedicti aut aliqua pars inde devenit debita*, ſhe aſſigned *totum ſtatum, intereſſe, et terminum ſuum viginti et unius annorum, to J. S. viz.* 29 *Junii*, and that the aſſignee accepted it, *&c.* The plaintiff replies, that the defendant aſſigned *totum jus titulum ſtatum, intereſſe et reſiduum dicti termini ipſius Mariae* (*viz.* the defendant) *in narratione praedicta ſuperius ſpecificata et expreſſa*, to defraud the plaintiff. The defendant rejoins, and traverſes the fraud. Upon which the plaintiff demurs. And Mr. *Northey* took exception to the plea, becauſe it appears that the defendant aſſigned before the term was aſſigned to her by the aſſignment, of which the plaintiff declares; but ſhe does not ſay, that ſhe aſſigned after. Now it may be, that it was reaſſigned to her again upon the firſt of *July*, which is very conſiſtent with her plea, and then ſhe ſhall pay the plaintiff his rent. But if the plea had been, that after the defendant was aſſignee ſhe aſſigned, *viz.* ſuch a day, which in fact was before the day of the aſſignment to her mentioned in the plaintiff's declaration, there the *viz.* had been void, and the plea good. But *contra*, ſince the words *poſt aſſignationem* are not in the plea. And *per Holt* chief juſtice this plea ought to have ſaid *poſt aſſignationem*; for the defendant muſt either traverſe the aſſignment mentioned in the plaintiff's declaration, or confeſs and avoid. And therefore here if the plaintiff had not replied, this plea had been ill; but here the plaintiff has aided it by his replication, where he ſays, that the defendant aſſigned *totum jus titulum ſtatum intereſſe et reſiduum dicti termini ipſius Mariae in narratione praedicta ſuperius ſpecificati, &c.* And (by him) the ancient method of pleading aſſignments was, *virtute cujus* the aſſignee entred and was poſſeſſed; but (*a*) that is diſuſed now, for the (*b*) aſſignee has the eſtate in him before entry, though not to bring treſpaſs. And (by him) if there be an agreement between the leſſor and leſſee that the leſſee ſhall pay the rent at the beginning of every year before hand; when the leſſee at the end of the firſt year pays his rent (which he deſigns for the year following) yet in judgment of law it is rent for the year paſt, and ſo the leſſee in judgment of law pays no rent for the laſt year of the term.

In an action againſt the aſſignee of a term the plea of an aſſignment over ought to ſhew that ſuch aſſignment over was made after the aſſignment ſtated in the declaration. But if it does not, no objection can be made againſt it after a replication that ſuch aſſignment over was fraudulent.

Tis not neceſſary that notice ſhould be given to the reverſioner of an aſſignment over.

Matter ſtated under a videlicet repugnant to what went before is ſurpluſage, R. acc. Str. 232. Vide 1 Saund. 287.

(*a*) Sed vide Dougl. 442, 445.
(*b*) Vide Dougl. 438. 445.

Then

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Then *Rokeby* justice took exception to the plea, that it is not said, that the plaintiff had notice of the assignment. And he said, that it was adjudged in the Common Pleas between *Tovey* and *Pitcher*, *Carth.* 177. 3 *Lev.* 295. *Salk.* 81. 2 *Ventr.* 234. that in such case there ought to be notice. [Note, Mr. *Place* told me, that he was in the Common Pleas when this case of *Tovey v. Pitcher*, was adjudged; and judgment was given by *Pollexfen*, *Powell*, and *Rokeby*, that the lessor ought to have notice, contrary to the opinion of *Ventris*.] But *Holt* chief justice said, that that judgment of the Common Pleas was reversed in the King's Bench upon error brought, by the opinion of the whole court, *Carth.* 178. 3 *Lev.* 296. *Salk.* 81. 2 *Vent* 234; which reversal was grounded upon the reason of *Walker's* case, 3 *Co.* 23, &c. Judgment was given for the defendant.

Yard *verſ.* Eland.

On a promise to a husband to pay him money due to his wife as executrix in consideration of his forbearing to sue for it, the husband may sue alone. S. C. Carth. 462. 12 Mod. 207. Salk. 117. pl. 8. vide acc. 1 Sid. 299. vide Com. Baron and feme. V. 2d. Ed. vol. 1. p. 571. And S. C. Carth. 462. 12 Mod. 207. D. acc. Yelv. 84. Cro. Jac. 110. And the money when recovered will not be Assetts. S. C. 12 Mod. 207. and Rokeby contra Carth. 462. D. cont. Yelv. 84. But it will be a devastavit in the husband, pro tanto, S. C. 12 Mod. 207. and Rokeby contra Carth. 462. In an action on a promise made in consideration of future forbearance, 'tis sufficient for the plaintiff to aver that he did forbear, without alledging that he expressly consented so to do.

ASSUMPSIT. The plaintiff declares, that forasmuch as the defendant was indebted to the plaintiff's wife as executrix of *J. S.* for arrears of rent incurred in the life-time of *J. S.* the defendant assumed to the plaintiff, that in consideration that the plaintiff at the special instance and request of the defendant would forbear to sue the defendant until *Michaelmas* next following, he would pay the money to the plaintiff, *&c.* and that the plaintiff *assumptioni* of the defendant *fidem adhibens* forbore to sue, *&c.* until *Michaelmas*, *&c.* and avers, that his wife is alive, and that the defendant has not paid the money. And upon *non assumpsit* pleaded, verdict for the plaintiff. And *Gould* king's serjeant moved in arrest of judgment, 1. That the wife ought to have been joined, because the husband has this debt in right of the wife, as she is executrix; and then this promise will follow the nature of the debt, and shall be *assets*; and therefore the wife ought to be joined. The case in *Yelv.* 84. and *Cro. Jac.* 110. says, that it was ill for want of averment that the wife was alive; but it does not say, that it had been good if her life had been averred. And the case of *Tyrrel v. Bennet*, 1 *Sid.* 299. is where the debt was in the proper right of the wife; but here the original debt is due to the wife as executrix, and the debt when recovered must be *assets*, which could not be, if the nature of the contract were altered, for then it would be a *devastavit*; and if it be not altered, the wife ought to be joined. But Mr. *Carthew* argued *e contra*. Of which opinion was the whole court. For *per Holt* chief justice, the wife could not be joined here, because she is neither privy to the contract, nor the person to whom the money ought to be paid. If the money had been to be paid to the wife, then there might have been some reason to join her with the husband. For if *A.*

assumes

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aſſumes to *B.* to pay money to *C.* upon good conſideration *C.* may have an action againſt *A.* for this money. But here the payment was appointed to be to the huſband, and reaſonably; for by the marriage the whole (*a*) adminiſtration devolves upon him, and he might have releaſed this debt, and therefore forbearance by him is a good conſideration to maintain *aſſumpſit*. But a recovery in this action would make a new contract, which would amount to a *devaſtavit*. (For it will not be *aſſets* of the teſtator's eſtate; for if the huſband dies before execution ſued, the executor or adminiſtrator of the huſband, and not the wife, ſhall ſue execution; and it will not be like a recovery by both of them.) And then the huſband will be chargeable to pay out of his own eſtate as much as he has recovered; but the old debt cannot be extinguiſhed until the money be paid to the huſband; for the promiſe is only a more ſubſtantial ſecurity, or rather another ſecurity for the debt; but it cannot extinguiſh it, becauſe it is of an inferior nature. But it might be a queſtion, if the wife died after judgment in this action, and before execution, by what means a man might make this *aſſets*; for it has been adjudged, that where an adminiſtrator recovered in trover for goods, and before execution the adminiſtration was repealed, the defendant maintained *audita querela*. If an executor ſubmits to an award, it is a *devaſtavit* after the award made. 21 *H.* 7. 29. If a woman executrix marries a man who commits a *devaſtavit*, it is a *devaſtavit* in both, and upon *devaſtaverunt* returned, judgment ſhall be againſt them both; and if the huſband dies, it ſhall ſurvive againſt the wife. Then ſerjeant *Gould* took another exception, that it is not averred, that when the defendant deſired a day of payment, the plaintiff conſented to give it him; but it is only ſaid, *quod aſſumptioni fidem adhibens* he forbore; ſo that the defendant might remain in fear all the time; and then the conſideration fails. But to this it was anſwered by the court, that it is averred that the plaintiff forbore, *&c.* which is ſufficient conſent. Judgment for the plaintiff.

(*a*) R. acc. Bl. 801. 3 Wilſ. 277. acc. Bro. Executors, pl. 147. D. acc. Salk. 306. Jenk. Cent. 79. pl. 56. Semb. acc. Yelv. 84.

Buſhell *verſ.* Lechmore

COVENANT for non-payment of rent. The defendant pleaded eviction, and concluded with a traverſe, that he at any time enjoyed the land from the time of the eviction until the day upon which the rent became due. The plaintiff replies, that he entered by virtue of a power reſerved to him in the leaſe, and traverſes the eviction. The defendant demurs. And *Holt* chief juſtice took exception to the plea, that the traverſe was immaterial; but yet he was of opinion, that it would not vitiate the plea: becauſe where a traverſe is immaterial, the adverſe party is not excluded

The unnecſſary or impertinent addition of a traverſe can only be taken advantage of by ſpecial demurrer. D. acc. Carth. 168.

In covenant for rent, if the defendant pleads eviction, a traverſe that he enjoyed after the eviction is impertinent. Vide 1 Leon. 110. pl. 149. To a plea of eviction a man may reply an entry by virtue of a power, and traverſe the eviction. Vide 1 Roll. Al. 838. 11 Vin. 456. G. pl. 2, 3.

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An immaterial traverſe may be paſſed over and a ſecond traverſe taken. R. acc. Carth. 99. acc. ante 121: and ſee the caſes there cited. See alſo Cro. Eliz. 418. pl. 13. and Common Pleader. G. 18. 19. 2d. Ed. vol. 5. 120.

cluded from an anſwer, but may reply, and traverſe the material part of the plea; and therefore this is aided by the general demurrer. But if it had been ſhewn for cauſe upon a ſpecial demurrer, it had been ill. But then he was of opinion, that the traverſe in the plaintiff's replication was an anſwer to the defendant's plea; and then the defendant, by not taking iſſue, has vitiated his plea; for, whether the plaintiff entered by virtue of any power, or whether (*a*) he was a mere treſpaſſer, if the defendant was not evicted, it will be no ſuſpenſion of the rent. Judgment for the plaintiff. *Ex rel. m'ri Jacob.*

(*a*) Vide T. Jon. 148. Cowp. 242. Hob. 326. Comb. 380.

Johnſon *verſ.* Long.

S. C. Salk. 10. pl. 3. Carth 455. Pleadings poſt. vol. 3. p. 259.

A man cannot bring two actions for the wrongful erection of one building. Vide Cro. Eliz. 402. Cro. Jac. 231. But he may bring an action for the continuance of it, after a recovery for the erection. R. acc. poſt. 713. Vide Cro. Eliz. 402. Cro. Jac. 231.

THE plaintiff brought an action upon the caſe againſt the defendant; and declared, that the defendant 21 *April* 9 *Will.* 3. erected a wall, which ſtopped the ancient lights of the plaintiff's houſe, *&c.* The defendant pleads, that the plaintiff brought another action in *Eaſter* term laſt paſt, for the erecting of this wall the firſt of *October* before, and recovered; and avers, that it was for the ſame erecting, *&c.* The plaintiff demurs. And judgment for the defendant. For though he might have another action for the continuance, yet he cannot have another action for the ſame erection. Judgment for the defendant.

Rex *verſ.* Gall.

The exceptions of a ſtatute ſhall relate to the day from which the purview takes effect. Under a power to inquire and hear and determine, by inquiſition, preſentment, bill of information before them exhibited, and by examination of two witneſſes, or by any of the ſame ways and means, juſtices of the peace may try by jury. S. C. Carth. 465.

AN information was exhibited againſt the defendant upon the ſtatute of 5 & 6 *Ed.* 6. *c.* 14. *ſ.* 9. for having bought live cattle, and having ſold them again, not having depaſtured them five weeks in his own paſture, *&c.* Upon not guilty pleaded, a ſpecial verdict was found, in which the act of general pardon 6 & 7 *Will.* 3. *c.* 20. was found, by which all offences (except thoſe thereafter excepted) committed before the twenty-ninth of *April* 1695, were pardoned; then follows an exception (upon which the queſtion in this caſe aroſe) of all offences committed contrary to any ſtatute, or to the common law, for which any information, *&c.* at any time within two years next before the day of aſſembling and holding of the ſaid parliament, or at any time ſince, had been commenced or ſued, *&c.* in any of his majeſty's courts at *Weſtminſter*, *&c.* and is depending and remaining to be proſecuted, *&c.* and the jury find that no information was commenced, *&c.* or depending, *&c.* againſt

The 21 Jac. 1. c. 4. extends to action on penal ſtatutes as well as informations. S. C. Salk. 372. R. acc. Salk. 373. 3 Salk. 200. 5 Mod. 425. R. cont. 1 Vent. 8. 2 Keb. 401. 424. 447. 458. 3 Lev. 71. 2 Mod. 264. Sed vide 1 Vent. 364. and 1 Bac. 39. But does not prevent proſecutions in B. R. for offences committed in the county in which that court ſits. R. acc. W. Jon. 193. Salk. 373. D. acc. 2 Keb. 424. q. v. acc. 1 Bac. 40. The 21 Jac. 1. c. 4. does not extend to any ſubſequent penal ſtatute, upon which remedy is expreſsly given by action of debt in any court of record. R. acc. Salk. 373. Vide 1 Bac. 40. To others it does. S. C. Holt 364. ſed vide S. C. Salk. 372. 3 Salk. 199. 12 Mod. 223. 5 Mod. 425.

the

the defendant for this offence at the day of aſſembling and holding of the ſaid parliament, nor within two years before; but that this information was commenced and ſued againſt the defendant afterwards, and before the twenty-ninth of *April* 1695, and was then depending; and if this offence be pardoned, then they find the defendant not guilty; and if not, then guilty, &c. And it was argued by Sir *Bartholomew Shower* for the defendant, that theſe relative words in the exception, *viz.* at any time ſince, &c. ſhould be expounded to refer to the firſt day of the aſſembling and holding of the parliament, which is the firſt day of the ſeſſion, at which time this ſtatute by relation was a law, for the judges cannot take notice of the time when it paſſed the royal aſſent. 1 *Sid.* 310. And therefore ſince the ſeſſion begun the twelfth of *November* 6 *Will.* 3. and at that time there was not any information depending, the defendant was not by the exception exempted from the benefit of the pardon. But againſt this it was argued by Mr. *Northey* for the informer, that (*a*) though an act ſhall be conſtrued generally to relate to the firſt day of the ſeſſions, yet that does not hold when there is a particular day mentioned, in which caſe the relation of the act is confined to ſuch a day. *Plowd.* 79. *b. Bro. parliament*, 86. *Hob.* 222. And he cited ſome caſes, where (*b*) things done in the term ſhall not relate to the firſt day of the term. 1 *Sid.* 373. 432. and 4 *Co.* 70. *b. Hynde's* caſe. A deed inrolled generally of ſuch a term may by averment be tied to the particular day upon which it was inrolled. Then ſince the twenty-ninth of *April* is appointed by the parliament, for the time to which the pardon ſhall extend; and ſince the act, by mentioning any time ſince, and which remains to be proſecuted, ſhews that it refers to another time ſince the firſt day of the ſeſſion, that ought to be underſtood of the twenty-ninth of *April* to which the pardon extends; and more eſpecially ſince the ſame clauſe of exception refers as to another particular to the thirtieth of *April*. Of which opinion was the whole court. And they held that the exception ought to be taken as generally, and as large as the purview; for the parliament could never deſign, that their pardon ſhould extend to pardon offences until the twenty-ninth of *April*, and that notwithſtanding their exception, which reſtrains it from pardoning thoſe which they thought unworthy of their pardon, ſhould be ſo ſhort, and that ſuch ſhould be unpuniſhed. Wherefore they held Sir *Bartholomew Shower's* conſtruction abſurd, and for this reaſon were all ready to pronounce judgment againſt the defendant. But then another exception was ſtarted by the defendant's counſel in arreſt of judgment; that in this caſe no information will lie in the king's bench for this offence; becauſe by 21 *Jac.* 1. c. 4. *ſ.* 1. it is enacted, that all informations, &c. upon penal ſtatutes ſhall be proſecuted before juſtices of aſſize, *niſi prius*, *oyer* and *terminer*, and gaol-delivery, and juſtices of peace, &c. having power to

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(*a*) Vide ante 159.

(*b*) Vide Burr. 1241. Cowp. 456.

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inquire, hear and determine them; and not in the courts of *Weſtminſter*, nor in other place, &c. and that if ſuch proſecution ſhould be in any other place, it ſhould be void. And therefore ſince power is given by the act 5 & 6. *Edw.* 6. to the juſtices of peace, to inquire of ſuch offences at their ſeſſions, this proſecution by the ſtatute 21 *Jac.* 1. is abſolutely void. But it was argued by Mr. *Wells* for the king, that this caſe is different from all other caſes upon penal ſtatutes. For by him, 1. Though the ſtatute 21 *Jac.* 1. *c.* 4. appoints the proſecution of offences againſt penal ſtatutes to be before juſtices of aſſize, of the peace, &c. yet the ſtatute extends only to ſuch things whereof the ſaid courts had conuſance before. 2 It extends only to ſuch things whereof they might inquire before by verdict of twelve men. Now this offence, for which the information is exhibited againſt the defendant, was not an offence at common law; then the juſtices of peace cannot have any other juriſdiction than that which is given them by the ſtatute; but the ſtatute 5 & 6 *Edw.* 6. *c.* 14. *ſ.* 10. does not give them power to inquire by verdict of twelve men or a jury; but it gives them power to proceed in a ſummary way, by examination of two witneſſes; for the ſtatute gives them power to make proceſs as though they had power to try by inquiſition; which is a plain intimation, that they had not power to try by inquiſition. 2. The words are, that they ſhall inquire, hear and determine, &c. by inquiſition, preſentment, bill or information, before them exhibited, and by examination of two lawful witneſſes, or by any of the ſame ways or means, &c. Now the words hear and determine ought to be applied to the examination of two witneſſes; for it would be abſurd to ſay, that they ſhould hear and determine upon inquiſition; for that is only a bare accuſation. Then they not having power to proceed to the examination of theſe offences by jury, the ſtatute of 21 *Jac.* 1. does not extend to them; and therefore the information well lies. But if the words of the ſtatute had been [hear and determine] generally, that would have been underſtood by verdict, &c. *Sed non allocatur.* For *per Holt* chief juſtice the word [or] disjoins the intire ſentence, and therefore the juſtices may proceed by any of the ſaid methods. And the whole court were of opinion, that this information was reſtrained by 21 *Jac.* 1. *c.* 4. And *Holt* chief juſtice ſaid, that he was of opinion, that actions of debt upon penal ſtatutes were within the 21 *Jac.* 1. *c.* 4. though it was otherwiſe adjudged between *Barnes* and *Hughes*, 1 *Ventr.* 8. 2 *Keb.* 401. 424. 447. 458. And *Hale* chief juſtice was of the ſame opinion with *Holt*, and thought that there was no difference between an action of debt upon a penal ſtatute, and an information, they being only different ways of proceeding to recover the penalty, for that may be as well recovered before juſtices of peace, by information, as by action of debt. But *Rokeby* and *Turton* juſtices ſaid, that informations in the name of the attorney general were within

The 21 Jac. 1. c. 4. extends to proſecutions upon thoſe ſtatutes only on which juſtices of aſſize, of the peace, &c. had cognizance before. S. P. Carth. 46. Holt 364. R. acc. Cro. Car. 112. Semb. acc. Sty. 340. D. acc. 1 Bac. 40.

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within the expreſs words of the 21 *Jac.* 1. *c.* 4. But as to actions of debt upon penal ſtatutes, they would not give any opinion. And for this reaſon only judgment was, that the information ſhould be quaſhed, becauſe contrary to the ſtatute 21 *Jac.* 1. *c.* 4. *niſi &c.* But the laſt day of the term Mr. *Montague* offered for cauſe, why the information ſhould not be quaſhed; that (by him) the buying and the ſelling make but one offence; then if the buying happens in one county, and the ſelling in another, the juſtices of peace of neither county can proceed; which would make a failure of juſtice, if the ſuperior courts are abridged from intermeddling. And though in the preſent caſe both the buying and the ſelling were in the ſame county, that will not alter the law. And he cited *Latch.* 192. as in point, 3 *Keb.* 247. And to the end that in this vacation the law, as well with regard to informations as to actions of debt upon penal ſtatutes, might be ſettled by all the judges, this caſe was adjourned till the next term. And *Holt* chief juſtice ſaid, that the ſtatute 21 *Jac.* 1. *c.* 4. principally aimed at the court of *ſtar chamber*, which at the time of the making of the act had aſſumed an exorbitant juriſdiction. *Adjournatur.* And afterwards, as Mr. *Robert Eyre* told me, the matter was compounded.

Q. Whether the 21 Jac. 1. c. 4. extends to an offence, different parts of which might have been committed in different counties.

Hil. 10 *Will.* 3. *Holt* reported the opinion of all the judges to the ſerjeants to be, 1. That debt would not lie in the king's bench for a common informer, unleſs the cauſe of action aroſe in *Middleſex*; and then it would lie in the king's bench. 2. That where a remedy is given by debt, *&c.* by ſubſequent ſtatutes, in any court of record, the act of 21 *Jac.* 1. *c.* 4. will not extend to it, for they are a repeal as to this purpoſe of the ſtatute 21 *Jac.* 1. *c.* 4. But (by him) where a ſubſequent act gives a popular action, it ought to be brought in the proper county within the equity of 21 *Jac.* 1. *c.* 4.

There was a caſe between *Danby* and *Lawes*, *Paſch.* 8 *Will.* 3. *C B.* Debt for ——— for exerciſing the trade of a coachmaker, not having ſerved an apprenticeſhip, *&c.* according to 5 *El. c.* 4. *Nil debet* pleaded. Verdict for the plaintiff. And motion was made in arreſt of judgment, that debt does not lie by 21 *Jac.* 1. *c.* 4. but the penalty ought to have been ſued for before the juſtices of aſſiſe, *&c.* *Sed non allocatur.* For *per curiam*, debt (*a*) lies in ſuch caſe in the common pleas; for otherwiſe the ſtatute 21 *Jac.* 1. *c.* 4. would be conſtrued to take away all actions of debt, *&c.* which was not the intent of the act. But then judgment was ſtayed until, *&c.* becauſe it was a queſtion to the court, whether the trade of a coachmaker was within the ſtatute of *Elizabeth*.

(*a*) R. acc. 2 Mod. 246. 3 Lev. 71. R. cont. 3 Salk. 200. 12 Mod. 223.

Q. Whether the trade of a coachmaker is within

5 El. c. 4. Vide Com. Trade. D. 5. 6. 2d Ed. vol. 5. p. 571. and Smith's Wealth of Nations vol. 1. p. 187.

Savile

Savile *verſ.* Roberts.

S. C. 5 Mod. 394. 405. Salk. 13. Carth. 416. 12 Mod. 208. Holt. 8. 150. 193. 2 Vin. 25. pl. 42.

Pleadings poſt, vol. 3. 264

Intr. Trin. 9 Will. 3. B. R. Rot. 724.

An action lies for a malicious indictment which puts the party to expence though the charge it contains neither ſcandalizes him or endangers his perſonal ſecurity. R. acc. 10 Mod. 148. 214. Gilb. Rep. Law and Eq. 185. 2 Mod. 51. 306.

Willielmus tertius, Dei gratia Angliae Scotiae Franciae et Hiberniae rex, fidei defenſor, &c. dilecto et fideli ſuo Georgio Treby militi capitali juſticiario ſuo de banco ſalutem. Quia in recordo et proceſſu ac etiam in redditione judicii quae fuit in curia noſtra coram vobis et ſociis veſtris juſticiariis noſtris de banco inter Jacobum Roberts et Willielmum Savile nuper de Mexbrough in comitatu, &c. armigerum de quadam tranſgreſſione ſuper caſum ei. em Jacobo per praefatum Willelmum illata, ut dicitur, error intervenit manifeſtus ad grave damnum ipſius Willelmi, ſicut ex querela ſua accepimus; nos errorem, ſi quis fuerit, modo debito corrigi, et partibus praedictis plenam et celerem juſtitiam fieri, volentes in hac parte, vobis mandamus, quod ſi judicium inde redditum ſit, tunc recordum et proceſſum praedicta cum omnibus ea tangentibus nobis ſub ſigillo veſtro diſtincte et aperte mittatis et hoc breve, ita quod ea habeamus a die Paſchae in quindecim dies, ubicunque tunc fuerimus in Anglia, ut inſpectis recordo et proceſſu praedictis, ulterius inde pro errore illo corrigendo fieri faciamus, quod de jure et ſecundum legem et conſuetudinem regni noſtri Angliae fuerit faciendum. Teſte meipſo apud Weſtmonaſterium decimo ſexto die Februarii anno regni noſtri nono.

Hungerford.

Reſponſio Georgii Treby militis capitalis juſticiarii infra nominati.

Recordum et proceſſum loquelae unde infra fit mentio cum omnibus ea tangentibus coram domino rege ubicunque, &c. ad diem infra contentum mitto in quodam recordo huic brevi annexo, prout interius mihi praecipitur. George Treby.

Placita irrotulata apud Weſtmonaſterium coram Georgio Treby milite et ſociis ſuis juſticiariis de banco de termino Sanctae Trinitatis anno regni domini Willelmi tertii Dei, gratia Angliae Scotiae Franciae et Hiberniae regis, fidei defenſoris, &c. octavo. Rot. 1737.

Eborum ff. *Willelmus Savile nuper de Mexbrough in comitatu praedicto armiger attachiatus fuit ad reſpondendum Jacobo Roberts de placito trangreſſionis ſuper caſum, &c. Et unde idem Jacobus per Robertum Darwent attornatum ſuum queritur, quod praedictus Willelmus Savile, machinans et nequiter et malitioſe intendens ipſum Jacobum minus rite praegravare ac*

cum

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cum variis laboribus et expensis praetextus et colore justitiae et legis procressus defatigare opprimere et multipliciter damnificare, sine causa rationabili, ex malitia sua praecogitata apud Barnesley in comitatu praedicto apud generalem quarterialem sessionem pacis domini regis tentam per adjournamentum ibidem pro se West Riding in comitatu praedicto quinto decimo die Octobris anno regni domini regis nunc septimo coram Georgio Cooke baronetto, Michaele Wentworth, Willelmo Lowther militibus, Roberto Monkton, Godfrido Boswile, Richardo Nettleton, Johanne Bradshaw, Nonus Parker armigeris, et aliis justiciariis dicti domini regis ad pacem in le West Riding in dicto comitatu conservandam nec non ad diversa felonias transgressiones et alia malefacta in le West Riding comitatus praedicti perpetrata audiendum et terminandum assignatis, &c. ipsum Jacobum Roberts et quosdam Richardum Offerton generosum, Willelmum Shertcliffe, Thomam Middleton, Samuelem Roberts, Ellenham Roberts viduam, Thomam Roberts, Richardum Holden, Thomam Sheepshanke, Antonium Hendley, Jonathanem Crosse, Georgium Sheepshanke, Antonium Roberts, Benjaminum Nicholson, et ——— uxorem ejus, Georgium Littlewood, Josephum Dell et Jonathanem White, per nomina Richardi Offerton nuper de Skirburgh in comitatu praedicto generosi, Willelmi Shertcliffe nuper de eadem laborer. Thomae Middleton nuper de Mexbrough in comitatu praedicto laborer, Samuelis Roberts nuper de Beneby in comitatu praedicto laborer, praedicti Jacobi Roberts nuper de eadem laborer, Edenae Roberts nuper de eadem viduae, Thomae Roberts nuper de eadem laborer, Jonathanis Crosse nuper de Skirburgh in comitatu praedicto laborer, Georgii Sheepshanke nuper de Beneby praedicto laborer, Anthonii Roberts nuper de eadem laborer, Benjamini Nicholson nuper de eadem laborer, et ——— uxoris ejus, Georgii Littlewood nuper de Skirburgh praedicta laborer, Josephi Dell nuper de Beneby praedicta laborer et Jonathani White nuper de eadem laborer, de eo quod ipsi secundo die Octobris anno regni domini Willelmi tertii Dei gratia nunc regis Angliae, &c. septimo, vi et armis apud Beneby praedictam in le West Riding comitatus praedicti riotose routose illicite et injuste sese assemblaverunt et congregaverunt, et adtunc et ibidem riotose et routose obstupaverunt cum quibusdam postibus pagulis et repagulis quandam viam pertinentem praedicto Willelmo Savile pro convehendis decimis granorum et foeni ipsius Willelmi Savile a villa de Beneby praedicta usque ad villam de Mexbrough praedictam, ita quod idem Willelmus Savile eadem via sicut praeantea gaudere non possit; et alia enormia eidem Willelmo Savile intulerunt ad grave damnum ipsius Willelmi et contra pacem dicti domini regis nunc coronam et dignitatem suas, nec non contra formam statuti, &c. falso indictari malitiose fecit et procuravit, ac indictamentum illud versus ipsum Jacobum Roberts falso et malitiose prosecutus fuit et prosecutum esse causavit, quousque idem Jacobus Roberts postea, scilicet ad generalem sessionem quarterialem pacis dicti domini regis tentam in et pro le West Riding comitatus

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tatus praedicti apud Pontefract vicesimo primo die Aprilis anno regni domini nostri Willelmi tertii Dei gratia, nunc regis Angliae, &c. octavo coram Henrico vicecomite Downe, Lionello Pilkington baronetto et aliis socii suis justiciariis dicti domini regis ad pacem in le West Riding in comitatu praedicto conservandam, necnon ad diversa felonias transgressiones et alia malefacta in le West Riding comitatus praedicti perpetrata audiendum et terminandum assignatis, debito modo secundum legem et consuetudinem hujus regni Angliae inde occupatus fuit. [And then he lays it for procuring him to be indicted by another indictment for a riot committed in the same manner the third of *October*, &c. as aforesaid.]

Prout patet per recordum, &c.

Quorum quidem praemissorum praetextu idem Jacobus Roberts non solum in bonis nomine fama credentia et aestimatione suis praedictis quibus praeantea gavisus fuerit magnopere laesus ac in diversis negotiis licitis et honestis agendis multipliciter impeditus existit, verum etiam idem Jacobus valde graves et arduos labores subire et diversas denariorum summas pro acquietatione sua praedicta et ejus exoneratione in hac parte expendere et erogare coactus et compulsus fuit, ad damnum ipsius Jacobi Roberts viginti librarum, Et inde producit sectam, &c.

Et praedictus Willelmus Saville per Willelmum Allabie attornatum suum venit et defendit vim et injuriam quando, &c. et dicit quod ipse in nullo est culpabilis de praemissis praedictis superius et impositis prout praedictus Jacobus superius versus eum queritur; Et de hoc ponit se super patriam, et praedictus Jacobus similiter. Ideo praeceptum est vicecomiti, quod venire faciat hic a die sanctae trinitatis in tres septimanas duodecim, &c. per quos. &c. qui nec, &c ad recognoscendum, &c. quia tam, &c. Ad quem diem jurata inter partes de praedicto placito posita fuit inde inter eas in respectum usque ad hunc diem, scilicet a die sancti Michaelis in tres septimanas tunc proxime sequen. nisi justiciarii domini regis ad assisas in comitatu praedicto capiendas assignati per formam statuti, &c. die sabbati vicesimo quinto die Julii proxime praeterito apud castrum Eborum in comitatu predicto prius venerint, &c. Et modo hic ad hunc diem venit praedictus Jacobus per attornatum suum praedictum et praefati justiciarii ad assisas coram, &c. miserunt hic recordum suum in haec verba.

Postea.

Postea die et loco infracontentis coram Edwardo Ward milite capitali barone scaccarii domini regis et Johanne Turton milite uno justiciariorum dicti domini regis ad placita coram ipso rege tenenda assignatorum justiciariis ipsius regis ad assisas in comitatu Eborum capiendas assignatis per formam statuti, &c. venit infra-nominatus Jacobus Roberts per attornatum suum infra-contentum, et infra-scriptus Willelmus Savile licet solemniter exactus non venit sed defaltam fecit; Ideo jurata unde infra fit mentio capiatur versus eum per defaltum et juratores juratae illius exacti quidam eorum, viz. Samuel Midgley, Willelmus Metcalfe, Radulphus Marsden, Abrahamus Haigh, Robertus Taylor, Richardus Burton, Christopher Shaw, Johannes Telberne

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Telborne et Johannes Pilling, veniunt et in jurata illa jurati exiſtunt; Et quia reſidui juratorum ejuſdem juratae non comparuerunt, ideo alii de circumſtantibus per vicecomitem comitatus praedicti ad hoc electi ad requiſitionem praedicti Jacobi Roberts ac per mandatum juſticiariorum praedictorum de novo apponuntur, quorum nomina panello infra-ſcripto affilantur ſecundum formam ſtatuti in hujuſmodi caſu nuper editi et proviſi; Ac juratores ſic de novo appoſiti, viz. Thomas Ward, Willelmus Pulleine et Johannes Prieſt, exacti ſimiliter veniunt, qui ad veritatem de inſra contentis ſimul cum aliis juratoribus praedictis prius impanellatis et juratis dicendam electi triati et jurati, dicunt ſuper ſacramentum ſuum, quod praedictus Willelmus eſt culpabilis de praemiſſis interius ei impoſitis modo et forma prout praedictus Jacobus interius verſus eam queritur, et aſſidunt damna ipſius Jacobi occaſione infra-ſcripta ultra miſas et cuſtagia ſua per ipſum circa ſectam ſuam in hac parte appoſita ad undecim libras, et pro miſis et cuſtagiis illis ad quadraginta ſolidos: Et quia juſticiarii hic ſe adviſare volunt de et ſuper praemiſſis, priuſquam judicium inde reddant, dies datus eſt praefato Jacobo hic uſque in octabas ſancti Hilarii de audiendo inde judicio ſuo, eo quod iidem juſticiarii hic inde nondum, &c. Ad quem diem venit hic praedictus Jacobus per attornatum ſuum praedictum. Et ſuper hoc viſis praemiſſiis et per juſticiarios hic plenius intellectis. Conſideratum eſt quod praedictus Jacobus recuperet verſus praefatum Willelmum damna ſua praedicta ad treſdecim libras per juratores praedictos in forma praedicta aſſeſſa, necnon decem et ſeptem libras eidem Jacobo ad requiſitionem ſuam pro miſis et cuſtagiis ſuis praedictis per curiam hic de incremento adjudicatas, quae quidem damna in toto ſe attingunt ad triginta libras; Et praedictus Willelmus in miſericordia.

Judgment.

The ſingle queſtion of this caſe was, if *A.* procures *B.* falſly and maliciouſly to be indicted of a riot, upon which indictment *B.* is acquitted; whether *B.* may have an action againſt *A.* for ſo falſly and maliciouſly procuring him to be indicted? And after verdict for the plaintiff, this was moved in arreſt of judgment by ſerjeant *Lutwyche* for the defendant. And it was argued by ſerjeant *Wright* for the plaintiff in *Michaelmas* term 8 *Will.* 3. *C. B.* And after having been argued two or three times at the bar of the court of common pleas, the judges in *Hilary* term 8 *Will.* 3. pronounced their opinions in ſolemn arguments. And *Nevill* and *Powell* juſtices held, that the action would well lie. But *Treby* chief juſtice was of opinion againſt the action. Whereupon judgment was entred for the plaintiff. Upon which error was brought for the defendant *in B. R.* And it was argued by Sir *Bartholomew Shower* for the plaintiff in error, and by myſelf for the defendant, *Hill.* 9 *Will.* 3. *B. R.* and by Mr.

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Mr. *Hall* for the plaintiff, and Mr. *Northey* for the defendant, *Paſch*, 10 *Will.* 3. *B. R.* And now in this term *Holt* chief juſtice pronounced the reſolution of the court, that the action would well lie; and therefore all the court was of opinion, that the judgment ought to be affirmed. And *Holt* chief juſtice ſaid, that this point is not *primae impreſſionis*, but that it has been much unſettled in *Weſtminſter-hall*, and therefore to ſet it at reſt is at this time very neceſſary. And, 1. he ſaid, that there are three ſorts of damages, any of which would be ſufficient ground to ſupport this action. 1. The damage to a man's fame, as if the matter whereof he is accuſed be ſcandalous. And this was the ground of the caſe between Sir *Andrew Henley* and Dr. *Burſtall*, *Raym* 180. But there is no ſcandal in the crime for which the plaintiff in the original action was indicted. 2. The ſecond ſort of damages, which would ſupport ſuch an action, are ſuch as are done to the perſon; as where a man is put in danger to loſe his life, or limb, or liberty, which has been always allowed a good foundation of ſuch an action, as appears by the ſtatute *de conſpiratoribus* (in the printed book ſaid to be made 33 *Edw.* 1. but in fact it was made *(a)* 21 *Edw.* 1. as my lord *Coke* obſerves, 2 *Inſt.* 562.) where the parliament deſcribes a conſpirator, and the ſtatute of *Weſtm.* 2. 13 *Ed.* 1. *St.* 1. *c.* 12. which gives damages to the party falſely appealed, *reſpectu habito ad impriſonamentum et arreſtationem corporis*, and alſo *ad infamiam*; but theſe kinds of damages are not ingredients in the preſent caſe. 3. The third ſort of damages, which will ſupport ſuch an action, is damage to a man's property, as where he is forced to expend his money in neceſſary charges, to acquit himſelf of the crime of which he is accuſed, which is the preſent charge. That a man in ſuch caſe is put to expences is without doubt, which is an injury to his property; and if that injury is done to him maliciouſly, it is reaſonable that he ſhall have an action to repair himſelf. And though this doctrine has been queſtioned lately, it was always received in ancient times. 3 *Ed.* 3. 19. 3 *Aſſi. pl.* 13. 7 *Hen.* 4. 31. *a.* 11 *Hen.* 7. 25, 26. *F. N. B.* 116. *Stile*, 379. *Atwood v. Monger*. But it was objected at the bar againſt theſe old caſes, that they were grounded upon a conſpiracy, which is of an odious nature, and therefore ſufficient ground for an action by itſelf. But to this objection he anſwered, that conſpiracy is not the ground of theſe actions, but the damages done to the party; for an action will not lie for the greateſt conſpiracy imaginable, if nothing be put in execution; but if the party be damaged, the action will lie. From whence it follows, that the damage is the ground of the action, which is as great in the preſent caſe as if there had been a conſpiracy. And *F. N. B.* 114. D. ſays, that where two cauſe a man to be indicted, if it be falſe and ma-

An action lies for a malicious indictment, the charge of which either ſcandalizes the party. D. acc. Gilb. Rep. Law & Eq. 202. or endangers his perſonal ſecurity. D. acc. Gilb. Rep. Law & Eq. 202.

Conſpiracy is not actionable, unleſs on account of ſpecial damage. Vide 9 Co. 55. b. W. Jon. 93. But it is indictable, though nothing be done in conſequence thereof.

(a) Vide Ruffhead's preface to the Statutes, p. 24

licious,

licious, he ſhall have conſpiracy; where one, he ſhall have caſe: ſo that the actions are founded upon one common foundation, but the number of the parties defendants determines it to the one or to the other. 2. Though in the old books ſuch actions are called conſpiracies, yet they are nothing in fact but actions upon the caſe. For conſpiracy (to ſpeak properly) lies only for procuring a man to be indicted of treaſon or felony, where life was in danger. *F. N. B.* 116. *A.* [Note, *Treby*, chief juſtice was of the ſame opinion *in C. B.*]. And if ſuch an action be ſued againſt two defendants for procuring a man to be indicted of a ſmaller offence, though the word *conſpiraverunt* be in the writ, yet if one of them be acquitted, the other may be found guilty. 11 *Hen.* 7. 25. *Contra*, of a proper action of conſpiracy; for there if the one be acquitted, no judgment can be given againſt the other. But conſpiracy, though it be not put in execution, is a crime, and is puniſhable in the leet. But in an action for a conſpiracy no villainous judgment ſhall be given, unleſs the life was endangered by that conſpiracy; and therefore where it is brought for a treſpaſs, it is only an action upon the caſe.

Conſpiracy lies not for a malicious indictment, unleſs the charge of it ſubjected the party to capital puniſhment. S. C. 5 Vin. 513. pl. 8. Semb. acc. F. N. B. 116, h. 2 Inſt. 562, D. cont. 2 Inſt. 562. 1 Roll. Abr. 112. 2 Vin. 20. 1 Danv. 210. pl. 10. In conſpiracy, one defendant alone cannot be found guilty. R. acc. 1 Vent. 12. 18. D. acc.

F. N. B 114. D. 115. E. W. Jon. 94. 1 Saund. 229. Semb. acc. 2 Inſt. 562. F. N. B. 116. K. Contra in caſe in the nature of conſpiracy. R. acc. 1 Will. 210. 1 Saund. 229. 1 Roll. Abr. 112. 2 Vin. 19. 1 Danv. 209. pl. 9. Semb. acc. 2 Inſt. 562. F. N. B. 114. D. 116. k. Cro. Car. 239. pl. 22.

Objection. The opinion of the judges in the caſe of Sir *Andrew Henley* and Dr. *Burſtall*, *Raym.* 180. was, that no action will lie for falſely and maliciouſly procuring a man to be indicted of a treſpaſs. He ſaid that he remembred that they were of ſuch opinion, and denied the caſe of 7 *Hen.* 4. 31. But to that he anſwered, that though he had a great regard to what the judges then ſaid, for the court was then compoſed of very knowing men, yet that opinion was not judicial, for ſuch matter was not then in queſtion. But in this caſe if the grand jury had found *ignoramus*, no (*a*) action had lain againſt *Savile* for preferring the bill, becauſe *Roberts* had not been impriſoned, nor ſcandalized, nor put to expences.

(*a*) Vide poſt. 381. and the caſes there cited.

Objection. Such actions will diſcourage proſecutions and there is no more reaſon that an action ſhould be maintainable in this caſe, than where a civil action is ſued without cauſe, for which no action will lie. If a man ſlanders another by ſuing of an action in a proper court, no action will lie for it. 2 *R.* 3. 9, 10. *Keilw.* 26. Anſwer. There is a great difference between the ſuing of an action maliciouſly, and the indicting of a man maliciouſly. When a man ſues an action, he claims a right to himſelf, or complains of an injury done to him; and if a man fancies he has a right, he may ſue an action. 4 *Co.* 17. *a.* makes a difference, that if a man calls *A.* who (*b*) is heir at law to *B.* a baſtard, *A.* may have an action againſt the man; but if the man ſays *A.* is a baſtard, and I am heir to *B.* no action lies. If then the law will permit a man to make a falſe claim out of a

Slander of title under a claim of right, is not actionable. Vide Burr. 2422.

(*b*) Vide 12 Mod. 210.

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court of juſtice, *a fortiori* when he proceeds to aſſert his right in a legal courſe. 2. The common law has made proviſion, to hinder malicious and frivolous and vexatious ſuits, that every plaintiff ſhould find pledges, who were amerced, if the claim was falſe; which judgment the court heretofore always gave, and then a writ iſſued to the coroners, and they aſſeered them according to the proportion of the vexation. See 8 *Co.* 39. *b. F. N. B.* 76. *a.* But that method became diſuſed, and then to ſupply it, the ſtatutes gave coſts to the defendants. And though this practice of levying of amercements be diſuſed, yet the court muſt judge according to the reaſon of the law, and not vary their judgments by accidents. But there was no amercement upon indictments, and the party had not any remedy to reimburſe himſelf but by action. 2. If *A.* ſues an action againſt *B.* for mere vexation, in ſome caſes upon particular damage *B.* may have an action; but it is not enough to ſay that *A.* ſued him *falſo et malitioſe*, but he muſt ſhew the matter of the grievance ſpecially, ſo that it may appear to the court to be manifeſtly vexatious. 1 *Sid.* 424. *Daw v. Swain*, where the ſpecial cauſe was the holding to exceſſive bail. But if a ſtranger who is not concerned, excites *A.* to ſue an action againſt *B. B.* may have an action againſt the ſtranger. *F. N. B.* 98. *n.* and 2 *Inſt.* 444.

A man who ſues without a cauſe is liable to an action, if any ſpecial damage is occaſioned by that ſuit. R. acc. 2 Will. 302. 1 Saund. 228. Semb. poſt. 503. D. acc. 2 Mod. 52. Vide 1 Vent. 86. Co. Litt. 161. a. 13th Ed. n. 4. If no ſpecial damage is occaſioned, not. S. C. 1 Vin. 595. pl. 28. 2 Vin. 26. pl 43. R. acc. 12 Mod. 257. D. acc. Gilb. Rep. Law & Eq. 197. Vide Co. Litt. 161. a. & 13th Ed. n. 4. But a ſtranger who incites him to ſue, is.

Objection. The caſe of *Chamberlain v. Preſcott*, *Raym.* 135. *Holt* chief juſtice (*a*) anſwered, that he had a manuſcript report of the ſaid caſe of *Bridgman* chief juſtice of the common pleas, written with his own hand, where the caſe is reported to be thus: *Chamberlain* brought an action upon the caſe againſt *Preſcott*, in which he declared, that the defendant *Preſcott* cauſed him *falſo et malitioſe* to be indicted upon the 8 *El. c.* 2. *ſ.* 4. for having cauſed *C.* to be arreſted at the ſuit of *S.* without his conſent, of which he was acquitted, *&c.* after verdict for the plaintiff it was moved in arreſt of judgment in the king's bench, and judgment was entered for the plaintiff; upon which error was brought in the exchequer-chamber, and after the reſtoration that caſe had the great debate; and the judgment of the king's bench for maintaining of the action was reverſed. *Bridgman* chief juſtice was againſt all ſuch actions. But it appears by his report, that this was not the reaſon of the reverſal of the judgment, but becauſe *Chamberlain* was indicted for that which was no offence at all; for in fact *Preſcott* arreſted *C.* in his own name and the name of *S.* for a debt due to them jointly, which was lawful without the conſent of *S.* and if *S.* did not appear, if it were in a perſonal action he might be nonſuit, if in a real action, ſummoned and ſevered; and therefore it was (*b*) held to be no offence.

(*a*) Vide Gilb. Rep. Law & Eq. 204.

One of ſeveral joint creditors may arreſt the debtor without the conſent of his companions. S. C. 1 Vin. 592. pl. 16, in marg.

(*b*) Vide Gilb. Rep. Law & Eq. 204. 206.

Objection,

Objection. Yet *Chamberlain* was put to expence. Answer. If he had been guilty, he could not have been damaged, for the (*a*) judgment must have been arrested. In *Cro. El.* 236. *pl* 1. this point came in question, and in it the court were divided; but in *Chamberlain*'s case it was held clearly to be out of the statute 8 *El. c.* 2. *f.* 4; then since the offence for which he was indicted was not any offence, he put himself to unnecessary charges in the defence of himself. For the same reason it is held, 9 *Ed.* 4. 12. that if a man be prosecuted upon an ill indictment, an action will not lie. In 1 *Roll. Abr.* 112. 2 *Vin.* 19. 1 *Danv.* 209. *pl.* 9. the matter of scandal was not such whereof the common law takes notice. And in 2 *Mod.* 51. there is the same difference taken. But *per Holt* chief justice, though this action will lie, yet it ought not to be favoured, but managed with great caution. For if the indictment be found, the (*b*) defendant in such action will not be bound to shew a probable cause, but the (*c*) plaintiff will be constrained to shew express malice and iniquity in the prosecution. 2. If *ignoramus* be returned, where the indictment neither contains matter of scandal, nor cause for imprisonment, or loss of life or limb, no action will lie; but if there is scandal, or loss of liberty, &c. an action will lie. The whole court being of this opinion, the judgment was affirmed, *Hil.* 34 & 35 *Car.* 2. *B. R. Shutter*'s case, and *Dobbins v.* Sir *Richard Newdigate* at the end of the reign of *Charles* II. case for falsly and maliciously indicting them of a trespass, and after verdict for the plaintiffs, and motion in arrest of judgment, judgment was given for the plaintiffs.

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(*a*) Vide Gilb. Rep. Law and Eq. 204. 206.

(*b*) S. C. 2 Vin. 38. pl. 19. 12 Vin. 96. pl. 2.

(*c*) Vide Burr. 1974. 1 T. R. 544, 545.

An action lies for preferring a bill of indictment, though the grand jury do not find it, if the charge it contains either scandalizes the party, R. Yelv. 46. or endangers his personal security, R. W. Jon. 93. otherwise not.

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ACTION upon several promises. *Indebitatus assumpsit* for 94*l.* 10*s.* and *quantum meruit* for another sum of 94*l.* 10*s.* and *insimul computassent* for 72*l.* 10*s.* and they were laid 9 *Will.* 3. The defendant pleaded, that he was indebted to the plaintiff before the act of composition 8 & 9 *W.* 3. *c.* 18. for goods sold, in several sums, *in toto se attingentibus* to 72*l.* 10*s. et non ultra*; and then he pleads the statute of 8 & 9 *W.* 3. *c.* 18. which makes a composition made by two thirds of the creditors in number and value to be binding to the rest; and then he brings himself within the compass of the act, and shews a composition made, &c. and demands judgment, if he ought to be sued before the time appointed by the composition is expired. The plaintiff demurred. And *Hall* took several exceptions to the plea. 1. That the act of parliament is misrecited, the words (secret and fraudulent) being omitted; and if a man undertakes to recite an act of parliament, and misrecites it, though he was not obliged to

The courts cannot take notice officially of the wording of a private act of parliament. S. C. 3 Salk. 330. Holt, 662. Vide 1 Lev. 296. 2 Keb. 686. 1 Sid. 356. pl. 7. Moore, 551. pl. 742. Dougl. 95. n. 41.

In actions in which it is not necessary to shew the very day on which the cause of action accrued the defendant may shew that it is a material point whether it accrued before the day mentioned in the declaration, and aver that it accrued on a precedent day. But he must traverse that it accrued afterwards. Vide ante 120. 229. Salk. 222. A plea not answering all is imports to answer is bad. D. acc. Salk.

have

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The misrecital of a public statute is fatal, if the party expresly refers to the statute he has recited. Vide ante 210. and the cases there cited.

have recited it, this makes the plea vicious. *Cro. El.* 236. 1 *Bulstr.* 218. *Sed non allocatur.* For *per curiam*, this being a private act, the court must take it to be as it is pleaded, unless the plaintiff denies it, as he might, by pleading *nul tiel record*, or by alleging that it is farther enacted, &c. and then if it is material, he shall take advantage of it. And *per Holt* chief justice, if a public act be misrecited in the time, if the plea be tied up to the statute, which the defendant has pleaded, by *vigore statuti praedicti*, or *contra formam statuti praedicti*, this misrecital will be fatal: but if the conclusion be *contra formam statuti* generally, the judges will take judicial notice of it as much as if it had been shewn in the plea. The same law of any other variance. Then *Hall* took another exception, that this contract appears to have been made after the act of composition, and therefore not within the intent of the act; for the *assumpsit* and debt are laid 9 *W.* 3. and the act was the eighth. And *Treby* chief justice refused to discharge a man who had contracted a debt subsequent to the act. But to this *Grove* answered, that this being a contract raised by the law, the plaintiff might lay it any day; and if this should put it out of the intent of the act, the statute would be entirely evaded. *Sed non allocatur.* For *per curiam*, the act relating to particular persons absconding, or in prison at such a time, it cannot be intended but for such debts as they then owed, and not where such a person gains sufficient credit to be intrusted afterwards. And then the time being material, the defendant should have traversed, *absque hoc quod assumpsit modo et forma* after the day mentioned in the act. For the promise is not a promise every day; for if a man brings *indebitatus assumpsit*, and declares of a promise in *November*, the defendant pleads a release the first of *May*, he ought to traverse, *absque hoc* that he assumed *modo et forma* after the first of *May*. 3. A third exception was, that there is an *indebitatus assumpsit* for 94*l.* to which the defendant has not given any answer. And for this reason the whole court held the plea to be ill, for not having given an answer to the whole. And therefore judgment for the plaintiff.

Adjudged accordingly this term in *C. B.* between Clod and Carter. *Ex rel m'ri Place.*

Nesson *verf.* Finch.

Where a bond is conditioned for the payment of money on a certain day, payment of the money after the day is no discharge of the bond. Sed vide 4 Ann. c. 16 §. 12. Where the service of a seven years apprenticeship entitles a man to his freedom, an apprentice bound for seven years only is not entitled to his freedom, if he trades on his own account within the seven years.

DEBT upon bond conditioned, that whereas the plaintiff became bound to the defendant in a bond of 52*l.* conditioned for the true payment of 26*l.* the twenty-ninth of *September* following; if after the discharge of the said bond by the plaintiff the defendant should make the plaintiff free of the cloth-makers company upon request, that then this bond should be void: the plaintiff shews that he had paid the 26*l.* but the payment was not upon the 29th of

September,

September, but afterwards, and that he requeſted the defendant, but that he had not made him free. And upon demurrer judgment was given for the defendant, becauſe this payment of the 26*l.* could not diſcharge the firſt bond, being after the day; and therefore the plaintiff has no title to ſue this bond as yet; becauſe the defendant is not bound to make him free of the cloth-makers company until the firſt bond be diſcharged. Note, it was ſaid by Mr. *Criſpe* the common ſerjeant, that if a man trade upon his own account within the ſeven years of his apprenticeſhip, the chamberlain of *London* will not make him free, becauſe he has not fully ſerved an apprenticeſhip of ſeven years.

NESSON v. FINCH.

Anonymous.

S. C. Salk. 99. pl. 7.

A man is not to be diſcharged upon common bail on a ground which amounts to a determination of the merits of the cauſe. R. acc. Salk. 100. pl. 9. Birch v. Douglas, Barnes, 4to. Ed. 63. If a ſtatute directs that all the creditors of inſolvents of a particular deſcription ſhall be bound to accept any compoſition a certain proportion of his creditors ſhall agree to take, and after ſuch an agreement a creditor who was no party to it holds ſuch an inſolvent to ſpecial bail for more than 10*l.* he cannot be diſcharged upon common bail, though the compoſition upon his debt would not amount to 10*l.* A man held to bail upon an uſurious contract cannot be diſcharged upon common bail.

A. Had made compoſition with his creditors according to the late act, 8 & 9 *W.* 3. *c.* 18. and being ſued by a non-ſubſcribing creditor, he moved for leave to file common bail, upon ſuggeſtion that the debt upon which the plaintiff brought his action, according to the proportion of his compoſition, would be leſs than 10*l.* and ſince the plaintiff, though a non-ſubſcribing creditor, was bound by that agreement, it is reaſonable that common bail ſhould be accepted. But the motion was oppoſed, becauſe it would amount to a determination of the merits of the cauſe. And it was compared to the caſe of an uſurious contract, where, though the contract be void, the defendant is compelled to give ſpecial bail. *Quod curia conceſſit.* For the plaintiff here may traverſe, that the defendant had abſconded the nineteenth of *November*, &c. and alſo that the ſubſcribing creditors were real creditors. But if the plaintiff had been ſummoned before a judge, then the matter would have received a determination as the ſtatute directs; or if the plaintiff had been a ſubſcribing creditor, and that had appeared to the court, it would have been reaſonable to allow common bail, becauſe his ſubſcribing had been a confirmation of the compoſition againſt himſelf.

A ſuit upon a ſcire facias is in ſtrictneſs to be conſidered as commenced from the day on which the writ is teſted.

Scire facias was ſued *teſte* 12 *Februarii* returnable *quindena Paſchae.* Between the *teſte* and the return the ſtatute of 8 & 9 *W.* 3. *c.* 11. *ſ.* 3. for preventing of frivolous and vexatious ſuits was made, which gave coſts upon a *ſcire facias.* And Mr. *Carthew* moved for coſts, becauſe the return of the writ was after the twenty-fifth of *March*, and that then properly the ſuit commenced. But denied *per curiam*, becauſe the ſtatute ſubjecting the defendant to a charge, ſhall be conſtrued ſtrictly, and in ſtrictneſs the action commences from the *teſte.* And ſo it is held, where a *latitat is teſte* within the ſix years, and returnable after, this *(a)* will prevent the ſtatute of limitations. And perhaps if the plaintiff had been liable to pay coſts, when he ſued this *ſcire facias*, he would

(a) Sed vide Burr. 950.

ANONYMOUS. would not have ſued it; and therefore when he has recovered, it is unreaſonable to give him coſts.

Intr. Mich. 8 Will. 3. B. R. Rot. 45.

Vinkenſterne *verſ.* Ebden.

Pleadings and verdict, 5 Mod. 356. poſt. vol. 3. 148.

Though the conſideration of a port-duty be the immemorial repair of the port, an avowry for the duty need not ſtate that the port is in repair. S. C. Salk. 248. Carth. 357. Holt. 674. Vide 2 Wilf. 296.

As to port duties directed to be paid by the exporters of goods, the maſter of the veſſel in which the goods are exported is to be looked upon as the exporter. S. C. Salk. 248. 12 Mod. 216. Vide 3 Lev. 38.

And if the payment can be inforced by diſtreſs, the anchor, ſails and cables of his veſſel may be diſtrained for it. S. C. Salk. 248. 12 Mod. 216. Carth. 357. but no judgment, 5 Mod. 359.

Where a place is in common underſtanding a town, by the deſcription of the port of the place ſhall be intended to be meant the port of the town. Newcaſtle is in common underſtanding a town. Courts cannot take notice of the value of a commodity.

Trover for an anchor, ſails and cables. Upon not guilty pleaded, ſpecial verdict, that the town of *Newcaſtle* is an ancient town and corporation, time whereof, *&c.* known by the name of *The mayor and burgeſſes* of *Newcaſtle*; that within the town there is, and time whereof, *&c.* hath been a cuſtom, that the mayor and burgeſſes have uſed from time to time to repair the port of the town, and that in conſideration thereof they have uſed to have a toll of 5*d. per chaldron* for all coals exported; and that for default of payment they have uſed by their water-bailiff for the time being to diſtrain *quaecunque bona* of the exporter, who refuſed to pay the toll, *per legem Angliae fuerint diſtringibilia*; then they find that the defendant was water-bailiff conſtituted by the mayor and burgeſſes *debito modo*; that the plaintiff loaded ſo many chaldrons of coals, the duty of which amounted for toll to 7*l.* the exporter refuſed to pay it, and therefore the ſaid anchor, ſails, and cables, being parts of the tackle of the ſaid plaintiff's ſhip, the defendant took as a diſtreſs for the toll, *&c.* and if the goods are *in tali caſu per legem terrae diſtringibilia*, they find for the defendant; *ſi non*, then for the plaintiff. And this caſe was argued *Trinity* term 9 *W.* 3. by Mr. *Cheatham* for the plaintiff, and Mr. *Cheſhyre* for the defendant, and in this term by Mr. *Broderick* for the plaintiff, and by Mr. *Northey* for the defendant. And Mr. *Broderick* argued, that the words [*in tali caſu*] would not tie the verdict to the ſpecial concluſion, for they ought to be underſtood, in ſuch caſe as is found by the ſpecial verdict; and therefore he has liberty to take as many exceptions as he pleaſes. And therefore, 1. he took exception that the toll being founded upon the conſideration of the repairing of the port, it ſhould have been found that the mayor and burgeſſes uſed to repair it; for this is like a condition precedent, and therefore performance ought to be averred; for there being no remedy to compel them to repair the port, it ſhould have been averred, that it is in repair. And this is like the caſe in 5 *Co.* 78. *b. Hob.* 42. of the cuſtom of *Potwater*. 27 *Aſſiſ.* 15. *Dier*, 117. *a.* where the avowant ſhews, that the bridge was in repair, and 1 *Roll. Rep.* 1. 2 *Bulſtr.* 201. where the bell-man avers, that he had ſwept the ſtreets. And this being a duty againſt common right, the court will intend nothing that is not

found

found. 2 Ex. It is a preſcription to take the goods of one man for the offence of another man; for the cuſtom is, to take the goods of the exporter, who is the owner and not the maſter, but here the goods are taken from the maſter, becauſe the toll is not paid by the owner, which is ill. 1 *Leon.* 105. 231. *Cro. Eliz.* 227. *pl.* 13. *Hern. plead.* 607. *Dyer* 199. *b. pl.* 57. 3. That the toll was unreaſonable, *viz.* 5*d. per* chaldron, which is worth no more than 2*s.* See *Moor* 474. 4. That theſe goods are privileged, and cannot be diſtrained, *Cro Eliz.* 549. *pl.* 25. *Noy* 68, and the rather becauſe *Newcaſtle* is a market for coals, which privileges the ſhip coming to the market to fetch them. But admitting that they were diſtrainable, yet they ought to ſhew, that there was no other ſufficient diſtreſs; as the caſe is of cattle of the plough. *Co. Lit.* 47. *a.* 1 *Sid.* 348. *pl.* 14. *Dyer* 312. *a. pl.* 86. *Fitzh. Nat. Bre.* 90, 174. 20 *Edw.* 4. 3; 13 *Co.* 2. 5. They are not within the cuſtom; for the cuſtom is, for all coals exported from the port of the town of *Newcaſtle*, but theſe coals are found to be exported from the port of *Newcaſtle*. Now the port of *Newcaſtle* extends much farther than the port of the town.

But Mr. *Northey* for the defendant argued, that Mr. *Broderick* was concluded by the ſpecial concluſion of the verdict, to take theſe exceptions. For where the jury make a ſpecial concluſion, the court cannot conſider any thing, but what was ſpecially referred to them by the jury. 5 *Co.* 97. *a. Cro. Car.* 21. *Moor* 267. *pl.* 420. So that all the exceptions but the fourth are out of the caſe. And as to that he ſaid, that ſails, anchor and cables are diſtrainable as reaſonably as any other thing. For ſuppoſe the plaintiff to be the exporter, and the perſon who is properly obliged to the payment of the duty; his goods ought to be liable to the diſtreſs for the toll. In caſe of rent the *averia carucae* are *(a)* not privileged, where there is not other diſtreſs ſufficient: and that law is founded upon the ſtatute of 51 *Hen.* 5 *St.* 4. See 2 *Inſt.* 132. 565. *Co. Litt.* 47. *a.* But the law does not privilege a ſhip from diſtreſs. Doubtleſs a ſhip in a yard may be diſtrained for rent iſſuing out of the yard. In *Dyer* 117. *a. pl.* 73. a ferry boat diſtrained.

(a) D. acc. Com. Diſtreſs. C. 2d Ed. vol. 3. p. 119.

But *per Holt* chief juſtice, ſuppoſing that there was no ſpecial concluſion here, yet he was of opinion, that theſe exceptions were not good. For, 1. By him, there is not any neceſſity to aver here, that the port was in repair; for the conſideration is, that they have uſed time whereof, *&c.* to repair, *&c.* ſo that the conſideration is that they have been time whereof, *&c.* obliged to repair, and not the actual repairing of it. 2. This duty of 5*d. per* chaldron is not unreaſonable, for the court cannot take notice of the price for which they are ſold. 3. To ſpeak properly in the way of trade, the owner of the goods is the exporter; but as to the duties of the port, the maſter of the ſhip is the exporter and ſatisfies and diſcharges all

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such duties; for it would be very unreasonable to drive the mayor and burgesses, or the owner of the toll, to send to seek the merchant. And this is the constant usage. It is very reasonable that such duties should be paid, for without ports there would be no navigation, and without a duty the port would not be repaired, &c. And *Holt* chief justice cited a case of *Malden* in *Essex*, 3 *Keb.* 532. The corporation there prescribed in a *que estate*, that they and all those, &c. time whereof, &c. have used to repair the *(a)* port, in consideration whereof they have used time whereof, &c. to receive for all lands sold within the precinct of the borough, a certain rate of 10*d.* in the pound out of the purchase money; and it was adjudged a good custom; and this is what they call *land-cheap*; for the landholder reaps a benefit by the trade coming to the town by reason of the port. And it was objected there against the prescription, because it was laid with a *que estate*, but it was held well enough, for a man may have had the borough, and may have granted it to the corporation. Now this present case is much stronger, the duty being paid by the trader, who reaps the benefit of the port. 4. It is true, that *(b)* a horse cannot be distrained in a smith's shop, &c. but there is no *(c)* such restriction where the distress is for a personal duty. The duty in this case arises out of the goods laden to be exported; so that by their being laden the duty commences, and the ship becomes chargeable, and *a fortiori* any part of her. Doubtless any other goods of the person who ought to pay the duty may be distrained as well as those for which the duty is payable. If a man ought to pay a penny a head as toll for twenty sheep, any of the sheep may be distrained for the whole duty. 5. *Newcastle* in general understanding is a town, and then *portus Newcastle* is the port of the town of *Newcastle*, and all one. Judgment for the defendant.

A prescription in consideration of repairing a port in a borough, to have a toll upon the sale of any of the lands within the borough is good. Vide 3 Keb. 532. 281. A corporation may prescribe in a que estate. R. acc. 3 Keb. 532.

(b) Vide Co. Litt. 47. a. 3 Bl. Com. 8. Burr. 1498. Bl. 483.

(a) In 3 Keb. 532. which is certainly the case here cited, the consideration is stated to have been the repairing of the bridges. *(c)* Vide Burr. 588.

Harrison *verf.* Cage and his Wife.

Entry post. vol. 3. p. 268. Salk. 737.

CASE. The plaintiff declared, that in consideration, that he promised the defendant's wife to marry her, she being then sole, she assumed and promised to the plaintiff to marry him; and though the plaintiff was ready, and after offered, to marry the defendant's wife, &c. Upon *non assumpsit* pleaded, verdict for the plaintiff, and 400*l.* damages. After motion for a new trial, and denial of it, *Montague* moved an arrest of judgment, that the action would not lie for want of a consideration. For though in such case a woman may have an action against a man, the reason of that is, because marriage is an advancement to the woman, but

An action lies against a woman for a breach of promise of marriage. S. C. Salk. 24. 12 Mod. 214. Carth. 467. 5 Mod. 411. Holt 456.

A promise to marry which does not ascertain the time, is a promise to marry in a reasonable time upon request. S. C. Carth. 467. On a promise to marry upon request, the request need not be made with a parson. R. acc. Cart. 233. In an action on a promise to marry upon request a declaration which shews that the defendant has married another person who is living need not state a request.

5 Mod. 179.
14 Law Jns. 23. 128

it is no advancement to the man, and therefore the consideration fails, *Hob.* 10. And he cited the case *de causa matrimonii praelocuti*, which lies for the woman, and not for the man. *Co. Litt.* 204. *a. F. N. B.* 205. And the case in 1 *Roll. Abr.* 22. *Vin.* 307. *pl.* 20. is where a woman brought the action. And he cited also the opinion of *Vaughan* in the case of *Dickinson and Holcroft. Carter*, 223. 1 *Freem.* 95. 3 *Keb.* 148. 2. Ex. That there is no time prefixed, and he does not shew a request with a parson. But this last exception was not regarded; for as to the time, it should be in convenient time; and as to the request with a parson, that was over-ruled in *Dickinson* and *Holcroft*'s case. *Cart.* 233. 1 *Freem.* 95. 3 *Keb.* 148. Which case though it was debated *in C. B.* yet upon error brought *in B. R.* it was affirmed upon the first opening. Besides, that in this case it appears that the defendant has disabled herself by marriage from the performance of her promise. And as to the first exception, *per Holt* chief justice, there is the same consideration in the case of the promise of a woman as in that of a man; for the ground of the action, where the woman brings the action, is the promise of the woman; for the action being founded upon mutual promises, if the woman's promise be void, the man's promise will be *nudum pactum*. The case upon the writ *de causa matrimonii praelocuti* is ancient law, and stands upon its own bottom: *Vaughan* chief justice grounded his opinion upon this matter's being of ecclesiastical conusance; for if the contract were *per verba de praesenti*, it cannot be discharged; and if a man have damages in an action for it, that would discharge the contract. Objection. That there might be some disability, which might hinder the performance, which is properly conusable in the spiritual court. Answer. Such disability might be pleaded as consanguinity within the *Levitical* degrees, or it might be given in evidence upon *non assumpsit* pleaded. Precontract *(a)* is a disability, but it will not avoid the performance of your promise, because it proceeds from your own act. And (by him) marriage is an advancement as much to the man as to the woman. But *Rokeby* justice took time to consider that, and at another day delivered his opinion also for the plaintiff; because marriage is an advancement as much to the man as to the woman. And to prove that, he relied upon the cases, where a man brings an action for scandalous words, by which he lost his marriage. 1 *Roll Rep.* 79. 2 *Bulstr.* 276. 3 *Bulstr.* 48. *Cro. Jac.* 323. *pl.* 2. *Cro. Car.* 269. And if a man covenants, in consideration of a marriage to be celebrated, to stand seised, this will raise a use. And for these reasons judgment for the plaintiff. Note, it was ruled in this case at *Norfolk summer* assises last past, by *Ward* lord

A disability by consanguinity may be given in evidence on the general issue in an action for the breach of a promise of marriage.

A promise to marry is not within the 29 Car. 2. c. 3. s. 4. R. cont. 3 Lev. A promise to pay a marriage portion is.

(a) Vide Salk. 438. pl. but see also 26 G. 2. c. 33. s. 13.

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chief baron, that this promiſe had no need to be in writing by the ſtatute of frauds, 29 *Car.* 2. *c.* 3. *ſ.* 4. And Mr. *Northey* ſaid at the bar, that the ſtatute intended only agreements to pay marriage portions, and that it had often been ruled ſo by *Holt* chief juſtice. *Quod Holt non negavit.*

Wrecked goods pay no cuſtoms, R. acc. Vaugh. 159. poſt. 501. D. acc. Molloy. B. 2. c. 5. ſ. 9. Sed vide, 5 G. 1. c. 11. ſ. 13.

PER *Holt* chief juſtice, always ſince the caſe of *Shepard v. Goſnold*, *Vaugh.* 159. it has never been made a doubt, but that wreck ſhall not pay cuſtom. And mention being made, that this point had been argued between Sir *William Courtney* and *Bower*, *poſt.* 501. three or four times *in C. B.* he ſaid, that he would not have ſuffered more than one argument, if it had been in the king's bench, and that *pro forma tantum.*

Northcott *verſ.* Underhill.

Intr. Trin. 10 Will. B. R. Rot. 204. Error. C. B. In a deed for the conveyance of an eſtate all covenants relative to matters not dependent on the paſſing of the eſtate are good, tho' the eſtate does not paſs. S. C. Salk. 199. Holt. 176. D. acc. Owen, 156. Semb. acc. 2 Brownl. 162. Vide 1 Bac. 541.

COvenant. The plaintiff declares, that the defendant by his deed bearing ſuch a date granted, bargained and ſold, releaſed, and confirmed, ſuch lands to the plaintiff and his heirs, provided that if the defendant ſhould pay ſo much money at ſuch a day, that he might re-enter, *&c.* and then follows a covenant for the payment of the money; and the breach was aſſigned in non-payment. And judgment for the plaintiff *in C. B.* by default, and a writ of inquiry of damages executed, and final judgment for the plaintiff. Upon which error is brought. And Mr. *Carthew* took exception. 1. That ſince nothing paſſed by the deed, it not being inrolled, the covenant to pay the money was void. And he compared it to the caſe of *Capenhurſt v. Capenhurſt*, *Raym.* 27. 1 *Lev.* 45. *Sed non allocatur:* For *per curiam*, though nothing paſſes by the deed, yet the covenant to pay the money is good, and does not depend at all upon the paſſing of the eſtate by the deed. In the caſe in *Raym.* 27. 1 *Lev.* 45. the covenant was, that the covenantee ſhould enjoy the term, which was impoſſible, where no term paſſed by the deed. But this covenant for the payment of the money is a ſeparate and independent covenant. And it is not neceſſary to ſhew in this action that any eſtate paſſed: but the more ſafe method of declaring is, *quod per indenturam teſtatum exiſtit*, and then ſhew the covenant. Then Mr. *Carthew* took another exception, that no day was given upon the writ of enquiry, and therefore it is a diſcontinuance. *Sed non allocatur.* For they never give a day *in C. B.* upon a writ of inquiry; nor is it neceſſary, for nothing is to be done but to aſcertain the damages. 3. Exc. That it is ſaid upon the writ of inquiry, *per ſacramentum duodecim*, and it does not ſay *proborum et legalium hominum. Sed non allocatur.* For the entries *in C. B.* are always ſo. Judgment was affirmed.

Covenant relative to dependent matters, void. S. C. Salk. 199. Holt. 176. D. acc. Owen, 136. 2 Brownl. 162. Vide 1 Lev. 45. 1 Bac. 541.

In a mortgage deed a covenant for the payment of the mortgage money does not depend on the paſſing of the eſtate by the deed.

It is not neceſſary to enter a *dies datus* upon the award of a writ of inquiry. R. acc. Cro. El. 144. pl. 2. acc. Imp. C. B. 2d Ed. 358. Nor in entering the inquiſition to ſtate that the jury were *honeſt and lawful men.*

Hyleing

Hyleing *verſ.* Haſtings.

S. C. Com. 54.

INdebitatus aſſumpſit for goods ſold and delivered. The defendant pleads *non aſſumpſit infra ſex annos*. And upon the trial of the iſſue, the plaintiff gave in evidence, that, after ſix years were elapſed ſince the contract, he being executor to the perſon who ſold the goods to the defendant, he came to the defendant, and demanded the money for them; but he denied that he had at any time bought any ſuch goods of the plaintiff's teſtator; and ſaid farther, that if the plaintiff could prove it he would pay him. And this was within ſix years before the action was brought. And whether this was ſufficient to revive the contract was the doubt. Upon which *Holt* chief juſtice conſulted with his brothers of the king's bench, keeping the *poſtea* till he had their opinions, the cauſe being tried before him at *niſi prius*. And *Darnall* ſerjeant argued, that the ſix years being expired, the cauſe of action was barred by the ſtatute; and therefore there ought to be a new promiſe, or acknowledgment at leaſt of the debt, which was not in this caſe, for the defendant denied the debt. *Per Holt* chief juſtice. Doubtleſs an expreſs promiſe will revive the debt, though it were twenty years after. So it was held in *Haſtings'* caſe. This conditional promiſe would be ſufficient to ground an action, if it were ſpecially ſhewn in the declaration: as if the plaintiff had declared that in conſideration that his teſtator had ſold ſuch goods to the defendant, he aſſumed to the plaintiff, that if he could prove it, the defendant would pay to the plaintiff, *&c.* and aver that the teſtator ſold ſuch goods. And he has no need to aver that he proved it, for that will be proved in the action upon the evidence. And (by him) it has been overruled upon a bare acknowledgment, but that has been held both ways. If an infant buys goods, and *indebitatus aſſumpſit* is ſued againſt him, he may plead *non aſſumpſit*, and give infancy in evidence, becauſe the contract is void; yet if he promiſes to pay it, after he comes to the age of twenty one years, a (*a*) general *indebitatus aſſumpſit* will lie againſt him. So that there is no doubt upon an expreſs promiſe. But the queſtion here is concerning this conditional promiſe. And (by him) there is a difference, where the ſix years are expired before the making of ſuch conditional promiſe, and where they are not; becauſe the contract not being barred by the ſtatute, has no need of ſo much aſſiſtance to continue it, as it muſt have to revive it, if it had been once abſolutely deſtroyed. The ſtatute is founded upon very good reaſon, becauſe men ſhould not unravel perſonal contracts ſo long after; upon a ſuppoſition, that if they were not paid, they would ſue ſooner; and acquittances being ſubject to be loſt,

A promiſe to pay a debt upon which the ſtatute of limitations has attached is an anſwer to the ſtatute in an action of aſſumpſit. S. C. Carth. 470. Salk. 29. pl. 19. 12 Mod. 223. Holt, 427. pl. 3. cit. 6 Mod. 309. R. acc. Prec. Chan. 385. Burr. 1099. and vide 3 P. Wms. 89. 4th. Ed. n. An acknowledgment of the debt is evidence of a promiſe to pay it. S. C. Carth. 470. Holt, 427. pl. 3. Semb. acc. 11 Mod. 37. and vide Burr. 1099. 2630. Bl. 703. 2 P. Wms. 375. But evidence only. S. C. 12 Mod. 225. 5 Mod. 425. Holt, 427. pl. 3. cit. 6 Mod. 310. A conditional promiſe is as effectual an anſwer as an unconditional one from the time the conditions are performed. S. C. Salk. 29. pl. 19. 12 Mod. 223. Carth. 470. Holt, 427. pl. 3. D. acc. Cowp. 548. On a promiſe to pay if the creditor can prove how the debt aroſe, the proof need not be made before the action brought. S. C. 12 Mod. 223. D. acc. Cowp. 548.

(*a*) R. 1 Term Rep. 648. D. acc. Cowp. 290. 548.

a man

HYLEING v. HASTINGS.

a man might be ſued for what he had paid before. And therefore this ſtatute ought to be favoured as much as a fine and non-claim. The principal caſe was adjourned, to be argued at the chief juſtice's chamber before the judges of the king's bench this vacation. *Adjournatur. Ex relatione m'ri Jacob. Poſt.* 421.

Pitts *verſ.* Polehampton.

The courts cannot take notice judicially of a private ſtatute. R. acc. ante 30. poſt. 708. D. acc. 1 Bl. Com. 86. A ſtatute to enable inſolvents of a particular deſcription to compound their debts is a private one. Vide ante 120. If a ſtatute enacts that an agreement for a compoſition with two-thirds in number and value of a man's creditors ſhall oblige his other creditors to accept a like compoſition, and points out a mode to aſcertain the real creditors, a repliſation to a plea under the ſtatute that two-thirds of the creditors in number and value did not agree is argumentative. But after a verdict for the plaintiff unobjectionable. If an immaterial iſſue is taken, and a verdict found for the plaintiff on a plea confeſſing but not ſufficiently avoiding the cauſe of action, the plaintiff ſhall have judgment.

5 Law Rep 444.

CASE. The defendant pleaded the act of compoſition 8 & 9 *W.* 3. *c.* 18. by which it is enacted, that two-thirds of all the real creditors in number and value ſhall bind the reſt; and that *A. B.* and *C.* being two-thirds in number and value of the real creditors, made ſuch an agreement, &c. The plaintiff replies, *quod duae tertiae partes in numero et valore realium creditorum non fecerunt agreamentum tale, &c.* And iſſue was joined thereupon. And verdict for the plaintiff. And it was moved, that this was a *jeofaile*, and not aided by any ſtatute, and therefore a *repleader* ought to be granted. And it was urged, that this was a *jeofaile*, becauſe this matter was not iſſuable, ſince there is a ſpecial method directed by the act, by which the reality of the creditors may be tried, *viz.* ſummoning them before a maſter in chancery, and compelling them to ſwear that their debts are *bona fide* contracted; which if the plaintiff has omitted, he ſhall not put it in iſſue afterwards. And as to that, the court held, that in this caſe, that part of the act not being pleaded, the court could not take notice of it, becauſe it is a private act. But if it had been pleaded, the court ſeemed to incline, that the difference would be, where the party was ſummoned, and where not, becauſe he had not any opportunity to make inquiry into the reality of the creditors. But the iſſue being here, not upon the reality of theſe creditors, but only that two thirds did not ſubſcribe, though the whole act had been pleaded, the plaintiff might have taken ſuch an iſſue; though the moſt proper iſſue had been, to have ſaid that theſe, *A. B.* and *C.* were not two-thirds, &c. for this iſſue in the preſent caſe is but argumentative; nevertheleſs it being found for the plaintiff, he muſt have judgment. Judgment for the plaintiff. Sir *Francis Winnington* in a motion in this caſe one day ſaid, that this iſſue was aided by the ſtatute of *jeofailes*; for where the defendant's plea confeſſes the duty of the plaintiff, and iſſue is joined upon an immaterial point, and found for the plaintiff, he ſhall have judgment; which *Hale* chief juſtice uſed to ſay, was the true reaſon of *Nichol's* caſe, 5 *Co.* 43. *a.* *Quod Holt* chief juſtice *conceſſit*, and ſaid, that it was very ſhortly reported in *Coke*. And he took this difference, where the defendant's plea confeſſes the duty demanded by the plaintiff, and does not avoid it ſufficiently,

If an iſſue on a plea going in diſcharge of the plaintiff's action, there ſhall be a repleader. S. C. 3 Salk. 305. R. acc. Cro. El. 214. pl. 9. Str. 394. Vide poſt. 924. ante 90

ciently, if the iſſue be immaterial, and found for the plaintiff, he ſhall have judgment; but if the defendant's plea goes in diſcharge of the action, and iſſue is taken immaterially, and verdict for the plaintiff, a repleader ſhall be granted.

PITT v. POLEHAMPTON.

Rex. *verſ.* major', &c. Coventry.

S. C. Salk. 430.

A *Mandamus* was directed to the defendants, to command them to reſtore *Oldham*, to be one of the council-houſe in *Coventry*. They return, that they are, and time whereof, &c. have been, a corporation by preſcription, known by ſuch a name; and that King *James* I. by his letters patent dated in the nineteenth year of his reign, reciting that they had a cuſtom to elect any one to be of the common council, and to remove him *ad libitum*, and reciting other cuſtoms; the king confirmed to them all their ſaid liberties; and then they conclude, that by force of the ſaid cuſtom, time whereof, &c. uſed, *et ſecundum formam praedictarum literarum patentium*, they removed *Oldham*. And Mr. *Northey* took an exception to the return, that by the election *Oldham* had an eſtate for life, and then a cuſtom to remove an officer for life, without cauſe, is not good. *Sed non allocatur per Holt* chief juſtice. For, 1. He is not returned to be an officer for life, but *e contra*, becauſe it is returned, that he might be removed at pleaſure. And if the conſtitution in the corporation be to elect *ad libitum*, &c. in ſuch caſe they ought to purſue their cuſtoms; and they cannot elect in other manner, or for a longer or more durable intereſt; and his eſtate is always liable to the determination annexed to it by the cuſtom. *Trin.* 31 *Car.* 2. *B. R. Rex v. Repes*, and others, mayor and bailiffs of *Cambridge*, 2 *Show.* 69. In *mandamus* to reſtore *P.* to the recorderſhip of *Cambridge*, they returned a cuſtom, to chuſe *ad libitum*, or *ad terminum vitae*, and that they had elected him, to hold *ad libitum*, &c. and that they removed him; and adjudged a good return. In the caſe of the lord *Hawles*, 1 *Vent.* 143. 2 *Keb.* 770. 778. 796. in *mandamus* to reſtore him to the recorder of *Bath*; they return a cuſtom, to elect a man learned in the laws of the land for their recorder, and that by the ſtatute for purging of corporations the commiſſioners put in the lord *Hawles*, but becauſe he was not learned in the laws of the land, they had deprived him; and it was adjudged a good return, for though the commiſſioners had power to put in a recorder, yet he ought to be ſuch a perſon as was required by their conſtitution. And *Kelyng* chief juſtice held, that he might have caſe for the falſe return, if he was learned in the laws of the land, and if it was found for him he ſhould be reſtored. And if a ſteward be choſen according to the cuſtom, to continue

An officer elected generally, if removeable at will, is an officer at will only. No cauſe need be aſſigned for the removal of a common councilman appointed during will. R. acc. Cro. Jac. 540. Vide Com. Franchiſes, F. 32. 2d. Ed. vol. 3. p. 408. The ſtatement of the recital of a patent is not to be conſidered as a ſtatement of the facts the recital contains.

REX v. MAYOR of COVENTRY.

continue during pleaſure, they may remove him, notwithſtanding *Blagrave's* caſe. 2. A ſecond exception was, that they do not ſhew any foundation for this removal; for they inſiſt upon their cuſtom and the letters patent, but do not ſhew any ſuch cuſtom, but by way of recital in the letters patent, nor do they ſhew any cauſe of grant in the letters patent, which ought to have been pleaded ſpecially. And of this opinion was the whole court. And therefore a peremptory *mandamus* granted, *niſi*, &c.

Roſewell *verſ.* Prior.

S. C. Salk. 459. pl. 4. Carth. 454. Comb. 481. 12 Mod. 215. Pleadings Lill 81.

In an action for darkening windows by building on the ground adjoining, the declaration ought to ſtate that the windows were ancient. Sed vide 1 Vent. 237. 3 Keb. 133. 1 Show. 7. pl. 3. 20 Vin. 11.

But a declaration ſtating only that the light *uſed and ought to paſs* through the windows will be unexceptionable after verdict.

CASE. The plaintiff declares, that he was poſſeſſed of a houſe, in which there were twenty-one windows, *per quas lumen inferebatur, et infuri conſuevit et debuit* into the houſe; and that the defendant erected a ſhed upon the *(a)* ground next adjoining, which ſtopped the lights, &c. Not guilty pleaded. Verdict for the plaintiff. Upon which it was moved in arreſt of judgment by Mr. *Montague*, that the declaration was ill, becauſe neither the meſſuage nor the lights are averred to be ancient. And this caſe is diſtinguiſhable from the caſe of a wrong doer: for here it *(b)* is lawful for the defendant to erect buildings upon his own ſoil againſt the windows of another, unleſs they are ancient windows; which not appearing here, there is nothing to make this act a wrong in the defendant. And this difference will anſwer all the caſes, where a bare poſſeſſion has been held ſufficient to maintain the action. See *Popb.* 170. *Cro. Jac.* 373. *Yelv.* 215. 225. *Cro. Car.* 325. 1 *Roll. Rep.* 13. *Babington's* caſe. But after it had been argued two or three times at the bar, the court upon great conſideration held, that it was good after verdict. For by reaſon of the words *conſuevit et debuit* it muſt be intended, that a preſcription was given in evidence. (As in fact it was in this caſe, for it was tried before *Holt* chief juſtice in *Middleſex.*) But *Holt* and *Tarton* ſaid, that it would have been ill upon demurrer. But *Rokety* held, that it would have been good after demurrer. Caſes cited for the plaintiff were 8 *Co.* 87. *Fitzh. entry*, 15. 50. *Bro. hors de ſon fee* 1. *Fitzh. brieſe*, 674. *Cro. Jac.* 43. *pl.* 9. *Owen*, 109. *Cro. Eliz.* 335. 419. 9 *Co.* 53. *b.* 1 *Roll. R.* 393. *Trin.* 6 *W. & M. Rot.* 550. *B. R. Stroud v. Birch*, *ante* 266. Judgment for the plaintiff.

(a) From the report in Salk. 459. pl. 4. and the context of the report here it ſhould ſeem that the declaration had ſtated the adjoining ground to have belonged to the defendant, but according to the entry in Litt. 81. that was not the caſe.

(b) P. cur. acc. Cro. El. 118. pl. 3. D. acc. 1 Lev. 122. 1 Vent. 239. and ſee 6 Mod. 116. poſt. 1093. 20 Vin. 8.

Hartfort

Hartfort *verſ.* Jones, &c.

S. C. Salk. 654. pl. 2. 3 Salk. 366.

TRover for goods. The defendant pleads that they were in a ſhip, and that the ſhip took fire, and that they hazarded their lives to ſave them; and therefore they are ready to deliver the goods, if the plaintiff will pay them 4*l.* for ſalvage, *&c.* The plaintiff demurred generally. And *Holt* chief juſtice held, that they might retain the goods until payment, as well as a taylor, or an hoſtler, or a common carrier. And ſalvage is allowed by all nations, it being reaſonable, that a man ſhall be rewarded who hazards his life in the ſervice of another. But though the detainer be lawful, yet it does not amount to a converſion, no more than a diſtreſs for rent. And he ſaid, that he never knew but (*a*) one ſpecial plea good in trover, except a releaſe. And ſee *Yelv.* 198. a man may (*b*) plead that ſpecially, which he might give in evidence upon not guilty, if he confeſſes and avoids the fact. For the reaſon why you may plead ſpecially is not the doubt in the law; but it is, becauſe the matter of the plea cannot be given in evidence upon not guilty. But this cannot be good though after a general demurrer, becauſe it does not confeſs a converſion. A rule was made by conſent, that the defendant ſhould waive the ſpecial plea, and plead the general iſſue.

A man entitled to ſalvage has a lien for it upon the thing ſaved. A man who reſcues goods from a ſhip on fire at the hazard of his life is intitled to ſalvage. In trover no ſpecial plea is good, which does not admit the converſion. B. acc. Cro. El. 435, pl. 48. Semb. acc. 2 Keb. 305. Latch. 185. 1 Roll. Rep. 1. Therefore any plea which ſhews that the defendant has a lien upon the thing for which the action is brought is bad.

(*a*) Vide Yelv. 198. (*b*) R. acc. ante 217. and ſee the caſes there cited.

Lug *verſ.* Goodwin.

Scire facias upon judgment againſt the defendant. He pleaded in abatement, no ſpecification. The plaintiff demurred in bar. *Reſpondes ouſter* was awarded. Afterwards the defendant pleaded the ſame matter in bar. The plaintiff demurred. And *Carthew* took exception, that there was a diſcontinuance here; becauſe upon the plea in abatement the plaintiff had concluded his demurrer as if it had been in bar. *Sed non allocatur.* For where the defendant pleads a good plea in abatement, and the plaintiff replies new matter, he (*a*) ought to maintain his writ; but if the defendant pleads an ill plea, though the plaintiff replies and concludes in bar, it is not material. Then *Carthew* took exception to the writ; that it was to ſhew cauſe, why he ſhould not have execution of the judgment, *et miſis et cuſtagiis in hac parte*, whereas it ſhould have been in *ea parte*. But upon ſearch of the precedents *Holt* chief juſtice ſaid, that where the *ſcire facias* was ſued againſt the defendant upon a judgment againſt himſelf, *in hac parte*, is well enough; but *contra*, if it be ſued upon a recognizance againſt the bail, there it muſt be *in ea parte*. And therefore he thought that ſuch *ſcire facias* brought by *Atwood* againſt *Burr* was ill.

A demurrer in bar to a plea in abatement occaſions a diſcontinuance. R. acc. Salk. 218. pl. 2. Say, 46. vide ante 338. A diſcontinuance occaſioned by the improper concluſion of a replication to a plea in abatement cannot be inſiſted upon after the award of a reſpondeat ouſter. A ſcire facias on a judgment may be either in hac or in ea parte. A ſcire facias on the recognizance againſt the bail muſt be in ea parte. R. cont. poſt. 532. 7 Mod. 4.

(*a*) Vide ante, 338.

Intr.

Lug v. Goodwin.

Intr. Paſch. 10 *W.* 3. *B. R. Mich.* 2 *W. & M. B. R. Rot.* 150. *Hil.* 2 *W. & M. B. R. Rot.* 717. And this diſtinction will reconcile (by him) all the precedents. *Ex relatione m'ri Jacob.*

Rex *verſ.* Inhabitants of Riſlip, Hendon, and Harrow.

S. C. but no judgment. Salk. 524. Sett. and Rem. 226. 5 Mod. 416. Holt, 572. 3 Salk. 261.

By the confirmation of an order of removal on appeal the pariſh to which the pauper is removed is concluded as to all the world from inſiſting that he is ſettled elſewhere. R. acc. Salk. 492. pl. 58. 527. pl. 9. 12 Mod. 668. Str. 232. 1 Seſſ. Caſ. 27. pl. 28. 145. pl. 135. Vide 1 Vent. 310.

SEveral orders being removed into the king's bench by *certiorari*, the caſe in effect appeared to be thus. *Edlin* came into the pariſh of *Harrow*, and being likely to become chargeable to the pariſh, two juſtices made an order, and remove him to *Riſlip*: *Riſlip* appeals to the quarter ſeſſions, and upon the appeal *Riſlip* is adjudged to be the place of his laſt legal ſettlement; afterwards *Riſlip* finds that *Hendon* was the place of his laſt legal ſettlement, and that he had been adjudged upon appeal to be ſettled there; and upon this they remove him to *Hendon* by order of two juſtices; and upon appeal an order is made at the quarter ſeſſions, reciting all this matter, that he ſhould be ſettled at *Riſlip*. And the queſtion was, if after the adjudication upon the appeal againſt *Riſlip*, *Riſlip* is not eſtopped as to all the world, to ſay that it is not the place of his laſt legal ſettlement. And after it had been debated at the bar by Mr. *Northey* and Sir *Bartholomew Shower*, *&c.* *Holt* chief juſtice was of opinion, that *Riſlip* is eſtopped; becauſe if it had not been the place of his laſt legal ſettlement, upon the appeal *Edlin* had been ſent back to *Harrow*; which being determined upon the appeal is concluſive, and there ought to be an end of ſuits. And he cited a caſe between *Thornton* and *Pickering*, 1 *Freem.* 283. 3 *Keb.* 200. where it was adjudged, that if a man be adjudged to be the father of a baſtard by two juſtices, he is eſtopped againſt all the world, to ſay the contrary, and a man may juſtify the calling him ſo. The caſe was *A.* libelled againſt *B.* in the ſpiritual court, for ſaying that *A.* had a baſtard; *B.* for a prohibition ſuggeſted this adjudication before two juſtices; and the ſuggeſtion being turned into a declaration upon attachment upon the prohibition, the defendant pleaded, that the words were ſpoken at large, without relation to the adjudication of the juſtices; the plaintiff replied, and prayed judgment if the defendant was not eſtopped by this adjudication, to ſay that he had not a baſtard; and judgment was, that *A.* was eſtopped. But *Turton* juſtice was of opinion, that it was very hard, to conclude *Riſlip* againſt a third pariſh, which was diſcovered after the adjudication of the appeal, to be the place of the laſt legal ſettlement. And (by him) it is contrary to the practice of all the juſtices of *England*. *Idea adjournatur*. *Per Holt* chief juſtice, if two juſtices make an order, to ſend a poor man from *A.*

The filiation of a baſtard by two juſtices precludes the adjudged father as to all the world from ſaying he is not the father R. acc. Cro. Jac. 535. pl. 19.

A pariſh to which a pauper is removed by an order from two juſtices cannot remove him otherwiſe than by appeal. Vide Burn. Poor, Removal. iii. 3.

to

to *B. B.* ought to appeal, and cannot remove him to *C.* *Poſt.* 425.

REX v. RISLIP.

Rex *v.* Inhabitants of Wangford in Suffolk.

S, C. Carth. 449. Salk. 482, pl. 35. Holt, 574.

An order to remove a pauper *and his family* is bad on account of the generality of the word "family." (*a*) R. acc. Salk. 485. pl. 41. and vide Seſſ. Caſ. 10. pl. 11. 76. ſee alſo Str. 114

AN order was made to remove three perſons and their families. And it was quaſhed, becauſe it was too general; for it might be, that ſome of their families were not removable. If a man marries a poor woman, who is ſettled in *B.* and had children by a former huſband, and he is ſettled in *A.* his wife ſhall be removed to him to *A.* but ſuch of her children as are more than ſeven years of age ſhall not be removed; thoſe under ſeven years of age may for cauſe of nurture, but ought to be maintained at the charge of the pariſh of *B.* *Per Holt* chief juſtice.

1 Seſſ. Caſ. 29. pl. 30. 140. pl. 128. 2 Seſſ. Caſ. 77. pl. 81. If a man and his wife become chargeable to a pariſh, the children of the wife by a former huſband ſhall be maintained by the pariſh in which ſhe was ſettled before her laſt marriage. R. acc. Carth. 279. Fort. 307 And none of them ſhall be removeable to the father-in-law's pariſh except for cauſes of nurture. All children under ſeven years of age are removable for cauſe of nurture. But no others. And children removed for nurture ſhall be maintained by the pariſh in which they are ſettled. R. acc. Rex v. Hemlington. Dougl. 9. n. 2.

(*a*) According to the report in Carth. the court was unwilling to quaſh the order on this exception, and affidavits were produced to prove a part of the pauper's families not removable.

Archbiſhop of Canterbury *verſ.* Fuller.

In all actions removed by the defendant from inferior courts the plaintiff ſhall, if he gets judgment have full coſts, how ſmall ſoever the damages he recovers may be R. acc. 2 Lev. 124. 3 Salk. 115. pl. 9. Vide ante 181.

TRESPAS was brought in an inferior court. And the defendant removed the cauſe by *habeas corpus* into the king's bench. And upon not guilty pleaded, verdict for the plaintiff, and 12*d.* damages. And Mr. *Turner* moved for full coſts; becauſe this cauſe, being removed by *habeas corpus* out of the inferior court, was not within the 22 & 23 *Car.* 2. *c.* 9. And ſo it was held by *Northey* and the practiſers, to be the courſe upon actions removed out of the *Marſhalſea*, and other inferior courts. And ſo it was ruled here. *Ex relatione m'ri Jacob.*

Rex *verſ.* Abbert Alberton.

S. C. Salk. 483. pl. 38. Carth. 469. Holt, 507.

The child of a feme covert conceived and born while the huſband is extra quatuor maria is a baſtard within the 18 El. c. 3. ſ. 2. if the huſband remains abroad from the conception to the birth. R. acc. Salk. 122. pl. 5. Vide Burn's juſtice, Baſtard, 1. otherwiſe not.

AN order was made by two juſtices, that *A.* ſhould maintain a baſtard child, where the caſe was thus. A *feme coverte*, during the abſence of her huſband at *Cadiz*, was brought to bed of a baſtard; and her huſband was not in *England* from the time of her conception till ſhe was brought to bed. The order being removed into the king's bench by *certiorari*, the queſtion was, whether this child was a baſtard within the 18 *El. c.* 3. *ſ.* 2? the words of which ſtatute are, children begotten and born out of lawful matrimony, which cannot be ſaid of this caſe (as Sir *Bartholomew Shower* objected) the mother being married at the time of the birth of the child, ſo that there is a father bound to provide for it. And if ſuch a mother ſhould kill ſuch a child, ſhe could not be guilty of murder within the 21 *Jac.* 1. *c.* 27. *ſ.* 2.

R. acc. Salk. 122. pl. 5. Sed vide Str. 925. 1076. If an order of filiation is quaſhed in B. R. the reputed father ſhall be bound to appear at the next ſeſſions.

Sed

Rex v. Abbert Albertон.

Sed non allocatur. For *per curiam*, he is a baſtard who is begotten and born of a *feme coverte*, whilſt her huſband is beyond the four ſeas. And in a real action, if general baſtardy was pleaded, the biſhop ought to certify ſuch a one baſtard. Indeed in caſe of *baſtard eigne* the baſtardy muſt be pleaded ſpecially becauſe ſuch a one is *mulier* by the canon law, and the biſhop would certify him ſuch. And where a man is baſtard, he is ſuch to all purpoſes, and why not within the 18th *Eliz.*? For though the ſtatute of 21 *Jac.* 1. is a penal law, yet this act is a remedial law. But then exception was taken to the form of the order, becauſe it is ſaid, that the huſband at the time of the begetting and birth was beyond the four ſeas; but it is not ſaid, that he was not within them in the mean time, for if he was, the child was not a baſtard. And for this exception the order was quaſhed. But he was bound in a recognizance to appear at the next ſeſſions. And *per curiam*, the conſtant practice has been ſo ever ſince the third of *Charles* I.

An attachment is grantable againſt a man who eſcapes out of confinement upon an attachment.

AN attachment was granted againſt a man, and he was reported in contempt; and being fined, and committed in execution for it, he eſcaped. And a motion was made for a new attachment; but *Holt* chief juſtice was of opinion, that a new attachment cannot be granted, but a ſpecial *ſcire facias* ought to be ſued, reciting the whole matter, why the king ſhould not have execution for the fine. But at another day (*abſente Holt*) an attachment was granted.

Rex *verſ.* Whiting.

S. C. Salk. 283. pl. 12. Holt, 755. cit. and diſapproved. Ann. 359. Burr. 2254, 2255.

A perſon cheated cannot give evidence on an indictment for the cheat, ſo long as he continues liable to an action upon the tranſaction if it was fair. Vide Raym. 191. But ſee alſo 1 Vent. 49. Salk. 286. pl. 20. Str. 1229, 1230. Burr. 2251.

AN information was preferred againſt *Whiting* for a cheat. And in evidence on the trial at *niſi prius* the fact was thus: His mother-in-law agreed to give him 5*l.* and he by ſome trick impoſing upon her, obtained her hand to a note of 100*l.* for which he was now indicted. And upon the trial it was a doubt, whether the woman ſhould be admitted to give evidence? And *Holt* chief juſtice held, that ſhe being in ſome meaſure concerned in the conſequence of this ſuit, it being ſome means to diſcharge her of the 100*l.* ſhe ſhould not be admitted to give evidence. For though the verdict in this information could not be given in evidence in a trial upon the note, yet doubtleſs they would mention it. And he could not diſtinguiſh this caſe from the caſe of perjury and forgery, where the party intereſted for the deed, or prejudiced by the perjury, ſhall not be admitted to prove the (*a*) perjury or forgery. Ruled by *Holt* chief juſtice, at the ſittings at *Guildhall*.

(*a*) R. acc. Ann. 265. Str. 1043. 1104. D. acc. Hardr. 331.

A Libel

A Libel was preferred againſt a man in the ſpiritual court, for ſaying to another, Thou art *Beelzebub*. A prohibition was granted, though ſtrongly oppoſed by Mr. *Hall*.

A man is not ſuable in the ſpiritual court for calling another Beelzebub. acc. Salk. 692.

Vide Com. Prohibition. G. 14. 2d. Ed. vol. 4. p. 507.

Odes *verſ.* Clerk

Intr. Trin. 10 Will. 3. B. R. Rot. 475.

S. C. but no judgment. 5 Mod. 413.

ESCAPE. The plaintiff declared, *quod proſecutus fuit extra curiam domini regis et nuper dominae reginae adtunc apud Weſtmonaſterium exiſtentem quoddam breve de latitat* againſt *William Hickes*, returnable *quindena Paſchae coram dictis domino rege et domina regina ubicunque*, &c. which writ was directed to the defendant as ſheriff of ——; and that the defendant by virtue of this writ arreſted the ſaid *William Hicks*, and permitted him to eſcape, &c. Judgment by default, and writ of enquiry executed. Upon which Mr. *Northey* moved in arreſt of judgment, that the plaintiff has not ſhewn out of what court the writ of *latitat* iſſued; for though it is returnable *in B. R.* yet it might iſſue out of the common pleas, and then it would be a void writ. And the ſheriff ſhall take advantage of void proceſs, though he cannot take advantage of voidable proceſs. And he cited a caſe between *Webb* and *Hart*, or *Bray* and *Hart*, *intr. Hil.* 9 *Will.* 3. *C. B. rot.* 346. where in treſpaſs the defendant juſtified under a *capias* and warrant thereupon; the plaintiff replied, *de ſon tort demeſne*, &c. and judgment was given for the plaintiff, becauſe it did not appear out of what court the writ iſſued. And though here there is the word *latitat*, yet that is uſed in the common pleas in the *teſtatum capias* and *capias utlagatum*. Sir *Bartholomew Shower e contra*. Of which opinion the court ſeemed to be; for the court ſaid, that there is no writ properly called a writ of *latitat*, but that which iſſues out of the king's bench; and therefore they ſeemed to be clear of opinion for the plaintiff. But *adjournatur*.

A latitat is a writ peculiar to the king's bench. Where it ought to appear out of what court a particular writ iſſued, the courts will in caſe of a latitat preſume it to have iſſued out of B. R. In an action for an eſcape, it ought to appear out of what court the proceſs upon which the priſoner was in cuſtody iſſued.

Hook *verſ.* Moreton.

MR. *Eyre* moved for a prohibition to be directed to the admiralty court, to ſtay a ſuit there upon a libel by the mate of a ſhip for mariner's wages, upon ſuggeſtion of the ſeveral ſtatutes, which reſtrain the admiralty from proceeding upon contracts made upon the land. And (by him) the admiralty has no original juriſdiction of ſuch ſuits. 13 *Rep.* 51. And though they are in their nature maritime, yet

One mariner alone may ſue in the admiralty for wages on a contract made on land. Vide Com. Admiralty, E. 15. 2d. Ed. vol. 1. p. 273. The mate is in this reſpect in the ſame ſituation with a common mariner. R. acc poſt. 632.

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yet the place where the contract is made alters the case. 12 *Rep.* 79, 80. Therefore the admiralty has no jurisdiction of charter parties, nor of policies of assurance. 4 *Inst.* 141. Prohibition granted to a suit for mariners wages. 1 *Sid.* 351. Besides, that in this case this suit is by a single mariner; and therefore it is the same thing to him, to sue here at common law, or in the admiralty. And the case of *Woodward v. Bonithon*, *Raym.* 3. is a case in point. For though the suit was for other things as well as for mariners wages, yet if a prohibition had not lain for the wages, the prohibition should have been granted, *quoad*, *&c.* Objection. 1. *Vent.* 343. Answer. That is no authority in this case, because the motion was made there after sentence; and if it does not appear in the libel that the court had not jurisdiction, no prohibition shall be granted after sentence. See 2 *Roll. Ab.* 318. 12 *Co.* 77. Mr. *Pratt* against the prohibition argued, that if all the mariners sue for wages in the admiralty, the king's bench at this day will never grant a prohibition, 1 *Ventr.* 343. and there is no difference, where the suit is by one mariner, or many, 2 *Vent.* 181. *Allefon v. Marsh*, in point; and the mate of the ship is but one mariner. Objection. *Raym.* 3. *Woodward v. Bonithon.* Answer. There the contract was for other things as well as for mariners wages, and the contract is intire. And *per curiam*, there was no difference, where one mariner libels, and where many. For the reason why the king's bench permits mariners to libel in the admiralty for their wages, is not only because they are privileged to join in suit in the admiralty, whereas they ought to sever at common law, because the contracts are several; but also by the maritime law mariners have security in the ship for their wages, and it is a sort of implied hypothecation to them. Therefore the king's bench allows mariners to sue in the admiralty for their wages, because they have the ship there for security. But the question is here, whether the mate of a ship differs from any other mariner; for if the plaintiff had been a single mariner, doubtless no prohibition would have been granted. And it seemed to the court, that a mate is but a mariner. And *per Holt* chief justice, heretofore the common law was too severe against the admiralty; it did not allow stipulations, but at this day they are always allowed. Ruled, that Mr. *Pratt* move the court for their opinion at another day.

Medena *verf.* Kilder.

Money may be brought into court after the expiration of the time limited by the rules for pleading. Vide Imp. B. R. 3d Ed. p. 185. 1 Crompt. 2d Ed. 146. A jury will not give interest in the damages in an action for a wager. Vide Bl. 761. Str. 649. 2 Term. Rep. 58. Dougl. 361.

AN action was brought by the plaintiff against the defendant for 100*l.* won upon a wager, that the peace would not be concluded by such a day. Sir *Bartholomew*

Shower

Shower, after the rules for pleading were out, moved, that upon the bringing in of 100*l.* into court, and upon payment of coſts, the plaintiff might proceed at his peril; for the diſpute was only, whether the plaintiff ſhould have intereſt or not? And *per Holt* chief juſtice, intereſt is never given by the jury in ſuch caſes in the damages. Ruled, that the defendant ſhould ſhew cauſe, *&c.*

MEDENA v. KILDER.

Baker *verſ.* Swindon.

Int. Mich. 10 Will. C. B. Rot. 360.

S. C. but rather differently reported, Holt, 589. pl. 5.

AN action was brought againſt *Swindon*, one of the clerks of prothonotary *Tempeſt*, *&c.* The defendant pleaded, that he ought to be ſued by bill. And it was adjudged nót; Becauſe the clerks of the prothonotaries of the common pleas, the ſerjeants, the clerks of the ſerjeants of the common pleas, and of the judges, have privilege to be ſued in the common pleas by original writ, but not by bill. But the attornies of the common pleas ought to be ſued there by bill, becauſe they are ſuppoſed to be always preſent in court, but the others not. *Ex ratione m'ri Place.*

The privilege of a clerk of a prothonotary in C. B. is to be ſued by writ. R. acc. Swain. v. Girdler, 1 Barnes, 266. Of an attorney to be ſued by bill. R. acc. 3 Lev. 398.

Langton *verſ.* Wallis, C. B.

S. C. Lutw. 587. Pleadings, Lutw. 582.

DEBT was brought by the plaintiff, executor of *A.* againſt the defendant as executor of *B.* formerly ſheriff of the county of *D* Upon *nil debet* pleaded, the jury found a ſpecial verdict, *viz.* that *A* recovered a judgment againſt *F.* and ſued a *capias ad ſatisfaciendum* directed to *B* then ſheriff, *&c.* which writ of *capias ad ſatisfaciendum* was executed by the under ſheriff, and *F.* being in cuſtody, aſſigned a term for years to the under ſheriff, in ſatisfaction of the money recovered by the judgment, and to be diſcharged out of execution; and this aſſignment was to be void upon payment of the money recovered by the judgment at a day, after the office of *B.* to be ſheriff ſhould determine; and upon this *F.* was diſcharged out of execution, and at the day, *&c.* he paid the money to the under-ſheriff; but the under-ſheriff did not pay the ſaid money to *A. B.* died, and *A.* died; and the plaintiff as executor of *A.* brought this action againſt the defendant. And it was adjudged, that it did not lie; becauſe the releaſe of *F.* out of cuſtody was an eſcape in the ſheriff, and the receipt of the money afterwards could not purge it. *Ex relatione m'ri Place.*

No action lies againſt the repreſentatives of a ſheriff on account of the eſcape of a priſoner out of his cuſtody. R. acc. Dyer, 322. pl. 25. D. acc. 1 Saund. 218. poſt. 973. 2 Inſt. 382. Vide Com. Adminiſtration, B. 14. 2d. Ed. vol. 1. p. 242. If a ſheriff diſcharges a priſoner in execution upon a ſecurity for the payment of the debt, the priſoner in contemplation of law, eſcapes. And though the debt is afterwards paid to the ſheriff, it cannot be recovered from his repreſentative.

Mich.

Mich. Term

10 Will. 3. C. B. 1698.

Sir George Treby *Chief Juſtice.*

Sir Edward Nevill
Sir John Powell
Sir John Blencoe
} *Juſtices.*

Intr. Hil. 9 Will. 3. C. B. 1175.

Challoner *verſ.* Davies.

Pleadings, Lutw. 565. poſt. vol. 3. p. 273.

A bargain and ſale by tenant for years conveys no poſſeſſion without actual entry. A bargain and ſale by tenant for years and the reverſioner operates as a ſurrender by the tenant, and a bargain and ſale by the reverſioner. S. C. Lutw. 569. Vide 6 Co. 15. a. Cro. El. 166. pl. 2. Co. Litt. 45. a. 301. b. 302. b. 1 Vent 137. 2 Vent. 149. 260. 266. 1 Mod. 175. 2 Lev. 9. 3 Lev. 291. 370. 2 Saund. 96. 2 Wilſ. 75. Cowp. 597. Sheph. Touchſt. 82.

COVENANT. The plaintiff declared, that the plaintiff covenanted with the defendant, that the plaintiff, and all other perſons having any eſtate under him, ſhould make ſufficient conveyance of certain land to the defendant and his heirs before the ſeventeenth of *November* next following; and that the defendant covenanted, that upon ſuch conveyance made to him, he would pay to the plaintiff or his aſſigns, at the houſe of Sir *Francis Child*, *London*, 300*l.* and that they mutually bound themſelves, *&c.* in the penalty of 100*l.* to the performance of the ſaid agreement; and the plaintiff avers, that he was ready to perform all on his part to be performed; and that he and one *Markham*, who had a leaſe for years under the plaintiff of the ſaid lands, bargained and ſold the ſaid lands to the defendant for one half year, and that the plaintiff, by a releaſe dated the day after, releaſed to the defendant and his heirs all his right, title, *&c.* of which leaſe and releaſe the defendant had notice at *A.* in the county of *Bucks*, the ſixteenth of the ſaid *November*, and there refuſed to accept them, and refuſed to pay the money to the plaintiff *ſecundum formam* of the ſaid covenant, *&c.* Upon which declaration the defendant demurred.

But a court cannot take notice that it has ſuch operation unleſs it is either pleaded according thereto. S. C. Lutw. 569. Vide 5 H. 7. 1. Noy. 66. 6 Co. 14. b. Co. Litt. 45. a. 2 Vent. 149. 260. 266. 3 Lev. 291. 2 Saund. 97. 1 Mod. 14. Dougl. 735. or ſet out in hæc verba. Under a covenant to make a ſufficient conveyance of an eſtate it is a ſufficient averment of performance that the covenanter did make a ſufficient conveyance. To entitle a man to recover under a covenant for the payment of money at a particular place on the execution of a conveyance by him, it is not eſſential that he ſhould have executed the conveyance at that place. If a man covenants that he and all perſons having any eſtate under him will make a ſufficient conveyance, an averment that he made a conveyance will be ſufficient, he need not add that no perſon had any eſtate under him, for that ſhall not be intended. Vide Cro. Li. 302. ante 358. 2 Wilſ. 100. Burr. 1037.

Birch ſerjeant for the defendant argued, that the declaration is not good; 1. For the plaintiff has not averred, that the leaſe and releaſe were a ſufficient conveyance. 2 The plaintiff has not ſhewn, that the defendant had notice of the execution of the ſaid conveyance; which ought to have been done, becauſe the defendant was to pay the money upon the execution of it at Sir *Francis Child*'s houſe, and therefore the conveyance ought to have been executed there; and in this caſe it was executed in *Bucks* forty miles diſtant; and therefore it was impoſſible, that the defendant could pay the money upon the execution at *London* at the houſe of Sir *Francis Child*. But admitting that it might have been executed at another place, the defendant ſhould have had notice of it, or reaſonable and ſufficient time, before the money was to be paid, which was payable the ſeventeenth of *November*, and the conveyance was executed the ſixteenth, and perhaps the laſt inſtant of the day, upon which inſtant the money was payable at another place forty miles diſtant, by which it was impoſſible for the defendant to perform his covenant. 3. It does not appear, that *Markham* was the only perſon that claimed under the plaintiff, nor that all the eſtates that he and all perſons have under him, paſſed by this leaſe and releaſe. 4. Notice is ſaid to be given to the defendant at *A.* of the execution of the conveyance there, but that notice is not good, for the defendant is not bound to go thither to accept it, to pay his money there upon the conveyance executed, which by the covenant ought to be paid at London.

But *Gould* king's ſerjeant argued, that the court in this caſe ought to judge, whether the bargain, *&c.* by leaſe and releaſe be a good conveyance or not. And it ſeemed to him that it is a good conveyance. But he admitted, that if leſſee for years and the reverſioner join in a leaſe and releaſe, this does not operate by the ſtatute of uſes; for the leaſe being the leaſe of the leſſee, who has no ſeiſin of the freehold in the land, but only a poſſeſſion of it, is not within the ſtatute of uſes; and then no poſſeſſion by this leaſe is transferred before an actual entry, upon which the releaſe may operate; but no entry appears to be in this caſe. But though in this caſe it is not good by bargain and ſale by the ſtatute of uſes, yet the leſſee and the reverſioner joining together, who have the whole intereſt and eſtate of the land in them, this will be a good conveyance to paſs the eſtate. For the leaſe ought to operate, *ut res magis valeat*, *&c.* and then in this caſe the leaſe ought to be expounded the ſurrender of the leſſee to the reverſioner, and then the leaſe and releaſe of the reverſioner. Or otherwiſe it will be a grant of the reverſion, and then the grant of the intereſt of the leſſee for years. For the intent of the parties

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Termor for 20 years may ſurrender to a leſſee of the reverſion for 10. acc Cro. Eliz. 302.

No formal word eſſential to make a ſurrender. D. acc. 1 T. R. 444. Shep. Touch. 306. Semb. Co Litt. 301. b. ſee alſo 2 Wilſ. 26. Burr. 1980. 2213.

was, that both their intereſts ſhould paſs; and they have power to do it, and therefore it ought to be expounded a good grant to ſatisfy their intention. If the reverſioner makes a leaſe for years of his reverſion, the leſſee in poſſeſſion, though he has a greater term than the leſſee of the reverſion has, yet he may ſurrender to the leſſee in reverſion. *Co. Litt.* 192. *a.* and nevertheleſs the term for years in poſſeſſion cannot merge in the term in reverſion, but is merged in the inheritance. *Hutt.* 126. and *Treport*'s caſe 6 *Co.* 14. *b.* are authorities in point, that in this caſe it ought to operate as the grant of the reverſioner and the ſurrender of the leſſee; for the word ſurrender is not abſolutely neceſſary to make a ſurrender. 40 *Aſſ.* 16. For the intent of the parties is ſufficient to make a deed operate as a ſurrender, without any formal words. But if it cannot in this caſe operate as a ſurrender, yet ſince the leſſee joins in the leaſe and releaſe, it will be an extinguiſhment of his term. *Cro. Eliz.* 487. 10 *Co.* 46. *b.* *Lampet*'s caſe. 2 *Roll.* 402. For a term of years being only a chattel intereſt, it will be eaſily extinguiſhed. And though it was in this caſe deſigned by the parties, that it ſhould be a leaſe, and then a releaſe, to make the conveyance, yet the law in divers caſes will make a tranſpoſition of eſtates, to ſatisfy the general intent of the parties, that it ſhould not be fruſtrated. 1 *Co.* 76. *Bredon*'s caſe. *Cro. Eliz.* 727. *pl.* 62. 792. *Plowd.* 172. *W. Jones* 455. which ought to be done in this caſe, rather than that it ſhould be void. To the other exceptions taken to the declaration; as to the firſt, the plaintiff ought to make a conveyance before the ſeventeenth of *November*, and the defendant ought to pay the money at Sir *Francis Child*'s in *London*; but he is not obliged by the covenant, to pay it before the ſeventeenth, and therefore he ought to have reaſonable time to pay it after the conveyance executed. *Co. Litt.* 211. *a.* *Keilw.* 75. 5. And per *Powell* juſtice, and *Treby* chief juſtice, although the money be to be paid at the houſe of Sir *Francis Child* upon the conveyance executed, yet that has no need to be executed there, but the money is to be paid there in reaſonable time after the conveyance executed; for the conveyance might be by fine or recovery, which cannot be there. And it is not neceſſary, that the money be paid inſtantly upon the conveyance executed, nor before the ſeventeenth of *November*; but the defendant ought to have given notice to the plaintiff after the conveyance executed, at what time he would have paid the money. And as to the exception, that it does not appear, that *Markham* was the only perſon, who had any eſtate under the plaintiff; it ſhall not be intended, unleſs it be ſhewed by the other party. In this caſe it cannot be a bargain and ſale within the ſtatute of uſes, for a termor is not within the ſaid ſtatute; but the queſtion is here, whether this be not a good conveyance. The books have gone a good

good way, in transposing grants and words of the parties, to make them agree with their intents, that they should not be void. And in this case doubtless this might be a good conveyance, the one way or the other, to pass the interests of the parties. But *per Treby* chief justice, it is a doubt to him, whether the plaintiff should not have pleaded the conveyance according to its operation; but in this case having pleaded it as a bargain and sale, where it cannot be a bargain and sale, the declaration is not good. But *per Powell* justice the question is, whether this is not sufficient within the declaration, to shew that the plaintiff has performed all on his part, to intitle himself to his action; and therefore it may differ from the matter of a title pleaded. And (by him) in this case the termor has consented to pass his term, which will amount to a surrender. *Dier* 110. *b.* Lessee for years released to the reversioner, and held a good surrender. *Treby* chief justice doubted of the case in *Dier*. But if it be law, yet if the declaration in the said case had been, that the lessee released to the reversioner, where there was not any release, but a surrender, such declaration had not been good; but he ought to have declared that he had surrendered. But if in this case the deed of conveyance had been shewn *in haec verba*, there the court might have judged according to its operation. But here the deed is not shewn, but only it is said what is the effect, *viz.* that it is a bargain, *&c.* which it cannot be in this case. And if judgment be given for the plaintiff, it must be, that the lessee for years bargained, which cannot be, *&c.* for there is nothing before the court to make another construction. Whereupon it was directed to be argued again upon this point. And at another day it was argued by *Lutwyche* serjeant for the defendant, that the declaration is not good. But it ought to have been shewn what conveyance he had made to the defendant; for without a good conveyance the plaintiff is not entitled to his action; and it appears, that there cannot be any such conveyance, as he has shewn; and the court must take the case as it appears upon the declaration; and every one ought to declare upon the truth of his case, according to the operation of the law. And in this case the defendant is liable to a penalty, and therefore it ought to be strictly taken. And he took other exceptions to the declaration, against which it was argued by *Gould* king's serjeant. And he admitted, that pleas in bar, which were to answer particular matter, ought to be pleaded agreeably to the operation of law. And therefore between *Besley* and *Withe*, *Hill.* 5 *Will. & Mar. C. B. Rot.* 1839. in *indebitatus assumpsit* the defendant pleaded a letter of licence, to take so much by the pound; and that he and the plaintiff have accounted together, and that he was indebted so much to him, which by the said agreement was so much, which he has tendered, *&c.* and upon demurrer it was adjudged ill, in-

Release by tenant for years to the reversioner operates as a surrender. Vide Cro. Eliz. 21.

An agreement to take a composition for a debt ought to be pleaded a release. Vide 2 T. R. 24. A licence

trespass as a lease. R. acc. 1 Mod. 14. 5 H. 7 1

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aſmuch as the defendant ought to have pleaded it as a releaſe. In the ſame manner in treſpaſs a licence ought to be pleaded as a leaſe. But where the matter is only inducement, as in this caſe it is only inducement to the aſſignment of the breach, there ſuch exactneſs is not requiſite. 22 *Edw.* 4. 40. *Hob.* 107. *Latch.* 95. *Waſhington's* caſe there cited. *Powell* juſtice, The point ordered to be argued was only upon the pleading, whether the leſſee joining in this caſe with the reverſioner, amounting to a ſurrender, ought to have been pleaded as a ſurrender. And (by him) in this caſe it need not, *&c.* If a man pleads by the words *dedit conceſſit et confirmavit*, it is not ill, inaſmuch as the party has not taken upon him, to ſhew in which of the ways the deed operates, but only it is a double plea. There is not here an expreſs ſurrender by reaſon of the words in the deed, and therefore it ſeemed to him, that the plaintiff could not have declared better than by ſhewing the ſpecial matter. But by *Treby* chief juſtice the joining of the leſſee with the leſſor amounts to a ſurrender, and therefore the plaintiff might have pleaded it as a ſurrender. In this caſe the plaintiff does not recite the deed *in haec verba*, nor the ſubſtance and effect of it, but only that he made a deed of bargain and ſale, by which bargain and ſale, *&c.* and therefore the plaintiff took upon him, to ſhew to the court the effect and operation of the deed which the defendant refuſed, that it appears that the deed by law could not have any ſuch operation, and the deed itſelf is not before the court upon which they might adjudge, that it had any other operation, for no words of the deed are recited, but only that the leſſee bargained and ſold, *&c.* By this the joining in the deed by the leſſee is only evidence of his conſent, which ought to be adjudged by the deed, what effect ſuch conſent hath. *Blencowe* juſtice, If two tenants in common join in a leaſe, if this be pleaded as their joint leaſe, it is ill; and though it appears to the court that it has its operation as ſeveral leaſes, yet the party not having pleaded it ſo, the court will not adjudge it againſt the party's plea; which does not differ from this caſe. *Treby* chief juſtice. The plaintiff ſhould have ſaid, that the leſſee ſurrendered, and that the reverſioner bargained, *&c.* or if he had ſaid that he had ſufficiently conveyed, it had been ſufficient. *Adjournatur.* Mr. *Place.*

If a man attempts to plead a deed according to its ſuppoſed operation, the court is precluded from ſaying it has any other.

A joint leaſe by tenants in common muſt be ſtated in pleading as the ſeveral leaſe of each. R. Cro. Jac. 166. 83. Noy 13. 1 Show. 342. 2 Wilſ. 232. D. 1 Brownl. 39. 134. Co. Litt. 45. a. Comb. 2.

And afterwards by the opinion of the whole court judgment was given for the defendant, becauſe the plaintiff did not plead according to the operation of law. *Ex relatione m'ri Lutwyche.*

Redding

Redding *verſ.* Lion.

REplevin. The defendant made conuſance as bailiff to *B.* for rent, *&c.* The plaintiff replies, and traverſes, that the defendant was bailiff to *B.* And iſſue thereupon, and verdict for the ———. And now motion was made for a repleader. But denied *per curiam*, for though this is not traverſable, and it had been ill upon demurrer; yet after verdict it is good, and is not ſuch an immaterial iſſue, as to cauſe the granting of a repleader. See *Heb.* 113. Mr. *Daly.*

No objection can be taken after verdict to a traverſe on a cognizance for rent, *that the defendant was bailiff.* Vide ante 310. and the caſes there cited.

Gerrard *verſ.* Arnold.

JUdgment againſt three. Two bring error. The record was tranſmitted. Though in law the record is not removed, becauſe all did not join, yet the execution is ſuperſeded. And therefore in this caſe the other party being taken in execution, and having paid the money to redeem his body, reſtitution was awarded. Mr. *Daly.*

A writ of error by ſome only of the perſons againſt whom a judgment is given is irregular. Vide ante 71. and the caſes there cited. R. acc. 2 T. R. 737. but ſuperſedes the execution. R. acc. 2 T. R. 737. Vide poſt 1403.

Weekly *verſ.* Wildman.

CASE. The plaintiff declares, that he was occupier of a houſe for ten years in *D.* and that for the time aforeſaid there was a cuſtom within the town of *D.* that all inhabitants and occupiers of houſes within the ſaid town ought to have common for all commonable cattle in a fen called *Deeping Fen*; and that the plaintiff by reaſon thereof ought to have his common, *&c.* and that the defendant had erected an engine, by which he caſt the water upon the ſaid fen, more than could be carried off by the drains of the ſaid fen, whereby the ſaid fen was drowned; ſo that the plaintiff could not enjoy his common in ſo full and beneficial a manner as he ought, *&c.* The defendant demurs. This caſe was brought two or three terms before in this court, and then the plaintiff declared upon a preſcription for all the inhabitants to have common, *&c.* And it was held, that a preſcription for an inhabitant or occupier was not good; and therefore the plaintiff brought this action, and declared upon a cuſtom. And it was argued by *Levinz* ſerjeant for the defendant, that the plaintiff has declared, that he was poſſeſſed of a houſe for ten years; and that for all the time aforeſaid he hath been uſed to have common, *&c.* which is not good, for all the time aforeſaid refers to the cuſtom;

A natural perſon cannot preſcribe except in right of a permanent eſtate. R. acc. 2 Wilſ. 258. D. acc. Bro. Preſcription, pl. 28. 76. 77. 3 Lev. 160. Co. Cop. f. 33. Ed. 1764. p. 66. poſt. 1188. A grant of common ſans nombre in groſs is good. Semb. Co. Litt. 122. a. and 13th Ed. n. 5. 3 Bl. Com. 239. R. cont. 1 Saund. 343. Inhabitants cannot as ſuch take by purchaſe. D. acc. Co. Litt. 3. a. or have an intereſt in the ſoil of another by cuſtom, except on account of ſome ſpecial reaſon. R. acc. 6 Co. 59. b. Cro. Jac. 152. Bro. Preſcription. pl. 28. Semb. acc. Cro. El. 362. pl. 25. D. acc. 6 Co. 60. b. 61. a. Cro. Car. 419. and vide Hob. 86. 118. Semb. cont. 1 Roll. Abr. 398. 4 Vin. 486. I. pl. 1. 4. Vide alſo 3 Wilſ. 456. An eaſement they may. Semb. acc. Bro. Preſcription, pl. 28. 76. D. acc. 6 Co. 60. b. Cro. Jac. 152. Cro. El. 363. Cro. Car. 419. Vide Hob. 118. A right of common is an intereſt in another's ſoil. R. acc. 6 Co. 59. b. Cro. Jac. 152. The word "aforeſaid" does not neceſſarily refer to the laſt antecedent. R. acc. poſt. 1094. D. acc. poſt. 888. It is never to be preſumed that a cuſtom owes its origin to an act of parliament.

that

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that it is impoſſible, that the plaintiff has uſed to have common for time immemorial. And as to the ſubſtance of the declaration, it is grounded upon a cuſtom, for inhabitants to have common; which is not good by preſcription, and for the ſame reaſon connot be good by cuſtom; for in this caſe it is a common in groſs without number or ſtint. Occupiers (a) may preſcribe for an eaſement, not for an intereſt. In *Co. Litt.* 122 *a.* and *Bro. Common*, 49. mention is made of a common in groſs *ſans nombre*: but by other books, as 22 *Aſſiſe*, 36. 15 *Ed.* 4. 29. *b.* 1 *Roll. Abr.* 398. *c.* 28. 4 *Vin.* 586. 22 *H.* 6. 36. 1 *Saund.* 343. it is proved, that in an action for ſuch common it ought to be aſcertained by levancy and couchancy upon ſome land; and therefore in the caſe in *Saunders* the action was not good for want of levant and couchant; and a new action was brought, where it was aſcertained by levancy and couchancy, and for that it was held good. If ſuch a cuſtom, as is in this caſe, were good, there could be no improvement againſt the commoners; or if an inhabitant purchaſed parcel of the land, out of which the common iſſues, the next inhabitant would not be bound by this, but would have common *ſans nombre*, and therefore there could not be any apportionment. *Wright* king's ſerjeant for the plaintiff. To the firſt exception: the delaration is, that time whereof, *&c.* there has been a cuſtom, *&c.* and then that the plaintiff has been poſſeſſed for ten years, and that *per totum tempus praedictum* he hath uſed to have common. This relates to the ten years, and not to the cuſtom. Of which opinion was the whole court. Then as to the cuſtom 6 *Co.* 59. *a.* and *Cro. Jac.* 152. *Gateward's* caſe ſeems to be againſt it, but notwithſtanding theſe caſes the cuſtom is good. The defendant by his demurrer admits ſuch a cuſtom. And then being a cuſtom the court will not adjudge it void, if by any reaſon it can be ſuppoſed to have had a reaſonable commencement and continuance. A thing may be good by cuſtom, which is not good by preſcription; as (b) a cuſtom *in non decimando*, *&c.* This cuſtom is not unreaſonable, for common in groſs *ſans nombre* may be granted at this day; and whatſoever thing may be good in a grant, it will be good in a cuſtom. 12 *H.* 8. 2. [15 *Ed.* 4. 29, *b.* which is cited in *Gateward's* caſe, 6 *Co.* 60. *b.* does not prove the reaſon of that judgment. In 7 *Ed.* 4. 26. 18 *Ed.* 4. 3. a difference appears between a cuſtom and a preſcription: for it is ſaid there, that inhabitants cannot preſcribe for common, but they may have it by cuſtom; for preſcription is in the perſon, and therefore occupiers and inhabitants not having any perdurable eſtate, cannot preſcribe; but a cuſtom being fixed to the land, all the occupiers and poſſeſſors may have advantage of it. And as to the unreaſonableneſs, although it is common *ſans nombre*, yet it (c) ought to be ſtinted with reaſon. As to *Meller* and *Walker's* caſe, 1

(a) D. acc. Cro. Car. 419.

(b) Vide ante 337.

(c) Vide 1 Roll. Abr. 397. 4 Vin. 590. pl. 5.

Saund

Saund. 343. that was a preſcription, and therefore levancy and couchancy was held neceſſary; but that reaſon does not hold, where the common is claimed by cuſtom; for if any reaſonable commencement can be preſumed the cuſtom will be made good; and an act of parliament ſhall be intended for its original, rather than it ſhall be made void. WEEKLY v. WILDMAN.

As to the firſt exception, *per curiam*, the *tempus praedictum* muſt relate to the ten years, not to the time of the cuſtom, and therefore the declaration good notwithſtanding that objection. And *per Powell* juſtice, the general ſtint of common is by levant and couchant, but a man may grant at this day common in groſs *ſans nombre*. But this cuſtom could not commence by grant, being in the inhabitants and occupiers, who are not capable to take by grant. This common cannot be extinguiſhed or apportioned by purchaſe of part of the land, nor can the lord improve againſt ſuch commoners. The reaſon given in *Gateward's* caſe cannot be anſwered againſt preſcription and cuſtom for occupiers to have common, though one ſhould admit that the authorities cited there do not prove it. Copyholders may have cuſtomary common, their eſtates being alſo by cuſtom, but their common may be extinguiſhed.

Treby chief juſtice. It is agreed, that this common cannot be good by preſcription; the queſtion then is, if it be better by cuſtom. In ancient times ſuch grants might be, as to the inhabitants, *&c.* which were then allowed good, as the grant of the iſle of *Wexham*, but ſuch grants would not be good at this day. So in this caſe a grant of ſuch a common to the inhabitants for encouragement of habitation in the fen country may be ſuppoſed, which ought to be adjudged good, if there had been conſtant enjoyment under ſuch grant. See 2 *Keb.* 68. 3 *Keb.* 247. where ſuch common is mentioned to be good by cuſtom. But one ought not to preſume any act of parliament in the caſe, for ſuch preſumption would make all unreaſonable cuſtoms good; but theſe cuſtoms ought to appear of themſelves to be reaſonable, otherwiſe they will not be good; and therefore here the plaintiff ſhould have ſuggeſted ſome particular reaſon to make the cuſtom good, as for the better peopling of the fens, *&c.* for no reaſon appears in this record to maintain the cuſtom, but the plaintiff ſhould have ſhewn it; and it is not ſufficient to ſay, that it may be reaſonable, which might appear in evidence, but it ought to appear to the court. Although a common *ſans nombre* may be granted at this day yet ſuch grantee cannot grant it over. *Blencowe* juſtice. It will be very difficult to maintain this cuſtom. The plaintiff might have declared of a levant and couchant, and a ſmall evidence would have induced the jury to have found it, if it had been traverſed. Inhabitants may have a cuſtom to have pot water, which is an intereſt, and not barely an eaſement. But *Powell* juſtice denied that, and ſaid that it

Common ſans nombre is not grantable over

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is only an eaſement. And he agreed, that if any particular reaſon had been ſhewn, to ſupport the euſtom, it might have been good. The court inclined againſt the cuſtom. *Adjournatur.* Mr. *Place.*

In debt upon a bond conditioned to pay money, the defendant cannot properly plead payment after the day. Sed vide 4 Ann. c. 16. ſ. 12. Tutan iſſue inde cannot be objected to after a verdict for the plaintiff.

IN debt upon a bond payable in 1668, payment made in 1689 was pleaded; and iſſue being joined upon it, verdict for the plaintiff. And the defendant moved for a repleader becauſe the iſſue was immaterial. But *per curiam*, the verdict being for the plaintiff, it is well enough. For if it had been paid in 68, it had not been unpaid in 89; and it is like *Nichol*'s caſe, 5 *Co.* 43. But there the judges ſeem to be of opinion, that if the verdict had been for the defendant, it had been ill. And *per Powell* juſtice. If payment be pleaded to a ſingle bill, it is good after verdict. *Ex relatione m'ri Daly.*

Beal *verſ.* Simpſon Bailiff of the Liberty of Pomfret.

S. C. Lutw. 632. Pleadings Lutw. 627. poſt. vol. 3. p. 210.

A temporary adminiſtrator muſt in actions brought by him ſhew that his adminiſtration continues. R. acc. 5 Co. 29. a. Cro. El. 602. 1 Brownl. 247. 2 Sid. 60. poſt. 1071. Jon. 48. D. acc. Hob. 251. Cro. Jac. 590. Vaugh. 93. and the omiſſion will be fatal on demurrer. Vide poſt. 634. But the defendant can take no advantage of it after he has pleaded. R. acc. Cro. Car. 240. pl. 25. 2 Sid. 60. Semb. acc. Yelv. 128. poſt. 634. D. acc. 2 Roll. Rep. 466. Semb. cont. 5 Co. 29. a. Cro. El. 602. 2 Brownl. 247. Vide Com. Pleader C. 85. 2d. Ed. vol. 5. p. 59. Adminiſtration *durante minori ætate* of an executor determines when the executor attains the age of ſeventeen. Vide ante 338. and the caſes there cited. In an action by an adminiſtrator *durante minori ætate* of an executor, an averment that the executor is *within age* ſhall be intended to mean under twenty-one. Semb. acc. 2 Sid. 60. A *virtute cujus*, when it contains an inference of law only, is not traverſable; when matter of fact depends upon it, it is. Vide Hob. 52. 1 Saund. 20. 298. 11 Co. 10. a. 2 Keb. 607. pl. 41. poſt. 454. 1046. 3 Wilſ. 234. Bl. 776.

CASE (*a*) for eſcape. The plaintiff declared as adminiſtrator to *J. S. durante minoritate* of *A.* which *A.* is yet within age, that *B.* being in the cuſtody, *&c.* of the defendant, he permitted him to eſcape the third day of *February*. The defendant pleads, that the ſaid A. being in his cuſtody, *a habeas corpus* iſſued out of this court in *Hilary* term returnable in *Trinity* term: which *habeas corpus* being delivered to him before the eſcape, he by virtue thereof ſuch a day before the return thereof took the ſaid *B.* out of priſon, and carried him to *Weſtminſter*, and there delivered him in cuſtody to the *Fleet*, *&c.* The plaintiff replies by proteſtation, that the ſaid *habeas corpus* was not delivered to the defendant before the ſaid *B.* was taken out of priſon; and pleads, that a *habeas corpus* iſſued in *Michaelmas* term returnable the firſt day of *Hilary* term next following, but the defendant did not take the ſaid *B.* out of priſon by virtue of that writ; but after the return of the ſaid writ the defendant without the plaintiff's knowledge took the ſaid *B.* out of priſon, and he being out of priſon, the defendant by covin procured another writ of *habeas corpus* to be iſſued *teſte* before, which iſſued out returnable in *Trinity* term; and by fraud, and by colour of that writ ſued out by fraud, the defendant took the ſaid *B.* out of priſon; *abſque hoc* that the ſaid *B.* was taken out of priſon *virtute* of the former writ. The defendant demurred. *Gould* ſerjeant argued, 1. That the declaration is not good, becauſe the plaintiff declares as adminiſtrator *durante mino-*

(*a*) Debt. Vide Lutw. 627. poſt. vol. 3. p. 210.

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ritate of *A.* and ſays that *A.* is yet within age, but does not ſay that he is within the age of ſeventeen years, for at ſuch age his adminiſtration ceaſes; and within age generally ſhall be intended the age of twenty one years, and then *A.* may be within the age of twenty one years, and yet more than ſeventeen, and then the plaintiff has no authority. So that the plaintiff having only a particular authority for a certain time, he ought to ſhew that it is continuing; as *(a)* tenant *pur auter vie* ought to ſhew that *ceſtuy que vie* is not dead. And there is a difference between a plaintiff and the defendant, for the plaintiff ought to intitle himſelf by ſhewing particularly the age of the executor, where he ſues in his right; but where an action is brought againſt ſuch an executor, there the plaintiff has no need to ſhew it, becauſe he is a ſtranger to the executor's age, but finding a man meddling in the adminiſtration is ſufficient cauſe for him to bring his action againſt him. *Cro. Eliz.* 110. *Cro. Jac.* 590. *Yelv.* 128. *Hob.* 251. 2 *Sid.* 60. 2. The traverſe is not good, it being that the defendant did not take the ſaid *B.* out of priſon *virtute brevis praedicti*, for *(b)* it is a negative pregnant. *Anger v. Hutton, Paſch.* 18 *Car.* 2. *B. R. rot.* 316. But in this caſe there ſhould not have been any traverſe, becauſe the plaintiff had confeſſed and avoided the firſt writ, and then he ought not to take a traverſe to it. The defendant in this caſe is not eſtopped by the *teſte* of the writ, but might have ſhewn that it was ſued after the time of the *teſte* of it. And the plaintiff in this caſe ſhould have relied upon the fraud, for by this traverſe he has tied the defendant to join in it, and has not given him any opportunity to anſwer, and ſhew the ſpecial matter when the writ was firſt ſued out. *Wyott* ſerjeant for the plaintiff argued *e contra*.

(a) R. Dal. 101. 1 Mod. 216. 2 Mod. 93. D. acc. Moor 335. Plowd. 31. a. Co. Litt. 41. a. 303. b. poſt. 999. q. v.

(b) Vide Cro. Jac. 87. pl. 13.

An averment that a writ was ſued out after the day on which it bears teſte, allowable. Vide ante 212. and the caſes there cited.

Powell juſtice. The difference where the plaintiffs or defendants are ſtrangers to the executor within age as to the ſhewing of the executor's age is grounded upon great reaſon; becauſe privies ought to ſhew their authority, but ſtrangers to it cannot. 2 *Roll. Abr.* 466. And for this reaſon the plaintiff in this caſe being privy to the executor within age, ought to ſhew his age; and if he does ſhew it, and does not aver it ſufficiently, it is not good upon demurrer, and it is not aided by verdict here. But the queſtion is in this caſe, whether the defendant has not aided this defect by pleading over other matter, and not relying upon this deficiency of the declaration; for he has admitted by his plea, that the plaintiff is a perſon able to bring the action. In *Pigot's* caſe; *Cro. Eliz.* 602. 5 *Co.* 29. the defendant pleaded a plea as in this caſe, but there was an ill averment there, that the executor was not twenty-one; and an ill averment is worſe than the omiſſion of an averment, or an uncertain averment. And for this reaſon he took it, that though there were no averment

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averment in this case, yet the defendant's plea would have aided it And as to the traverse, he thought that the *virtute cujus* is traversable. 41 *Edw.* 3. 21. When a matter of law is only comprised in the *virtute cujus*, then it is not traversable. *Plowd.* 430. But matter of fact in the *virtute cujus* is traversable, 9 *H.* 6. 26. and admitted in *Foster* and *Jackson's* case, in *Hob.* 52. which in probability would not have been admitted there, the case being so greatly debated, if it had been thought material. And in 1 *Saund.* 23. it is the opinion of *Saunders*, that *virtute cujus* is traversable. It is not any negative pregnant, because all is admitted, but only the taking out of prison by virtue of the writ.

Treby chief justice. As to the first exception, he agreed the difference between a stranger and a privy to the executor, and it is a defect, which is not aided but by verdict. And under age shall be intended under the age of twenty-one. 1 *Roll. Rep.* 400. But the defendant by pleading over has taken away this intendment, having by his plea admitted him able to maintain the action. And by this reason only the declaration is made good, where at the beginning of itself it was not good. As to the traverse, he thought it to be ill, because *virtute cujus* is not traversable. After demurrer it is ill, but it is good after verdict; which is an answer to *Foster* and *Jackson's* case. 6 *Hob.* 52. for the said case being after verdict, was aided, as all perplexed and improper issues are. But in this case there is a special demurrer, and cause shewn that the traverse is not good, but contains double matter, *&c.* And this traverse would be intricate, and contain multiplicity of matter, *viz.* of fact, and of law; and for that reason it could not be put in issue, to be tried by the jury, which was his chief reason against it. For *virtute* of such a writ is only that which the law says and expounds upon the writ. As if a writ be delivered to the sheriff, where the party is in his custody, it is matter of law, whether the party be in custody in virtue of that writ, by the delivery of it. But whether there was any such writ or no, or whether it was delivered or not, is matter of fact. And after such fact agreed in the affirmative, then is the matter of law, whether the party was in custody *virtute* of it, 11 *Co.* 10. *a*. There the matter was not traversable, inasmuch as it was mere matter of law, and nothing of fact in the case. And if *virtute cujus* be traversable, then *(a)* the pleading of the statute of uses, that *virtute cujus* a man was possessed or seised may be traversed, which is a mere effect of the law. *Hob.* 52. and 1 *Saund.* 20. are only cases where the point passed *sub silentio*. But 1 *Saund.* 298. is a judgment in point. A *per quod* is not traversable, and there is no difference between *per quod* and *virtute cujus*. In this case the traverse ought to have been upon

(a) A seisin, *by force of the statute of uses*, is not traversable.

upon the delivery of the *habeas corpus*. And as to what was ſaid by *Gould*, that the defendant ought to have had an opportunity to ſhew that the writ of *habeas corpus* iſſued out at another day after the *teſte of* it, he *(a)* did not know that it was ever reſolved that it was averrable, that a writ iſſued out contrary to the *teſte* of it; though it has been oftentimes attempted and diſputed.

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(a) Vide ante 409.

Gould ſerjeant, There is a difference between writs which are to puniſh wrongs, and thoſe which are in advancement of right. Alſo a man cannot ſay *quod breve emanavit* at another day, contrary to the *teſte* of it; but *proſecutus fuit* the writ not before another day, may be pleaded. *Hutt.* 20. 2 *Roll. Abr.* 576. *Treby* chief juſtice, Admit that one may ſay, *quod proſecutus fuit* a writ at another day than it bears *teſte*, but not that the writ *emanavit* at another day; in this caſe the traverſe ought to have been, that the party was taken out of the priſon before the writ delivered to him.

Powell juſtice. But then it may be a queſtion, whether the ſheriff cannot juſtify after the *teſte* of a writ, before it be delivered to him? And *Levinz* ſerjeant, who was not in the cauſe, ſaid that it was adjudged that he might juſtify before the writ delivered to him. But *Treby* chief juſtice denied that, and 1 *Saund.* 298. agrees.

A gaoler cannot remove a priſoner under habeas corpus, until after the writ has been delivered to him. Vide ante 309. 2 Keb. 607. pl. 41.

At another day in this term the judges gave judgment in this caſe. *Powell* juſtice. The time of the iſſuing of the writ is traverſable. There is no confeſſing and avoiding of the writ mentioned in the plea; for the plaintiff ſhews, that there was no ſuch writ, but another writ ſued out after it. He might in this caſe have traverſed the delivery of the writ, that being alledged by the defendant; but he has not traverſed it, but the taking out of priſon *virtute* of the writ; and there being two things alleged, which were traverſable, it was at the plaintiff's election to traverſe the one or the other. He confeſſed, that generally the *virtute* of a writ is matter and inference of law only, and then not traverſable; but matter of fact may depend upon it, and then it is traverſable; as in this caſe the taking out of priſon, and for that reaſon it is here traverſable. And in ſome caſes it may be, that nothing but only the *virtute* of the writ is to be traverſed; as if two writs be delivered to the ſheriff againſt *A.* one at the ſuit of *B.* returnable the firſt return of *Hilary* term, and the other at the ſuit of *D.* returnable the laſt return of the ſaid term; and *D.* procures a warrant upon his writ, upon which *A.* is arreſted after the return of the writ of *B.* and then gives a bail-bond for his appearance; and in a ſuit upon this bail-bond *A.* pleads

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A. pleads that he was arreſted upon the writ of *B.* returnable the firſt return of the term, and that *(a)* he gave the ſaid bail-bond after the return of the ſaid writ, by which it is void by the 23 *H.* 6. *c.* 10. the ſheriff replies, that there was another writ at the ſuit of *D.* returnable the laſt return of the ſaid term, and that *A.* was arreſted, and the *abſque hoc* that he was arreſted *virtute* of the writ of *B.* and no bail-bond given, upon that writ; he ought *(b)* to traverſe, other thing is travetſable there; and if it be not traverſed, the bail bond will be made void, where it was rightly taken, which is not reaſon. 3 *Keb.* 260. *Rod. v. Huans.*

(a) Vide Doug. 93.

(b) Sed vide poſt. 562.

Treby chief juſtice *contra.* The *virtute cujus* is not traverſable in any caſe, and that is reſolved, 1 *Saund* 298. and he himſelf has a report of the ſaid caſe, which agrees with the ſaid book, that it was held by the court there, that *virtute cujus* is not traverſable. When one ſays, ſuch a thing was done *virtute* of a writ, it is meant by authority of the ſaid writ, by an operation of the law upon the ſaid writ, without any ingredient or mixture of matter of fact; and a mere matter of law is not to be traverſed, and tried by a jury. *Foſter and Jackſon*'s caſe, in *Hobart* 52. is no authority in this caſe, being upon an iſſue tried; for if iſſue be taken thereupon, it is not void, but good after verdict. The queſtion in this caſe is, whether the party be bound to take ſuch an iſſue, that being before the court to be adjudged upon a demurrer, and in this caſe upon a ſpecial demurrer; and for that reaſon in this caſe he has ſaved to himſelf by the demurrer all the advantages, which might be taken to it. And the forms of pleading ought to be preſerved by us by all means, that being the chief reaſon of the preſerving the law ſo well until our time. The words *virtute cujus, per quod, praetextu* or *vigore cujus*, introduce a conſequence of law only, from the matters of fact before ſtated. *Heath's Maxims of Pleading*, 165. 7 *H.* 7. 3, 4. which is cited and allowed, *Plowd.* 54. 193. *Dier* 185, *b.* where it is agreed, that the *virtute cujus* never introduces any new matter, but only collects the matter before. And if it be ſo, being the concluſion only, it ought not to be traverſed, but the matters precedent, upon which it depends, which are proper matters of fact, and the *virtute* the concluſion of the law from ſuch facts. 7 *H.* 6. 5, 6, 7. *accord.* The caſe 9 *H.* 6. 20. cited, does not reſemble this caſe; for it is not ſaid here, that he was in execution *virtute, &c.* but that he was committed in execution; and the commitment is proper matter of fact to be tried, whether there was ſuch commitment or not. And the ſame caſe is 12 *H.* 6. 2, 3. where it appears the commitment was of fact, and there was an iſſue there joined; and, as has been ſaid before, if iſſue be joined, it is good. That a man was ſeiſed *vigore* of the ſtatute of uſes, will not be a good traverſe upon demurrer, yet after verdict ſuch an iſſue ſhould be good. In

A mere matter of law is not traverſable.

After iſſue joined, no exception can be taken to the traverſe of a matter of law. Vide Cro. Jac. 87.

this

this caſe upon this traverſe, what is the matter to be tried? Whether any writ iſſued? or whether the ſaid *A.* was taken out of priſon? But all this was alleged before the *virtute cujus*. Or rather all the matters upon this traverſe ſhould be tried; and then the traverſe is ill, containing multiplicity of matters of fact; but the point of law upon this is a ſingle point. Suppoſe a perſon in the cuſtody of the ſheriff, and another writ is delivered to him, and the ſheriff upon delivery of it declares that he will not execute it, and the perſon eſcapes, upon which he who delivered the ſecond writ brings an action upon the eſcape, and the ſheriff pleads that he was not in his cuſtody *virtute* of the ſecond writ to him delivered; in this caſe if the law be only tried by this traverſe, doubtleſs the party was in cuſtody by delivery of the ſecond writ, he being in cuſtody before by another writ; but the matter of fact is contrary, for he declared abſolutely that he would not execute it; and by this it appears, that the law, and not the fact, is to be tried upon this iſſue. *Nevill* and *Blencowe* juſtices agreed with *Powell* juſtice, that generally the *virtute cujus* is not to be traverſed, containing matter of law; but when it is mixed with fact there it may be traverſed. And in this caſe there is matter of fact which depends upon it, and for that reaſon it is traverſable. And there may be ſome caſes, as the caſe of the bail bond, where nothing but the *virtute cujus* is traverſable, as put before by *Powell* juſtice. To the other matter the court agreed, that the advantages of the exception for not averring that the executor was within the age of ſeventeen, was waived by pleading over. And judgment was given for the plaintiff.

Hilary Term

10 Will. 3. B. R. 1698.

Sir John Holt *Chief Juſtice.*
Sir Thomas Rokeby
Sir John Turton
Sir Henry Gould, *Knight, King's Serjeant, this Term was made a Juſtice in the King's Bench in the Room of Sir* Samuel Eyre *deceaſed.*
} *Juſtices.*

Memorandum. *This Term Mr. Serjeant* Darnall *was made King's Serjeant in the Room of Mr. Serjeant* Gould, *made Juſtice of the King's Bench.*

Rex *verſ.* Beare.

An indictment for a libel muſt ſhew the words the libel contained. S. C. Carth. 407. Holt 422. 3 Salk. 226. An allegation that in the libel was contained *juxta tenorem ſequentem*, imports that the words afterwards ſet out in the indictment were the words uſed in the libel. S. C. Carth. 407. Holt. 422. 3 Salk. 226. Vide Dougl. 184. An allegation that in it was contained *juxta effectum ſequentem*, does not. S C. Carth. 407. Holt. 422. 3 Salk. 226. Writing a libel is criminal. S. C. Carth. 407. Holt. 422. Vide 12 Co. 35. Hob. 62. 215. Poph. 139. 5 Mod. 163. Hawk. B. 1. c. 73. ſ. 10. or, unleſs the party has a ſufficient authority for ſo doing, copying it. acc. Hawk. B. 1. c. 73. ſ. 10. Semb. acc. 5 Mod. 166. 167. or collecting copies. S. C. Carth. 407. Holt. 422. Words in a verdict are to be taken in their common acceptation. Upon a verdict finding a man guilty of a thing which is generally criminal, though in ſome caſes not, the thing ſhall be taken to be criminal. D. acc. Burr. 2667. On an indictment for a generic crime, and ſeveral ſpecies of it, if the jury find the defendant not guilty as to all except one ſpecies, and as to that guilty, he is to be conſidered as convicted of that ſpecies.

THE defendant *Beare* was indicted at *Exeter* in *Devonſhire*, for that he, 7 *W.* 3. at *B.* in *Devon* compoſed, made, wrote and induſtriouſly collected, many falſe and ſcandalous libels, *in uno quorum continetur inter alia juxta tenorem et ad effectum ſequentem*, viz. and then ſhews the words of the libel, &c. Which indictment being removed by *certiorari* into the king's bench, the defendant pleaded not guilty. And being brought to trial at the aſſizes at *Exeter*, it was tried before *Nevill* juſtice of the common pleas, and *Rokeby* juſtice of the king's bench, then juſtices of aſſize, &c. And the jury, as to the writing and collecting of the ſaid libels, find him guilty *prout in indictamento ſuperius ſupponitur*; and as to all other things charged in the indictment,

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praeter ſcriptionem et collectionem, they find him not guilty. This caſe depended in the king's bench ſeveral terms, and was argued ſeveral times at the bar. And now this term it was argued ſolemnly on the bench by all the judges, *viz.* *Holt* chief juſtice, *Rokeby* and *Turton* juſtices. And all were of opinion that judgment ought to be given for the king. The exceptions taken at the bar were as well to the indictment as to the verdict. To the indictment, becauſe it is not ſufficiently and certainly ſhewn, that the words contained in the indictment were the ſame with thoſe in the libel. *Sed non allocatur.* For *per curiam*, the words [*juxta tenorem ſequentem*] aſcertain and ſatisfy the court, that theſe are the ſpecific words mentioned in the libel. For *juxta* is ſometimes uſed as an adverb, ſometimes as a prepoſition. It is uſed here as a prepoſition, as it is in all caſes where it governs an accuſative caſe. And where it is applied to a place, it ſignifies near to, or beſide; where it is applied to a thing, it has the ſame ſignification as *ſecundum i. e.* according to; and *ſecundum formam ſtatuti, &c.* is always held well enough. *Plow.* 285. *b.* 286. *b.* *Juxta vim, &c. indenturae praedictae*, is well enough, *Co. Entr.* 116. Then tenor imports the ſpecific words, *Reg.* 169. *a.* Tenor is uſed in the ſame ſenſe as *tranſcriptum*, and upon the b. ſide of the leaf *tenor* and *tranſcriptum* are uſed indifferently for the ſame thing. Then if *tenor* ſignifies *tranſcriptum*, *tenor ſequens* is as much as to ſay, that the words following are a true copy of the words in the libel; and therefore the jury could not have found the defendant guilty, if the words in the indictment, and thoſe in the libel had been different. In the caſe of *Ford* and *Bennet*, *intr. Hil.* 34 & 35 *Car.* 2. *B. R. Rot.* 1154. where in a ſpecial action upon the caſe there againſt *Bennet* and others, the plaintiff declared, that the defendants at *Saltaſh* procured a falſe and ſcandalous libel againſt the plaintiff to be written in the form and under the colour of a petition; in which information, in form of a petition the libel *continetur ad tenorem et effectum ſequentem*; two were found guilty upon not guilty pleaded, and five not guilty; upon which judgment was entered for the plaintiff; and afterwards upon a writ of error brought in the exchequer chamber the judgment was affirmed, the exception being over-ruled without conſideration. And *Holt* chief juſtice ſaid, that he then thought the judgment to be given with too great precipitation, but he afterwards upon great conſideration had eſteemed the ſaid reſolution to be very good law. *Mich.* 4 *W. & M. Rex v. Fuller*, and *Mich.* 4 *W. & M. Rex v. Young*, were cited as authorities in point. And therefore the whole court were of opinion, that notwithſtanding this exception the indictment was good; but if it had been only *ad effectum ſequentem* it had been ill, becauſe it had not imported that the words were the ſpecific words which were in the libel. The exceptions to the

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the verdict were two, 1. That the defendant being found guilty only of the writing of a libel, and collecting of it, is not guilty of any offence. 2. That as this case is, the verdict amounts to an acquittal. And as to the first exception *Holt* chief justice said, that he did not regard the collecting the libels; but he was of opinion, that the copying of a libel, by a man who is not contriver nor composer of it, is criminal; and to prove this, he said that he would consider in what a libel consisted. And (by him) it is not the infamous matter or words which make the libel; for if a man speak such words, unless they are written, he is not guilty of the making of a libel, for the writing is essential to a libel; and therefore if *Beare* writes such matter he becomes a libeller, for it is not a libel before it was written. And in all cases where a man does the act, which act causes the thing to be that which it is, that man ought to be construed the doer of such a thing. This rules proves itself, as well in all the great offences as in all the least. If *A.* contrives treasonable matter, and *B.* writes the whole contrivance, *B.* is guilty as well as *A.* If an act of parliament makes sodomy felony, and does not speak of the abettors, and *B.* accompanies *A.* whilst he does the fact, and keeps the door, *B.* will be guilty of the felony as well as *A.* 3 *Inst.* 59. The same law in the lowest offences, where all are principals. As if *A.* holds *B.* while *C.* beats *B.* *A.* is guilty of the battery. It would be very strange then, if in this case only, he who contributes so much to the doing of the thing (as he who writes does in this case of the libel) should be construed innocent.

Writing is essential to a libel. And the man who reduces into writing scandalous matter suggested by another is the libeller. acc. 1 Hawk. B. 1. c. 73. s. 10. 5 Mod. 165, 166, 167.

Objection. It is said, 9 *Co.* 59. *c. Lamb's* case, that a libeller ought to be either the contriver, procurer, or publisher.

Answer. That book ought to be expounded by *Moor*, 813. where the writer of a libel is deemed in law to be the contriver; and then *Coke* may be admitted to be law, otherwise not; for in the case in *Coke* the question was of the publication of a libel; and it was held, that the writing of a copy of a libel, was not a publication, but only evidence of it; but no question was made, if he was a libeller. And for the matter of publication, the having of a libel is not a publication. If a libel be publicly known to be published, the having of a copy is evidence of a publication, but *contra*, where it is not known to be published.

Copying a libel is not of itself a publication. But it is evidence of one. Having the copy of a libel is evidence of a publication, if the libel is generally known to have been published. Otherwise not.

Objection. The writing of a libel may be lawful, as by the clerk who draws the indictment, or by a student who took notes of it, &c. Then *Beare* being found guilty of writing generally, for all that appears to the contrary, it may be a lawful writing.

Answer

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Anſwer. Where the matter abſtractedly conſidered is unlawful, there ſuch a general verdict ſhall be taken to be criminal; and ſome ſpecial thing ought to be found to excuſe the defendant. If an action be brought upon the ſtatute for maintenance, it is ſufficient to ſay *manutenuit*, though in ſome caſes a man may lawfully maintain a ſuit, as an attorney or relation, &c. yet becauſe it is unlawful *in abſtracto*, ſuch general allegation is well enough, and it ſhall be intended of unlawful maintenance within the ſtatute. Beſides, that it cannot be here intended of ſuch writing; for if an officer of a court or reporter, &c. copies a libel, ſuch copy in writing is not a libel, becauſe it is not done *ad infamiam* of the party, but only to bring the criminal to puniſhment. 3 *Inſt.* 174. is a ſtrong caſe, for there *John* of *Northampton* is charged with writing only, nor is any mention made of publication, but the writing only is confeſſed; but the court were tender in the puniſhment, becauſe he was an attorney. And *Holt* chief juſtice ſaid, that it was not neceſſary in this caſe to pronounce his opinion, whether the writing of a copy of a libel be the writing of a libel; for if it be not, then the jury having found the defendant guilty of writing a libel, he muſt be found guilty of writing the original, and a copy could not have been given in evidence. *E contra*, if the copying of a libel be the making of a libel, then the writing of a copy is a great offence. But he ſaid, that to the end that the audience might not maintain a notion, that the copying of a libel by a man who has no warrantable authority to do it, is not libelling, he would obſerve, 1. That ſuch copy contains all things neceſſary to the making of a libel, *viz.* the ſcandalous matter and the writing. 2. That it has the ſame conſequence, for the writing makes the offence, becauſe by this means it is perpetuated, and of neceſſity at ſome time will come into the hands of other men; and there is as much danger in the writing of a copy as in the writing of the original; and for this reaſon being ſo adviſed, he ſaid, that he was of opinion, that the writing of a copy of a libel is the writing of a libel. And if the law were otherwiſe it might be very dangerous, for then men might take copies of them with impunity; and for the ſame reaſon the printing of them would be no offence; and then farewel to all government. The defendant *Beare* has had great favour in the verdict; for when a libel is produced written by a man's own hand, and the author of it is not known; he is taken in the mainer, and that throws the proof upon him; and if he cannot produce the compoſer, the verdict will be againſt him. As to the ſecond queſtion upon the verdict, *viz.* Whether this amounts to an acquittal, becauſe the defendant being charged with the compoſing, writing, and making, and being found not guilty of the making, he is found not guilty of the writing

A libel is *prima facie* to be preſumed to have been made by the perſon in whoſe hand written.

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alſo, becauſe the writing is the making; otherwiſe the verdict is repugnant. *Holt* chief juſtice ſaid, that the making is a genus, and compoſing, contriving, and writing are ſpecies of it. Then the finding that he is not guilty of all, except the writing, finds him not guilty of any ſpecies of making except writing. And he ſaid that this notion of libelling is as old as the law. Libelling againſt a private man is a moral offence; but when it is againſt a government, it tends to the deſtruction of it. For the antiquity of this notion, ſee *Vinnius* 741. by the law of the twelve tables. And afterwards when the civil law was digeſted into a method by the emperor *Juſtinian* about the year 741. in his *Inſtitutes*, *lib.* 4. *tit de injuriis* 4. where the writing of a libel is diſtinguiſhed, and held to be an offence. And he ſaid, that he cited this authority, becauſe *Bracton*, *lib.* 3. *tit coron.* 135. ſeems to have transferred the ſame ſentence out of *Juſtinian*. And therefore (by him) judgment ought to be given for the king.

Turton and *Rokeby* juſtices cited ſome caſes, to prove, that the writing of a libel, without publiſhing, was puniſhable in the ſtar chamber, and by conſequence now puniſhable by indictment. And they ſaid, that the defendant was found guilty, *prout per indictamentum praedictum ſupponitur*; which includes all the aggravating adverbs in the indictment, as *proditorie*, *&c.* And *Rokeby* juſtice, that it is a great offence to collect induſtriouſly ſuch libels. And as to the finding of the verdict he ſaid, that the verdict being the words of lay people, ought to be underſtood according to the vulgar acceptation; and therefore though the writing in point of law is making, yet it was underſtood in common ſpeech otherwiſe. And therefore if *A.* invents the matter, *B.* makes rhime of it, and *C.* writes it, every one in common underſtanding may be diſtinguiſhed by ſome ſpecial term, as *A.* the inventor, *B.* the poet, *C.* the writer, though the law denominates them all makers; and ſo the verdict will be free from repugnancy. 2. If the jury find, that *B.* did not make the libel, after which they find that which amounts to the making, that will be repugnant, and ſhall be rejected, for all that is inconſiſtent with what they have found before. *Hetley*, 4. *Moor*, 431. *Dyer*, 372. Judgment for the king. And *Beare* was fined 500 marks, and ordered to appear at the aſſizes at *Exeter* with a paper denoting his offence. But the laſt day of the term his fine was remitted to 100 marks.

Clayton

Clayton *verſ.* Kinaſton.

Intr. Trin. 10. Will. 3. B. R. Rot. 246.

S. C. Salk. 573.

CLAYTON executor of *Clayton* executor of *Winterſhall* brought covenant againſt *Kinaſton*; in which the plaintiff declared upon articles of agreement made the firſt day of *May* 1676, between *Killigrew*, *Kinaſton*, and others, of the firſt part, and *Winterſhall* of the other part, in which (*inter alia*) it was covenanted, that if *Winterſhall* would quit the company of actors of comedies, and give notice thereof in writing three months before, or if *Kinaſton* and the others ſhould declare him incapable of acting by note in writing under their hands; that after three months after ſuch notice as aforeſaid, or ſuch declaration, *Winterſhall* ſhould be allowed by them, or others to be added to the company, 5*s.* *per diem* for every day of acting out of the profits of acting, and after his death 100*l.* ſhould be paid to his executors within three months; and if *Winterſhall* ſhould die before ſuch notice, &c. then his executors ſhould have 100*l.* within ſix months after his death, provided that ſuch notice ſhould not be given but in an acting week, and the three months to be complete by acting weeks; and the plaintiff aſſigns for breach, that *Winterſhall* died the ſeventh of *June* 1679, and the 100*l.* were not paid within the ſix months nor at any time after. The defendant pleads, that at the ſame time there was another deed executed between *Killigrew* and *Winterſhall* of the firſt part, and *Kinaſton* of the ſecond part, with the ſame agreement as in the other deed, and moreover that after ſuch notice given by *Kinaſton*, &c. as aforeſaid, *Kinaſton* ſhould be diſcharged of all debts, &c. and ſhould be indemnified from all agreements or ſecurities at any time before made or thereafter to be made for the uſe of the company; and the defendant avers, that he gave notice, and that three months elapſed before the death of the plaintiff's teſtator, *viz.* *Winterſhall*, by which he became diſcharged, &c. and he pleads this by way of defeaſance to *Winterſhall*'s deed. The plaintiff demurs. And the principal queſtion was, whether this ſecond deed could be a defeaſance of the firſt. And it was argued for the plaintiff by Mr. *Montague*, that it could not; and by Sir *Bartholomew Shower* and Mr. *Northey* for the defendant, that it might, for avoiding circuity of action. For the defendant *Kinaſton* being diſcharged by his notice given, &c. might have covenant againſt the executors of *Winterſhall* upon the covenant that he ſhould be indemnified, &c. and the *quantum* of the damages would be that which the executors have recovered againſt him in this action; and where the plaintiff ſhall not

An undertaking from a man with whom many perſons have entered into a joint contract to indemnify one of them againſt the contract is no defeaſance. S.C. 3 Salk. 298. 12 Mod. 221. R. acc. poſt. 688. Vide Com. 139. 1 Term Rep. 446.

An undertaking to indemnify a ſole contractor is. S. C. 3 Salk. 298. 12 Mod. 221. R. acc. poſt. 688. Vide 1 Show. 46. Com. 139. 1 Term Rep. 446.

The ſame name repeated upon pleadings, tho' without words of reference, ſhall prima facie be intended to mean the ſame perſon. R. acc. ante 199. and ſee the caſes there cited.

A proviſo in a deed altering the tenor of one of the covenants is to be conſidered as a part of that covenant.

A proviſo by way of defeaſance is not.

CLAYTON v. KINASTON.

If a leſſor covenants to repair and does not, the leſſee may, and deduct the expence out of his rent.

recover more againſt the defendant, than the defendant upon his covenant againſt the plaintiff; there the law will conſtrue ſuch covenant to amount to a defeaſance. And therefore where the leſſor covenants to repair the houſe demiſed, the leſſee in default of the leſſor may repair, and in debt for the rent, upon *nil debet* pleaded, he may give in evidence what he has expended in reparations. *Cro. El.* 222. 1 *Leon, pl.* 320. (But *Holt* chief juſtice ſaid that he doubted that, unleſs it were part of the covenant, that the tenant ſhould deduct). And upon the ſame reaſon, *Co. Lit.* 265. the caſe of rebutter upon warranty is adjudged. And the difference is, where ſo much ſhall be recovered upon the plaintiff's covenant as he recovers againſt the defendant, and where but part of it. And this is an anſwer to the caſes in 1 *Anderſ.* 387. and *Moor, pl.* 20. And that difference is taken there as the foundation of thoſe reſolutions. And one deed may be defeaſanced by another deed executed at the ſame time. 2 *Saund.* 47, 48. *Co. Litt.* 207. 3 *Cro.* 125. 21 *H.* 7. 23. 1 *Roll. Abr.* 590. And it has been adjudged in this court, *Mich.* 3 *W. & M. Intr. Trin.* 3. *W. & M. Rot.* 394. *Searville* or *Cammell v. Edwards*, that a covenant not to ſue a bond will amount to a defeaſance. See 3 *Cro.* 352. *Noy* 5. *Moor*, 811. And to this point *Holt* chief juſtice this term delivered the opinion of the court, that the ſecond deed could not be conſtrued to be a defeaſance in this caſe, becauſe the two deeds, being made at the ſame time, ſhall not be conſtrued to deſtroy themſelves; but if *Kinaſton* for deſiſting to act ſhould be diſcharged of his covenant, the ſecurity of *Winterſhall* would be much diminiſhed, if it were not totally deſtroyed, for the joint remedy is altogether deſtroyed, and perhaps the ſeveral remedy alſo; for where two are jointly and ſeverally bound in a bond, a releaſe to the one diſcharges the other. But he ſaid, that he would not give any opinion how the law would be in ſuch caſe in caſe of a covenant; but that the joint remedy is deſtroyed is without doubt. And certainly it could never be the intent of the parties, that the deed ſhould be void as ſoon as it was made. But if *A.* be bound to *B.* and then *B.* reciting the bond covenants to ſave him harmleſs abſolutely, or upon a contingency; this amounts to an abſolute defeaſance in the one caſe, and in the other caſe after the contingency happens. And it is ſo, for avoiding circuity of action. But here there is no relation between the deeds: and the words of the covenant are, to be diſcharged and ſaved harmleſs from agreements, *&c.* before made, or hereafter to be made; but no mention is made of the ſecurity at the ſame time given. Beſides, that the intent of the parties was, that they ſhould be mutual ſecurities the one to the other, and therefore the one deed cannot be a defeaſance of the other. Mr. *Northey* took exception to the declaration, becauſe when the plaintiff comes to the deed, he

he ſays only, between *Killegrew* and *Edward Kinaſton* and others of the one part, and *Winterſhall* of the other part, without ſaying *praedictum*, ſo that it does not appear, that it is the ſame party againſt whom the action is brought. And he took a diſtinction, where the omiſſion is in the charging part, as here (for if the defendant was not a party to the deed, then there is nothing for the foundation of the action) and where the defendant is once well charged; and afterwards ſuch an omiſſion follows, there it may be well enough. See *Yelv.* 103. *Cro. El.* 913. But to this exception *Wright* king's ſerjeant anſwered, that *Edward Kinaſton* in the deed muſt be intended the defendant, and the omiſſion of *praedictum* has been over-ruled in many caſes. 8 *Co.* 57. *a. Bridgm.* 99. *Dier* 70. *Hardwr.* 178. And all the court was of opinion, that this was well enough, becauſe it appeared ſufficiently to be the ſame perſon. Another exception was taken to the plea, becauſe it is not averred, that notice was given in an acting week according to the covenant; ſo that for all that appeared, the defendant was ſtill of the company. But to this Mr. *Northey* anſwered, that ſince they came by way of proviſo, it ought to be ſhewn on the other ſide, if they would take advantage of it; for the pleader has no need to ſhew more, than that which makes for his advantage. 5 *Co.* 78. *b.* 3 *Cro.* 405. 7 *Co.* 10. A difference between a condition precedent and ſubſequent; in the latter caſe one has no need to aver performance, *contra* in the former. *Poph.* 28. So in pleading of ſtatutes the pleader ſhall plead only the enacting part; and if there is a proviſo, which is for the advantage of the other party, he ought to ſhew it. *Plowd.* 376. *a.* 1 *Leon. pl.* 202. but the whole court held the plea incurable for this defect. For where the proviſo is by way of defeaſance, it ought to be pleaded by him that takes advantage of it; but here this alters the tenor of the covenant by tying it to another notice than the general words of the covenant would require; and therefore it is part of the covenant itſelf. Judgment for the plaintiff.

Heyling *verſ.* Haſtings. *Ante* 389.

HOLT chief juſtice reported in the king's bench, that he had put this caſe to all the judges of *England* (except *Lechmere*) aſſembled at ſerjeant's inn; and that they were all of opinion, that this conditional promiſe had brought the caſe out of the ſtatute of limitations, and that a general *indebitatus aſſumpſit* might be well maintained, becauſe the defendant has waved the benefit of the ſtatute. And it is as ſtrong as an expreſs promiſe, after the condition is performed, *viz.* the proof of the debt, which ought to be done in evidence upon the *indebitatus aſſumpſit*. 2. It was moved whether the acknowledgment of a debt within ſix years would

HEYLING v. HASTINGS.

would amount to a new promiſe, to bring it back out of the ſtatute; and they were all of opinion, that it would not, but that it was evidence of a promiſe. And *Rokeby* juſtice compared it to the caſe of trover and converſion, where a (*a*) demand and denial is held to be evidence of a converſion, but not a converſion. Judgment for the plaintiff.

(*a*) D. acc. Burr. 1243. arg. Burr. 2826.

Ward *verſ.* Everet.

Intr. Hil. 7 Will. 3. C. B. 718.

S. C. Salk. 390. Holt. 368. 12 Mod. 227. but no judgment, 5 Mod. 25. Carth. 340.

Under the grant of an annuity of 100l. to five for their lives and the life of the ſurvivor, to be equally divided among them, viz. 20l. to each, with limitations of ſurvivorſhip on the ſeveral deaths of the firſt, ſecond and third, the grantees are jointenants. S. C. with judgment the other way. Comb. 329. Vide 3. P. Wms. 121. Cro. Eliz. 729. pl. 66. Yelv. 23. Moor 667. Owen 127. The words "equally to be divided between them" will not make a limitation at common law in a deed which would otherwiſe have paſſed a joint eſtate, paſs an eſtate in common. Vide poſt. 622. Tenants in common cannot avow jointly. Vide ante 197. 2 Will. 232. Bl. 1077. 3 Will. 120. Co. Litt. 200. a.

REPLEVIN. The defendant avows as bailiff to *Carina* and *Elizabeth Cromwell*, for that Sir *Robert Carr* was ſeiſed in fee of the place where, &c. and being ſo ſeiſed, granted one annuity or annual rent of 100 pounds, to *Carina*, *Elizabeth*, *Ann*, *Mary*, and *Heſter Cromwell*, for their lives and the life of the ſurvivor, to be equally divided among them, *viz.* 20*l.* for each of them during their lives and after that the firſt of them ſhould die, that her part ſhould be divided equally among the ſurvivors; and then follows the ſame limitation, if the ſecond and third ſhould die; but when the deed comes to the two laſt, there (*a*) is no limitation of ſurvivorſhip between them; that *Carina* and *Elizabeth* were the two ſurvivors; and for rent arrear, as bailiff to them, the defendant avows, &c. The plaintiff in bar of the avowry pleads, that by an act of parliament all conveyances made by Sir *Robert Carr* before *April* 1630, were made void; and that this conveyance was ſuch, &c. Upon iſſue joined upon this plea in bar, and trial at bar, the verdict was for the avowant. And ſerjeant *Pemberton* about three years before this time, moved in arreſt of judgment, that the avowry was ill; becauſe by the grant the grantees were tenants in common of this rent, and therefore they could not join in avowry, but ought to avow ſeverally. *Litt. Sect.* 317. And upon this exception the matter was referred, and lay dormant for three years and more. And now this term Mr. *Montague* argued for the avowant, that this was a joint tenancy. For it is a grant of an annuity of 100*l.* to five, which is joint by operation of law, and the clauſe, to be equally divided, will not make it a tenancy in common in a deed, otherwiſe in a will. 2 *Roll. Abr.* 90. *Sti.* 211. See *Co. Litt.* 180. *b. Cro. Car.* 74. *Dier* 361. 3 *Cro.* 25. 1 *Saund.* 282.

Per Holt chief juſtice. This ſeems to be a ſtrong caſe of a jointenancy; for when Sir *Robert Carr* has granted an annuity to five, the words equally to be divided, will not

(*a*) In 5 Mod. 25 Holt. 368. and Comb. 330. it is repreſented to have been expreſsly provided that there ſhould be no ſurvivorſhip between the two laſt.

make

make a tenancy in common in a deed; and the limitation of 20*l.* a piece is only by way of diſtribution, not ſevering the grant. And this is like the caſe of *Knight*, 5 *Co.* 55. where it is held, that the rent iſſued out of the whole, and the [*viz.* 10*s.* for the one, *&c.*] was only an indication of the ſeveral values and rates of the lands demiſed. For when the grantor has granted one rent, it is repugnant to the words of the grant to make it ſeveral grants of ſeveral rents. As if *A.* ſhould grant two acres to *B.* and *C.* *viz.* the one to *B.* and the other to *C.* the [*viz.*] is repugnant. See *Hob.* 172. And *Holt* ſaid, that this caſe cannot be diſtinguiſhed from the caſe in *Co. Litt.* 169. *b.* where one coparcener grants a rent of 20*s.* for equality of partition to the other two, *viz.* ten ſhillings to the one, and ten ſhillings to the other; they have but one rent, and the [*viz.*] is only explanatory. Then the limitation of 20*l.* cannot make a tenancy in common here, for tenant in common ought to avow *de quinta parte centum librarum*, and not for 20*l.* Judgment for the defendant by the whole court. See *Dier* 308, 9 *Winter's Caſe.*

Coxeter *verſ.* Parſons.

S. C. Salk. 692. 12 Mod. 231.

A clergyman cannot ſue a man in the ſpiritual court for defamation, charging him with ignorance or knavery Vide Com. Prohibition. G. 14. 2d Ed. vol. 4. p. 507.

DR. *Parſons* libelled in the ſpiritual court againſt *Coxeter*, for having ſaid of him, that *Parſons* had no ſenſe, was a dunce and a blockhead, and he wondered that the biſhop would lay his hands upon ſuch a fellow, and that he deſerved to have his gown pulled over his ears. Upon a rule to ſhew cauſe why a prohibition ſhould not be granted, Sir *Bartholomew Shower* cited 2 *Roll. Abr.* 295, 7. Prohibition denied to a ſuit for calling a parſon knave. 2. That by the 13 *Eliz. c.* 12. he is liable to be deprived for being unlearned. To the firſt *Holt* chief juſtice ſaid, that a conſultation was denied in this court, in a caſe where a prohibition was granted to a ſuit for calling a parſon knave, upon demurrer to the declaration upon the prohibition, between *Nelſon* and *Hawkins*, *Mich.* 8. and *Hill.* 8 *Will.* 3. *B. R.* 12 *Mod.* 104. *Holt* 593. For it imports nothing of ſpiritual defamation; for a parſon may be a knave or a blockhead, as well as another man; and no puniſhment is inflicted upon parſons in the ſpiritual court for being ignorant or knaviſh; and he cited a caſe in this court between *Bill* and *Field*, 1 *Lev.* 52. where *A.* ſpeaking to *B.* of *C.* (who was abſent, and was gone to be made a juſtice of peace) ſaid *C.* will make ſuch a juſtice as Major *Bill*, who is a fool and an aſs, and a blockhead, and a buffle headed juſtice; in an (*a*) action brought by *Bill* for ſpeaking theſe words, after verdict for the plaintiff, upon not guilty pleaded, judgment was arreſted. And as to the ſecond *Holt* ſaid, if that was as Sir *Bartholomew Shower* urged, then it was a temporal damage, and for that he ſhall have an

(*a*) Vide Com. Action upon the caſe for defamation. D. 15. 2d Ed. vol. 1. page 181. F. 8. 2d Ed. vol. 1. p. 190.

COXETER v. PARSONS. an action, and cannot ſue in the ſpiritual court. Prohibition was granted.

Rex *verſ.* Fell.

A gaoler who ſuffers a priſoner to eſcape is only puniſhable in reſpect of thoſe offences for which the priſoner was committed. S. C. Salk. 272. 5 Mod. 414. 12 Mod. 226. Holt 279. 10 Vin. 123. pl. 23. Acc. 2 Hawk. c. 19. ſ. 144. Vide Com. Eſcape, 2d Ed. vol. 3. p. 178. Error in the commitment of a criminal will not warrant a gaoler to permit his eſcape. S. C. Salk. 272. 10 Vin. 124. pl. 24. Semb. cont. 2 Inſt. 592. 1 Hale P. C. 1ſt Ed. p. 583. Vide 2 Mod. 29. 1 Hale P. C. 1ſt. Ed. p. 595. 2 Hawk. c. 19. ſ. 24.

A gaoler is reſponſible for permitting the eſcape of a man committed to the ſheriffs. S. C. Salk. 272. 12 Mod. 226. Holt 279. 10 Vin. 124. pl. 24. The ſheriff is chargeable criminaliter for eſcapes permitted by his gaoler. S. C. 12 Mod. 226. with the judgment the other way, Salk. 272. Holt 279. 10 Vin. 124. pl. 24.

FELL keeper of *Newgate* was indicted for the eſcape of *Birkenhead*, who was committed for high treaſon in conſpiring the death of the king. Upon not guilty pleaded, verdict for the king. And now Sir *Bartholomew Shower* and Mr. *Northey* moved in arreſt of judgment, that it was ſaid only that *Fell* ſuffered *Birkenhead* to eſcape, being in his cuſtody *oneratum pro alta proditione*, &c. and does not ſhew, that he was *committed* for high treaſon to the cuſtody of the defendant. And for this exception judgment was arreſted. For *per Holt* chief juſtice, if a man be in cuſtody of *Fell* for a treſpaſs, and another perſon goes before a juſtice of peace and ſwears high treaſon againſt him, he will be in cuſtody of *Fell* and alſo charged with high treaſon; but yet ſince he was not committed to *Fell* for high treaſon, *Fell* ſhall not anſwer for his eſcape, as the eſcape of a man committed for high treaſon. The precedents are, *cujus ex cauſa commiſſus fuit.* And in the caſe for the eſcape of the lord *Grey*, the *mittimus* was ſet out; and though error in the commitment will not excuſe the gaoler (as if a man be committed for high treaſon, there to continue until farther order) if he permits the man committed to eſcape, yet the gaoler ſhall never be charged for the eſcape of a man, as committed for an offence, for which he never was committed to him. And he reprehended the king's counſel, for not following the ancient precedents. Another exception was, that it was ſaid, *Birkenhead* was committed *priſonae de Newgate ſub cuſtodia vicecom.* ſo that it did not appear that he was committed to the cuſtody of *Fell*; and alſo to ſay, that he was committed *priſonae* &c. was inſenſible, becauſe a man cannot be committed to a place, but to a perſon, &c. To the firſt point they held, that this was well enough. For if *Birkenhead* was committed to the ſheriff, and the gaoler permits him to eſcape, the gaoler is liable; for the priſoner is in the cuſtody of both. And though ſome ſcruple has been made, whether the ſheriff be in ſuch caſe chargeable [See *Hale, P. C.* 114. The ſheriff ſhall not be charged criminally, *viz.* to extend to life or limb; though he be liable to payment of damages in eſcape for civil cauſe] without doubt he is. For by 14 *Edw.* 2. *c.* 10. the ſheriff ought to put in ſuch a gaoler, as for whom he will be anſwerable; and 19 *Hen.* 7. *c.* 10. which reſtores the gaols to the ſheriffs ſays, that in all caſes where the gaol belongs to the ſheriff, he ſhall be chargeable for eſcapes. And *Holt* ſaid, that he made mention of it for the good of the ſheriffs, and not to cauſe examination of what is paſt; and as to the ſecond

1 Hale, P. C. 1ſt Ed. 597. A commitment to a priſon, acc. 2 Hawk. c. 19. ſ. 29. Vide a commitment to the keeper of the priſon. S. C. Salk. 272. 12 Mod. 226. The court will not *preſume* that a man committed for an offence has been pardoned. S. C. Salk. 272. A ſheriff cannot take notice of or act upon a pardon until it has been allowed by a proper court. S. C. Salk. 272. Holt 279. 10 Vin. 124. pl. 25.

point

point, *Holt* chief juſtice ſaid, that it was according to the precedents; for commitments *priſonae et turri London* are frequent, and ſuch commitment is a good commitment to the lieutenant of the *Tower*. 3. A third exception was, that it did not appear (admitting *Birkenhead* to have been committed to the priſon for high treaſon) that he was under ſuch commitment at the time of the eſcape; for it may be he was pardoned, *&c.* But this was over-ruled; for *Holt* chief juſtice held, that *that* ought to come of the other ſide. And if a man was pardoned, yet the ſheriff ought not to take notice of it, until the pardon was allowed in the king's bench, or ſome other court; for the ſheriff cannot allow the king's pardon; and it is criminal in him to permit a priſoner to eſcape before ſuch allowance had.

Rex v. Fell.

Rex *verſ.* Inhabitantes de Riſlip. Ante 394.

THIS caſe being now debated, *Holt* chief juſtice and *Gould* juſtice were of opinion, that *Riſlip* was concluded. And *Gould* juſtice ſaid, that *Harrow* being firſt poſſeſſed of *Edlin*, and removing him to *Riſlip* as the place of his laſt legal ſettlement, from which order *Riſlip* appealed, and the order was confirmed upon that appeal, *Riſlip* is concluded from conteſting that it was the place of his laſt legal ſettlement; becauſe *Riſlip* upon the appeal had the advantage of that matter; for if *Riſlip* could have ſhewn that there was another place, where *Edlin* was lawfully laſt ſettled, *Edlin* ought to have been ſent back to *Harrow*, for then he was not well removed to *Riſlip*, the place which was poſſeſſed of him being obliged to maintain him, until they can find where he was laſt legally ſettled. *Rokeby* juſtice was of opinion, that the appeal to the ſeſſions, was not final in any caſe, but it might be removed into the king's bench, and examined there upon the merits. *Turton* juſtice was of opinion, that *Riſlip* ſhould be concluded againſt *Harrow*, but not againſt *Hendon*, becauſe *Hendon* was not party to the ſuit. The court being divided, it was adjourned till the next term.

Ethericke *verſ.* Cooper.

S. C. Salk. 99.

PER *Holt* chief juſtice, if the ſheriff takes inſufficient bail, he (*a*) is liable to an action, as well as to amercements.

(*a*) R. cont. Salk. 99. D. cont. 2 Mod. 181. Vide 6 Mod. 122.

Rex

Rex *verſ.* Inhabitantes parochiae Boughton in Kent.

Where an appeal does not lie, the ſeſſions may do all acts which two juſtices are impowered to do. S. C. Cit Burn's Juſtice. Seſſions 9. 14th Ed. vol. 4. p. 185. A conſtable can only make a rate upon the pariſh of which he is conſtable to reimburſe himſelf what he may have expended in relieving, conveying, &c. rogues, vagabonds and ſturdy beggars. Vide 17 G. 2. c. 5. ſ. 33.

A Rate was made by a conſtable, *&c.* upon ſeveral pariſhes, to reimburſe himſelf his charges in conveyance of ſturdy beggars, *&c.* according to 13 *&* 14 *Car.* 2. *c.* 12. *ſ.* 18. which was confirmed at the ſeſſions. And it being removed by *certiorari*, a motion was made that it might be quaſhed. 1. Becauſe two juſtices are directed by the ſtatute to confirm it, and not the ſeſſions. But *per Holt* chief juſtice, where authority is given to two juſtices of peace to do any act, the ſeſſions may do it in all caſes, except where appeal is directed to the ſeſſions. 2. Becauſe the conſtable has power only to charge his own pariſh, as conſtable of which he is put to this expence. And for this exception it was quaſhed. And *Holt* chief juſtice took a difference; where ſeveral pariſhes are in one and the ſame town, ſuch an order may be good. [See the ſtatute which ſays, pariſhes.] But that not being alleged here, it cannot be intended.

Rex *verſ.* the Mayor and Aldermen of Hertford.

A defendant in an information in the nature of a quo warranto is, if found guilty, finable. D. acc. 3 Bl. Com. 263. 4 Bl. Com. 312. The judgment on a quo warranto is, that the franchiſe be ſeized for the king. S. C. Salk. 374. pl. 15. In an information in the nature of a quo warranto that the defendant be ouſted. S. C. Salk. 374. pl. 15. The proceſs on ſuch an information is firſt a ſubpoena. S. C. Salk. 374. pl. 15. ſed vide 1 Sid. 86. Salk. 699. pl. 2. Carth. 503. and Com. Quo Warranto, C. 2. 2d Ed. Vol. 5. p. 386. and then a diſtringas. S. C. Salk 374. pl. 15. If ſuch proceſs iſſues into a different county than that in which the court ſits, it muſt have fifteen days between its teſte and return. S. C. Salk. 374. pl. 15. Sed vide Salk. 699. pl. 2. Carth. 503.

AFTER ſeveral motions and debates at the bar, leave was given by the court to file an information in nature of a *quo warranto*, in the name of Sir *Samuel Aſtrey*, againſt the mayor and aldermen of *Hertford*, to know by what warrant they admit perſons, who do not reſide within the borough, to the freedom of the corporation. And *Holt* chief juſtice ſaid, that if the defendants were found guilty, they ſhould be fined. And the difference of the judgments in this caſe and in the writ of *quo warranto* is, that in the latter caſe the judgment is to ſeize the franchiſe into the king's hands, but in the other caſe only an *ouſter* of the particular franchiſe. That the firſt proceſs in this caſe is *ſubpoena*, and afterwardr *diſtringas*; and it being in a foreign county, there ought to be fifteen days between the *teſte* and return.

Inhabitants of South Moulton in Suffolk.

A ſervice under different hirings for a year confers a ſettlement if any of theſe hirings was for a year. Vide Burn's Juſtice. Poor. Settlements. vi. 14th. Ed. vol. 3. p. 291. 409. R. acc. Fort. 316. 1 Seſſ. Caſe. 2d. Ed. 6. pl. 5. 226. pl. 183. The ſeſſions is not bound to make any order upon an appeal.

AN order was made to remove a woman from *B.* to *C.* And upon appeal the matter was ſet out at large. And it appeared that ſhe was a covenant ſervant firſt for half an year, which time ſhe ſerved; and then for another year, and ſerved half of that. And the queſtion was, whether this was a ſervice for a year within the new ſtatute? And

Rokeby,

Roleby, *Turton*, and *Gould*, juſtices (*abſente Holt* chief juſtice) held that it was; 1. Becauſe the (*a*) ſtatute deſigned only, that the party ſhould ſerve a year. 2. They held, that it was not neceſſary, that there ſhould be an order made at the ſeſſions upon appeal. Mr. *Jacob*. Inhabitants of South Melton in Suffolk.

(*a*) 8 & 9 W. 3. c. 30.

Coot *verſ.* Linch.

S. C. Salk. 321. pl. 6. Carth. 460. 5 Mod. 421. Holt 372. 12 Mod. 225. 3 Danv. 298. pl. 3.

JUdgment was given for the plaintiff in the king's bench in *Ireland*, and coſts were taxed. And afterwards error was brought in the king's bench here, and the judgment affirmed, and the coſts taxed. And afterwards error was brought in parliament here, and judgment affirmed. Upon which a *capias* was ſued here againſt the defendant for all the coſts given here. And after motion and conſideration by the court, the execution was ſet aſide. For by *Holt*, it cannot be good; for in this caſe a man cannot have a *capias* into any county of *England*, becauſe the cauſe of action ariſes in *Ireland*, and there the venue is laid. And therefore the original *capias* ought to iſſue in *Ireland*. But no *capias* can iſſue out of the king's bench in *Ireland*, and therefore they can have here, neither original *capias*, nor *teſtatum capias*, becauſe one cannot have an original. But the method (*a*) is, to iſſue a writ, reciting all the proceedings here, directed to the chief juſtice of the king's bench in *Ireland*, and the execution ſhall be ſued there of the whole. For though the judgment is affirmed here, yet the law ſuppoſes the parties commorant in *Ireland*. For the coſts are but acceſſary to the judgment. And ſuch writ or mandate determines the writ of error, and reſtores the cauſe in *Ireland*. And *per Holt* chief juſtice, it is (*a*) the very record, which comes here out of *Ireland*, and not the tranſcript of it. And it is no objection, that it ſhould be the tranſcript for fear of the peril of the ſea; for one might object in the ſame manner, that upon error in the common pleas the tranſcript only is removed hither, for fear it ſhould be burnt or loſt, before it comes into the king's bench. But in fact when the record in both caſes arrives here, then (*b*) it is the true record, and not (*b*) before; and that which is in *Ireland*, or the common pleas, ceaſes to be the record.

Before a plaintiff can ſue out execution into any other county, he muſt either really or in ſuppoſition of law ſue a proceſs into the county in which the venue was laid. Vide Bl. 694. The courts here cannot iſſue proceſs into Ireland. The coſts upon the affirmance of a judgment are merely acceſſary to the judgment, and can only be recovered as the ſum for which the judgment is given is irrecoverable. Therefore if a judgment from Ireland be affirmed here, execution cannot iſſue here for the coſts of the affirmance. Vide 6 G. 1. c. 5. 22 G. 3. c. 53. But it may in Ireland.

(*a*) D. acc. Cro. Jac. 535. (*b*) Acc. Yelv. 118.

Foſter *verſ.* Hexam.

S. C. Salk. 183. pl. 2.

Wright king's ſerjeant came into the king's bench, and demanded conuſance for the biſhop of *Ely* in an action of treſpaſs *quare clauſum fregit*, which was removed into the

An allowance in B.R. or in Eyre is a ſufficient ground for a

claim of cognizance. D. acc. 12 Mod. 644. Vide Gilb. C. B. 195. Palm. 456. 1 Sid. 103. and in making the claim it is enough to ſtate one ſuch an allowance on the record. Vide 2 Inſt. 281. without ſhewing an immemorial uſage. Vide 2 Inſt. 281.

king's

Foster v. Hexham.

(a) Vide 1 Sid. 103.

king's bench by *certiorari*, and bail was put in. And firſt (a) the warrant of attorney under the ſeal of the biſhop, was read in *Latin*, then the record as it was, *viz.* treſpaſs, *&c.* and then the record proceeded, *et modo ad hunc diem venit Simon Epiſcopus Elienſis per Johannem Stone attornatum ſuum, et petit cognitionem, &c. quia dicit*, that the place, where, *&c.* is within the liberty of the biſhop; *et quod alias, ſcilicet, Mich.* 20 *Edw.* 3. *B. R. Rot.* 44. in treſpaſs and battery, and *Hill.* 21 *Edw.* 3. *Rot.* 21. *B. R.* in treſpaſs *quare, &c.* and *Hil.* 17 & 18 *Car.* 2. *Rot.* 229. *B. R.* in treſpaſs and ejectment, aud *Mich.* 35 *Car.* 2. *B. R. Rot.* 151. in treſpaſs, aſſault, and battery, this conuſance was allowed; and therefore he prays his privilege *habendi cognitionem*; and then the entry proceeds *quaeſitum eſt* of the plaintiff, *ſi quid dicere queat &c. ſuper quo allocatur, &c.* and then day is given upon the roll to the parties at *Ely, &c. et dictum eſt* to the biſhop, *quod celeris juſtitia fiat.* The two late records were produced in court; but becauſe the old records were not produced, and becauſe it was the laſt day of the term, and therefore, unfit for ſuch a motion, and becauſe *Holt* chief juſtice doubted of the manner, it was adjourned. For *Holt* chief juſtice ſaid, that the true method of pleading ſhould be, to lay uſage immemorial, and not to rely upon it, but to produce the allowance in the king's bench or in Eyre. And this is agreeable to the reaſon of the law; for ſince ſuch privileges do not lie in preſcription, but in grant, that alone cannot be a title to them, but becauſe that if the charter was before time of memory, *&c.* before the firſt of *Richard* I. the ſaid charter could not be pleaded, therefore by the ſtatute of *quo warranto*, 18 *Edw.* 1. one may lay an uſage, which is an argument of an ancient grant time whereof, *&c.* and then ſhew the allowance. But if no ſuch uſage hath been, then the preſumption of the law is deſtroyed, and they muſt ſhew the patent, for allowances in the king's bench or in Eyre are not pleadable. See *Keil.* 189, 190. 1 *Sid.* 103. It will be difficult to maintain this method of pleading. In the caſe in 17 & 18 *Car.* 2. *Holt* ſaid, he remembered, that no exception was taken to the manner of the demand. Adjourned. Mr. *Jacob. Poſt.* 475.

Between Coote *and* Graham, 1 *Barnard. B. R.* 65. *and* Paternoſter *and* Graham, *Str.* 810. *Conuſance was prayed for the univerſity of* Oxford *in theſe cauſes, becauſe the defendant was a gentleman commoner of* Magdalen Hall, *upon producing the chancellor's certificate*, &c. *And a rule was made to ſhew cauſe. And* July 2. Trinity *term* 1728, *the rule was diſcharged. There was no ſuggeſtion, nor entry of the claim made upon record. Mr.* Willes for the univerſity.

A Rent-

Anonymous.

If the grantee of a rent charge avows upon ſeveral undertenants for the ſame rent, the court will upon a tender pleaded by the undertenants make an order, that the payment of the rent into court in one action ſhall ſerve for all. Vide poſt. 639. 644. Bull. Ni. Pr. 4th Ed. p. 60.

A Rent-charge was granted to *J. S.* out of lands, which were demiſed to ſeveral undertenants. The grantee of the rent diſtrained upon them all for one half year's rent arrear. The tenants bring ſeveral replevins. The avowant makes the ſame avowry againſt all. The plaintiffs in bar of the avowry plead a tender with *profert in curia*. And now it was moved, that the bringing in of one ſum ſhould ſerve for all the three avowries, they being for the ſame rent arrear. And the motion was granted. *Ex relatione m'ri Jacob.*

Hilary

Hilary Term,

10 Will. 3. C. B. 1698.

Sir George Treby *Chief Juſtice.*

Sir Edward Nevill
Sir John Powell
Sir John Blencoe
} *Juſtices.*

Moſley *verſ.* Coldwell.

A plea of non-tenure as to part admits the party to be tenant for the reſidue, and precludes him from inſiſting upon any matter inconſiſtent with that admiſſion.

A formedon cannot be brought by a perſon having a right of entry.

An entry by a perſon intitled to a formedon will not preclude him from bringing a formedon upon a ſubſequent ouſter.

An entry by a demandant after the writ brought abates the writ. R. acc. Long. 5to. Ed. 4. 116. b. 26 H. 8. 1. a. pl. 2. D. acc. 5 H. 7. 7. b. pl. 16. Vide Com. Abatement. H. 48. 2d. Ed. vol. 1. p. 62. A plea of *entry by a demandant* muſt ſhew that the entry was ſubſequent to the bringing of the writ.

S. C. Arguments for the demandant. Lutw. 38. Pleadings, Lutw. 38. poſt. vol. 3. p. 217.

A Formedon in the deſcender was brought of two meſſuages and of ſeveral parcels of land in *Shelley*. The tenant *quoad* part pleaded, non-tenure; *quoad* the reſidue he pleaded, that the demandant had entered, and was ſeiſed thereof: and concludes in abatement. The demandant demurs. *Lutwyche* ſerjeant for the demandant argued, 1. That the pleading was repugnant and vicious; for the pleading of non-tenure *quoad* parcel allows himſelf to be tenant of the reſidue; and then the pleading that the demandant is ſeiſed of the reſidue is repugnant; for if that be true, he is tenant of no part, and therefore he ſhould have pleaded non-tenure of the whole. 2. The pleading that the demandant has entered is not good, becauſe it does not ſhew, when he entered, before the writ brought, or after it pending the action. If it was before the writ brought, it is not good; becauſe he had not right to enter, where the tenant might have entered upon him again, and then his action would be revived. 26 *Hen.* 8. 1. *a.* If it was after the writ ſued, then it will abate the writ. *Bro. briefe* 1. But he ſhould have pleaded it *puis darrein continuance*, and the certain time of entry ought to be ſhewn. *Girdler* ſerjeant to the contrary. The plea is good, and could not be better. For as to part the tenant claims nothing, and as to that he pleads generally non tenure. As to the other part he has title, and is tenant at the time of the pleading, but the

demandant

demandant has entered upon him, upon whom he has re-entered; yet the demandant after his entry could not have this action of formedon, though it be entailed, for by his entry the eſtate tail was executed in him; and although the tenant entered upon him, yet he ought not to have a formedon, but ought to bring his aſſiſe, writ of entry, or ejectment, &c. For this action ſuppoſes a right deſcended to him, of which he had never been poſſeſſed; but by his entry he having the poſſeſſion, the re-entry of the tenant was a tort to his poſſeſſion, of which he ought to have brought his own action. And the formedon does not lie after an entry, *F. N. B.* 219. *A.* 7. *Ed.* 4. 19 *Bro. formedon* 47. And the time of the entry need not be ſhewn, no more than the entry by the heir, &c. after the death of his anceſtor. And if the tenant had re-entered, the demandant ſhould have replied, and ſhewn it, for it ſhall not be intended.

Powell juſtice, 1. The tenant having pleaded non-tenure *quoad* parcel muſt be taken to be tenant of the reſidue, otherwiſe he ſhould have pleaded non-tenure to the whole. 2. The tenant has not pleaded when the demandant entered, nor is it pleaded *puis la darrein continuance*; and therefore muſt be taken before the writ brought. But entry before the writ will not take away the demandant's action, eſpecially if the tenant has re-entered upon him, as ſhall be intended by this plea; for by the re-entry the action ſhall be revived. But entry pending the action will abate the writ; and it is a queſtion, whether (*a*) a re-entry in ſuch caſe would make the writ good. *Treby* chief juſtice, formedon in the deſcender lies only upon a diſcontinuance made by the anceſtor, or when the iſſue is barred of his entry (which was agreed *per curiam*) for the reaſon of a formedon is, inaſmuch as the party cannot enter; but is put to that action to recover his right; for where he may enter he ought, and ought not to ſue a formedon. And therefore the demandant's entry be tolled, which muſt be intended upon the bringing of this action, if he has entered upon the tenant before this action brought, that entry will not make him ſeiſed by virtue of the intail; but it will be a diſſeiſin to the tenant, and conſequently the tenant's re-entry has revived the formedon, for he cannot have another action. But if the tenant had not re-entered, there the demandant could not have maintained a formedon, being ſeiſed of the land, though he be not ſeiſed by virtue of the eſtate-tail. The tenant in this caſe muſt be taken to be tenant of that part of the land whereof he has pleaded the entry, &c. by his pleading of non-tenure to the other parcel. And if the demandant has entered upon him, it muſt be intended pending the writ, and which ought to be ſhewn; but no time of the entry being ſhewn, the demandant could not reply to it; for he could not ſay, that he has not entered pending the writ; for

(*a*) Vide 26 Ll. 8. 1. a. pl. 2. Bro. Brief and Abatement de Brief pl. 1. 338.

Mosley v. Coldwell.

for that is not pleaded; and to ſay that he did not enter generally would not be good; and he might have entered before the writ brought, and yet no cauſe that the writ ſhould abate, as appears by what is ſaid before. Judgment *quod reſpondeat ulterius. Ex relatione m'ri Place.*

Kinſey *verſ.* Heyward.

S. C. Lutw. 260. Pleadings. Lutw. 256. poſt. vol. 3. 219.

A writ by journeys accounts is a continuance of a former writ. R. acc. 6 Co. 10. b. Vide Com. Abatement. P. 2d Ed. vol. 1. p. 80.

And cannot be brought but by a perſon who was party to ſuch former writ. D. acc. 6 Co. 10. b. Vide Com. ubi ſupra.

It cannot be ſued out until ſuch former writ is returned. D. acc. 6 Co. 10. b. Vide Com. ubi ſupra.

It muſt be of the ſame ſpecies as the firſt. Vide Com. ubi ſupra.

And muſt import to be brought by journeys accounts. D. acc. 6 Co. 10. b. Vide Com. ubi ſupra.

A clauſum fregit does not lie againſt an executor. Vide Cowp. 371.

The commencement of an action within the time limited by the ſtatute of limitations is an anſwer to a plea upon that ſtatute, tho' ſuch action abated by the act of God, if the action to which ſuch plea is put in was commenced within a reaſonable time after the abatement. Semb. acc. Str. 907. A year is a reaſonable time. Semb. acc. Str. 907. A clauſum fregit may be the commencement of an action of aſſumpſit. R. cont. poſt. 553. 880. Sed vide Bl. 924. 3 Will. 460. Imp. C. B. 2d Ed. 478. If it is returned and continued. But the court will not upon demurrer preſume it to have been returned. Vide poſt. 880. or continued. acc. Salk. 420. pl. 2. poſt. 701. Vide Str. 734.

Judgment was given in this caſe for the plaintiff by *Treby* chief juſtice, *Nevil* and *Powell* juſtices, againſt the opinion of *Blencowe* juſtice: The caſe was thus; the plaintiff declared as adminiſtratrix to her huſband againſt the defendant as executor to *Heyward* in *indebitatus aſſumpſit.* The defendant pleaded *non aſſumpſit infra ſex annos.* The plaintiff replies, that her huſband ſued a writ of *clauſum fregit* returnable in this court, in which he intended to declare in *aſſumpſit* for this debt againſt *Heyward*; that *Heyward* died, and her huſband ſued another writ againſt the defendant; that then her huſband died, and ſhe being adminiſtratrix to her huſband ſued this writ, *&c.* The defendant demurred. And the court gave their opinions in ſolemn arguments on the bench. (But the arguments of the three *puiſne* juſtices were not heard by Mr. *Place.*) *Treby* chief juſtice, 1. In this caſe this writ is not maintainable by journeys accounts; for a writ by journeys accounts is maintainable only by the ſame plaintiffs, or one of them at leaſt, who ſued the firſt writ; but where the plaintiff dies, a writ by journeys accounts cannot be brought by his executor, *&c.* And this appears by *The Terms of the Law*, *Fitzherbert* and *Strathan*, in title *Journeys Accounts.* If the defendant dies, there the plaintiff may purſue a writ by journeys accounts againſt his executors, *&c.* or if there are two plaintiffs, and one of them dies, the ſurvivor may have ſuch a writ, he being the ſame perſon who ſued the former writ; but a writ by journeys accounts is maintainable in no caſe but by the ſame plaintiffs, or ſome of them who were plaintiffs in the former writ; but in no caſe ſhall be brought by an executor, or heir, *&c. Raſt.* 107, 108. 417. 3 *Cro.* 174. *Bro. Journeys Accounts.* 23 *Theloal.* 407. *b.* 1 *Ventr.* 235. And without doubt there have been ſeveral occaſions offered, to bring ſuch a writ by executors, *&c.* which would have been brought, if the law would have allowed it. And the caſe of *Eſtobb v Thorowgood*, adjudged in this court *Mich.* 9 *Will.* 3. [See before. 283.] A general executor brought a writ by journeys accounts upon a writ brought by the executor *durante minoritate*, and adjudged that the ſaid writ was

well

well brought. And he ſaid, that he was then of the ſame opinion; but he never was aſhamed to retract his opinion, when he is convinced upon better reaſon; and for this reaſon he declared that he thought the ſaid judgment was not maintainable upon the reaſons upon which it was given, *viz.* that an executor may have a writ by journies accounts upon a writ abated, brought by the executor *durante minoritate*; but the judgment was notwithſtanding well given upon other reaſons. But in no caſe can a writ of journies accounts be, but by the ſame plaintiffs, or ſome of them who were plaintiffs in the former writ. And to ſay, that the general executor, and the executor *durante minoritate*, were as one perſon in the office, is to ſtrain the point too far; for it muſt be the ſame plaintiff, not only by repreſentation, but by name; for the ſecond writ is a continuance of the firſt, which cannot be but by the ſame perſon, not only in repreſentation, or in reſpect to their office, but ſtrictly and truly the ſame perſon. 2. In this caſe the writ cannot be by journies accounts, becauſe the former writ ought to be continuing in court and returned. *Fitzh. Journies Accounts*, 22. *Raſt. Entr.* 417. 11 *H.* 6. 34. For the writ is not in court before it is returned, but in this caſe it does not appear that the firſt writ was returned. 3. In this caſe the firſt writ was a *clauſum fregit*, which writ is not maintainable, nor can be continued againſt executors; and the ſecond writ ought always to be the ſame with the firſt, and uſually they were entered upon the ſame roll, and both together made only one record. 4. In this caſe there is nothing of journies accounts before us, for the ſecond writ is not ſaid to be brought *per dietas computatas*, as all the precedents are; though the meaning of the ſaid words he did not well apprehend. The word *dieta* ſignifies a day's journey, and the beſt account of the word is given by *Selden*, ——— that the chancery being a moveable court, and following the king's court, and the writs being to be purchaſed out of the ſaid court: the party who purchaſed the ſecond writ ought to have applied to the king's court as haſtily (that he might obtain the ſecond writ) as the diſtance of the place would allow, accounting twenty miles for every day's journeys; and for this reaſon he was to ſhew in the ſecond writ, that he had purchaſed his ſecond writ as haſtily as he could, accounting the day's journies he had to the king's court. But it has been urged by the counſel, that the death of the plaintiff, being the act of God, ſhall not do a prejudice to any, and the executor of ſuch perſon dying ought not to be prejudiced by the teſtator's death, to loſe a writ which was well commenced. Anſwer, that the ſaid rule, *viz. quod actus Dei nemini facit injuriam*, admits of ſeveral exceptions, and it will prejudice the party in divers caſes. The ſtatute *de bonis aſportatis*, &c. is an inſtance; for at common law before the ſaid ſtatute made, by the act of God executors were prejudiced in *quare impedit*; and in all actions and

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(a) R. acc. 1 Bulſtr. 29. Cro. Jac 244. Yelv. 178.

(b) Acc. 4 Bl. Com. 314. Com. Appeal. A. 1 Ed, 1780. vol. 1. p. 364.

caſes where damages only are recoverable, which ariſe *ex delicto*, unleſs in caſes which ariſe upon deeds or contracts. A pawn is (a) not redeemable after the death of the pawnor. In appeal the next heir dies after the appeal brought, the (b) appeal is loſt. And for this reaſon the ſaid rule will not ſupport this writ by journeys accounts. But that which is ſaid by *Coke*, 6 *Rep.* 10. *b. Spencer's* caſe, is law; that an executor, *&c.* ſhall not have a writ by journies accounts. But though this writ is not good to continue the former, and by ſuch means to avoid the ſtatute of limitations; yet the plaintiff here ought to recover notwithſtanding the ſaid ſtatute pleaded. For the ſtatute is, that actions upon the caſes, *&c.* ſhall be ſued within the ſix years, *&c.* and for this reaſon, where an action is ſued within the ſix years, that ſeems to be excepted out of the words of the ſtatute; and that if an action is ſued within the ſaid time, the party is out of the purview of the act, and at liberty to proſecute the ſaid action, or to ſue another action at any time not reſtrained or limited by the ſtatute. And in this caſe an action was commenced within the ſix years. Though the former was a writ of *clauſum fregit*, and this is an *aſſumpſit*, yet by the courſe of the court it is the ſame action, the *clauſum fregit* being a general writ, upon which a man may declare in any other perſonal action, as a *latitat* in the king's bench. And therefore the ſtatute is ſatisfied in this caſe by the ſuing of the *clauſum fregit*, and the plaintiff thereby ſet at liberty out of the reſtraint of the ſaid ſtatute. And if a copyholder has licence to make a leaſe, his leſſee may make an under leaſe, for by the licence it is exempt from the cuſtom of the manor. 1 *Roll. Abr.* 508. *pl.* 14. 6 *Vin.* 120. *pl.* 5. But though by the ſuing of an action the party ſeems to be ſet at liberty, without any reſtraint of time in which he ought to proſecute his action, or to bring a new action; yet by the reaſon of the ſtatute he ought to be reſtrained to ſome reaſonable time. For the ſtatute being made for ſettling ſome time for the bringing of actions, it ought to be expounded according to ſuch intent; and where the words are ſilent, a reaſonable time by conſtruction ought to be made. But it is difficult in this caſe to ſettle in what time an action ſhall be brought, whether another action hath been commenced within the ſix years. But it ſeems to me, a year ought to be a reaſonable time; for it is the time in which the law delights, as may be inſtanced in many caſes. *Co. Litt.* 254. *b.* 2 *Inſt.* 476. *Plowd.* 353. *Stowell* and *Zouche's* caſe. For though the ſtatute binds the right of the party, and therefore ought to be taken ſtrictly, yet the party ſhall be bound to ſome reaſonable time, and a year being the time which the law in many caſes adjudged reaſonable, (ſee 2 *Keb.* 764.) therefore, in his opinion, if a writ be brought within ſix years, although it be diſcontinued by death, *&c.* and the ſix years expire, yet the ſtatute of limitations will not be a bar, if another action be commenced in reaſonable time, and a year ſhall be ſaid a reaſonable time. Objection. That in this

this caſe the former writ was ſued more than five years ago, and it does not appear that the former writ was ever returned, or that any thing has been done for more than five years. Anſwer. That a writ being ſhewn to be ſued out, it ſhall be intended to be returned, and alſo to be continued, if the contrary be not ſhewn by the defendant. For the diſcontinuance or failing of any proceſs ſhall not be intended without being ſhewn. And it is not neceſſary to ſhew all the continuances, for that would make the replication too prolix; and if the continuances ſhould be pleaded, they ought to be pleaded every one particularly, and *debito modo continuat.* would not be ſufficient. And in *Every* and *Carter's* caſe, 2 *Ventr.* 254. the continuances were not pleaded. And *Stile*, 401. reſolved there, that the continuances need not be pleaded, and that the bringing of the action prevents the ſtatute of limitations. 1 *Sid.* 228. was cited. Judgment for the plaintiff. *Ex relatione m'ri Place.* Afterwards error was brought upon this judgment *in B. R.* and after argument at bar twice, the judgment was reverſed; becauſe the continuances of the writ were not pleaded, and it was not ſaid that the writ was undetermined. *Mich.* 13 *Will.* 3. *B. R.* 1701. And upon error brought in parliament the judgment of the king's bench was affirmed, *Friday* the firſt of *May*, 1 *Annae reginae*, 1702, upon the ſame point of not having entered the continuances, &c.

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Intr. Hill. 11 Will. 3. B. 3. Rot. 287.

Churchwardens of Market Boſworth *verſ.* The Rector of Market Boſworth.

8 Vin. Abr. 643

THE plaintiffs libel againſt the defendant in the archdeacon's court of *Leiceſter*, that there was time whereof, &c. and is a chapel of eaſe within the ſame pariſh; and that the rector of the ſaid pariſh for time whereof, &c. hath repaired and ought to repair the chancel of the ſaid chapel; and that the chancel being out of repair, the defendant being rector hath not repaired it. The defendant in the ſaid court denied the cuſtom. And a decree was made for the defendant, that there was no ſuch cuſtom. And coſts were taxed there for the defendant. And *Wright* king's ſerjeant moved for a prohibition. And (by him) it ought to be granted, becauſe it appears, that the libel is upon a cuſtom which the defendant has denied; and it may be the queſtion was in the ſpiritual court, cuſtom or not, which is not triable there, but at common law. And then this appearing upon the libel, that the court has not juriſdiction, a prohibition may be granted after ſentence. But all the court *e contra.* For (by the chief juſtice) the reaſon for which the ſpiritual court ought not to try cuſtoms is, becauſe they have different notions of cuſtoms, as to the time which creates them, from thoſe that the common law hath. For in ſome caſes the uſage of ten years, in ſome twenty, in ſome thirty years, makes a cuſtom in the ſpiritual court; whereas by the

The ſpiritual court cannot try the exiſtence of a cuſtom. acc. 1 Roll. Abr. 307. 18 Vin. 17. 18. pl. 18, 19. 20, 21 Semb. acc. poſt. 578. H. Bl. 100. Semb. Com. Prohibition. G. 10. Ed. 1780. vol. 4. p. 504. The reaſon is, becauſe it allows as cuſtoms what the common law does not allow as ſuch. D. acc. 2 Roll. Abr. 307. 18 Vin. 18. pl. 18, 19. Semb. acc. Com. Prohibition. F. 12. Ed. 1780. vol. 4. p. 497. Therefore a decree againſt the exiſtence of a cuſtom can be no ground for a prohibition

Churchwardens of MARKET BOSWORTH v. The Rector of MARKET BOSWORTH.

common law it must be time whereof, &c. And therefore since there is so much difference between the laws, the common law will not permit that court to adjudge upon customs, by which in many cases the inheritances of persons may be bound. But in this case that reason fails, for the spiritual court is so far from adjudging that there is any such custom which the common law allows, that they have adjudged, that there has not been any custom allowed by their law, which allows a less time than the common law, to make a custom. And the plaintiffs having grounded their libel upon a custom, which was well grounded, if the custom had not been denied (for libels there may be upon (a) customs); but the custom being denied, and found no custom, it is not reason to prohibit the court in executing their sentence against the plaintiffs. For the design of the motion for a prohibition, is only to excuse the plaintiffs from costs. And there is no reason but that they ought to pay them, since it appears, that they have vexed the defendant without cause. And therefore a prohibition was denied.

(a) Vide post. 578.

Where an executor sues upon a contract made with his testator, though he fail in the suit, he shall not pay costs.
Where upon a contract either actually made or arising by legal implication after the testator's death, he shall. Vide Com. 204. Sayer. costs. c. 13. 2d. Ed. p. 94. and post. 1413.
If a military officer dies, and the agent to the regiment afterwards receives the arrears of pay due to him, the executor of the officer may recover such arrears in an action for money had and received in his own name. Vide post. 1215.

Nicolas administrator Wildborn *verf.* Killigrew.

THE plaintiff brought *indebitatus assumpsit* against the defendant, and declared for so much money due to the intestate; paid to the defendant after the death of the intestate, to the use of the plaintiff his administrator. The plaintiff was nonsuit. And whether he should pay costs or not, was the question. And it was urged for the defendant, that he ought to pay costs, inasmuch as the action being brought for money received to his use after the death of the intestate, the naming of himself administrator is surplusage and to no purpose, for he might have brought the action in his own name; and where a man may have an action in his own name, though he brings it as executor or administrator, if it be found against him, he must pay costs, as hath been frequently settled, not only in this court, but also in the king's bench. *Birch* serjeant for the plaintiff, that he ought not to pay costs in this case; for he could not have brought the action without naming himself administrator; for the case was, that the intestate was a soldier in a regiment of which the defendant was colonel, and died having arrears of his pay due to him from his majesty, and the plaintiff took administration, and afterwards the money was paid to the hands of the defendant, to discharge the arrears of the regiment; and for the intestate's share of the said money upon account of his arrears, the action is brought. But it could not have been brought otherwise than as administrator, for

Nota: The rule hath constantly been, that where an executor or administrator can bring the action in his own right, and yet brings it qua executor, &c. there if he fails he shall pay costs; but if he could not bring the action otherwise than quatenus executor, though he fails he shall not pay costs. 6 Mod. 91. 181. Str. 684. Str. 1106. Creeke v. Pitcairne, 1 Barnes, 103. Grey v. Lockwood, Com. 162. post. 1413. 2 Barnes, 100. Bligh. v. Cope, 2 Barnes, 122.

otherwise

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otherwiſe the plantiff could not make title to it; for if he had brought the action in his own name, not as adminiſtrator, he could not have recovered. *Treby* chief juſtice, The plaintiff has declared of ſo much money received to his own uſe after the death of the inteſtate, and therefore the naming himſelf adminiſtrator is not to any purpoſe; and we ought to take the caſe, as it is upon the declaration. And by him and *Powell* juſtice, if *A.* be indebted to the inteſtate before his death, and after his death *A.* pays the ſaid debt to *B.* by direction of the adminiſtrator, there the adminiſtrator may ſue *B.* without naming himſelf adminiſtrator; and though he does name himſelf adminiſtrator, it is void, and he muſt pay coſts, if the action be found againſt him. Or if *A.* pays it to *B.* to the uſe of the adminiſtrator without his direction, yet the adminiſtrator may have an action againſt *B.* in his own name, and he ſhall pay coſts. But in ſuch caſe he hath election, to bring an action againſt *B.* or *A.* the firſt debtor; and if he brings it againſt *A.* it muſt be as adminiſtrator, and he ſhall not pay coſts. For in all caſes where an executor or adminiſtrator ſues for a debt or other thing belonging to the teſtator, *&c.* and grounds his action upon the ſame contract that was to the teſtator; he ſhall not pay coſts if he fail in the ſuit: but if he grounds his action upon a contract expreſſed, or by implication and operation of law, which accrues to him after the death of the teſtator; there the action lies in his own name, and the naming him executor, *&c.* is void, and he ſhall pay coſts. And in this caſe theſe two judges were of opinion, that the money being paid to the defendant, to diſcharge the arrears of the ſaid regiment, there being an arrear due to the plaintiff as adminiſtrator of the ſaid *Wildborn*; the plaintiff might have *indebitatus aſſumpſit* againſt the defendant for ſo much money received to his uſe; although no money was expreſsly paid to the defendant to the uſe of the plaintiff. But admitting that in this caſe the plaintiff ought to name himſelf adminiſtrator, to intitle himſelf to this money due to him and received by the defendant; the duty due to the inteſtate being altered, and being become a duty due from another perſon after the death of the inteſtate, the plaintiff ought to pay coſts. And *per Treby* chief juſtice, if the executor, *&c.* bring an action upon an *infimus computaſſet* with himſelf after the death of the teſtator, he ſhall pay coſts; and yet it is for a duty due to the teſtator, and not altered, for the accounting with the executor does not give a new duty, but only aſcertains that which was due before.

An executor ſhall pay coſts if he fails in an action upon an account ſtated with himſelf as executor. R. cont. T. Jones 49. 2 Lev. 163.

Lawrence

Lawrence *verſ.* Dodwell.

Pleadings Lutw. 734. poſt. vol. 3. 151.

A deviſe cannot be explained by matter out of the will. S. C. Lutw. 735. R. acc. 5 Co. 68. a. 2 Leon. 70. pl. 94. Salk. 231. pl. 10. D. acc. Salk. 234. adm. 3. P. Wms. 502. Vide Cowp. 840. 1 Bro. Cha. Caſ. 296. Com. Deviſe. N. 25. 2d Ed. vol. 3. p. 49. A general deviſe by a huſband to his wife cannot at law be averred to have been intended in lieu of dower. S. C. Lutw. 735. R. acc. 4 Co. 4. a. D. acc. Co. Litt. 36. b. 9 Mod. 152. Though it may in equity. Vide Co. Litt. 36. b. 13th Ed. n. 6. But a deviſe ſhall go in lieu of dower, if it appears upon the will to have the intention of the huſband that it ſhould, tho' it is not expreſſed in terms to be by way of jointure. R. acc. Cro. El. 128. pl. 3. If it appears upon a will that a huſband intended a deviſe to his wife to go in lieu of dower, in an action for the dower, ſo much of the will as is neceſſary to prove the intention ought to be pleaded at large.

DOWER. The defendant pleads, that the huſband was ſeiſed of the land in queſtion, and of other lands in *A.* and that he by his will deviſed the lands in *A.* to the demandant for her life, and died, and that the demandant entred into them by virtue of the ſaid deviſe; and avers, that the land deviſed was deviſed to her by her huſband in ſatisfaction of her dower. The demandant demurs. And after arguments at the bar by *Levinz* ſerjeant and *Pawlet* ſerjeant for the tenant, and *Wright* for the demandant, judgment was given for the demandant by the whole court; becauſe the averment, being of a matter out of the will, and not contained in it, ought not to be allowed: and that *Leak* and *Randal*'s caſe, 4 *Co.* 4. *a.* being expreſs in point, and always allowed for law, ought not to be queſtioned at this day. Judgment for the demandant See *Bro. Dower* 69. *Poph.* 188. *Dyer* 124. 3 *Cro.* 856. that in ſuch caſe the tenant has no need to plead, that it was deviſed *pro junctura.* See *Dyer* 377. *Roſt. Entr.* 233. *b* which *Powell* juſtice agreed. *Dyer* 125. 220. And *Powell* cited the will of lord chief juſtice *Saunders*, who deviſed all his lands, which he had, or afterwards ſhould have, in *Fulham*; and *Maynard* was of opinion, that that deviſe was not good for land there, which he had afterwards purchaſed; but *Holt* and *Pollexfen* chief juſtices *contra*; but that was agreed by the arbitrament of *Holt* and *Powell*. And (by him) if in this caſe any intent of the deviſor had appeared in the deviſe, that it ſhould have been at bar of the demandant's dower, the deviſe ſhould have been pleaded at large, and the court would have adjudged it to be in bar of her dower. But afterwards upon a bill brought in Chancery by the defendant, being heard by the lord chancellor *Somers*, he was of opinion, that in equity ſuch averment of the teſtator's intent ought to be admitted, and that the wife in ſuch caſe ſhould not have both her dower and the land deviſed; and (as I have heard) decreed in this caſe accordingly*. 2 *Vern.* 365. 1 *Bro. Parl. Caſe*, 593.

* But this decree was reverſed by Wright lord keeper in Mich. 1702. 2 Vern. 366. 1 Bro. Parl. Caſ. 593. which decree of reverſal was affirmed in the houſe of lords with 30l. coſts, 17th May 1717, 2 Bro. Parl. Caſ. 591. 1 Eq. Caſes Abr. 4th Ed. p. 219. Note: The principal reaſon of this reverſal of lord Somers's decree, and the affirmance of the decree of reverſal in the houſe of lords was, that the widow had brought a writ of dower in C. B. and recovered, and ſo the matter has been before determined at law, and if it was a bar at all, it was a bar at law.

Eaſter

Eaſter Term

11 Will. 3. B. R. 1699.

Sir John Holt *Chief Juſtice.*

Sir Thomas Rokeby
Sir John Turton
Sir Henry Gould
} *Juſtices.*

Wicket and Foot *verſ.* Cremer,

S. C. Salk. 264. Holt 272. 12 Mod. 240.

A writ of error does not abate by the death of one of ſeveral defendants in it. R. acc. Cro. Jac. 256. ante 244. and ſee the caſes there cited. The court will on motion ſet aſide an award of execution obtained upon a ſcire facias where the defendant was at the time of the award ignorant of the ſuit, if upon the merits execution ought not to iſſue. R. acc. Salk. 93. poſt. 1295. Bl. 1183. acc. Str. 1075.. unleſs the merits depend upon a queſtionable

A. and *B.* ſued an action againſt *C.* and recovered judgment. *C.* brings a writ of error. *B.* dies, pending it. *A.* ſued two *ſcire facias*'s againſt *C.* and upon two *nihils* returned he had award of execution againſt *C.* and took his goods in execution. And now Mr. *Robert Eyre* moved to ſet aſide the execution, *quia erronice emanavit*, becauſe the writ of error does not abate by the death of the defendant in error, and therefore the execution of the judgment was ſuſpended by it. And of that opinion was *Holt* chief juſtice, and the whole court. And the rather here, becauſe the *ſcire facias*'s were returned *nihil*; ſo that it appears, that the defendant had no day to plead it. But if the return had been *ſcire feci*, it might have been otherwiſe, becauſe he had a day to plead. Upon which *(a)* difference a man is allowed, or diſallowed, to have an *audita querela*. But in fact, *A.* need not to have ſued a *ſcire facias*, becauſe the judgment ſurvived to him. And a *ſuperſedeas* was granted, *&c.* And *per Holt* chief juſtice, in many caſes, where a man may have an *audita querela*, the king's bench will relieve upon motion; but if the ground of the *audita querela* be a releaſe, or other matter of fact. it may be reaſonable to put him to his *audita querela*, becauſe the plaintiff may deny it.

fact. Vide poſt. 445. If one of ſeveral plaintiffs die after judgment, the ſurvivors may without a ſcire facias take out execution. Vide ante 244. and the caſes there cited.

(a) Vide 12 Mod. 584.

Rex

Rex *verſ.* Harris.

S. C. Salk. 260.

Juſtices cannot award execution on an indictment for a forcible entry, if the defendant either traverſes the force. R. acc. 1 Sid. 287. D. acc. Salk. 588. acc. 2. Bac. 564. 564.

PER Holt chief juſtice, a man indicted of forcible entry may hinder the juſtices from awarding execution, either by traverſing the force (though the books heretofore have been *pro* and *con* as to that opinion) or by plea of poſſeſſion of three years, *&c.* which means *Holt*, being then counſel, uſed in the caſe of Sir *Robert Atkins* and the lord *Brounker*, in an indictment for forcible entry concerning *St. Catherine's Hoſpital*, removed *by certiorari* into the king's bench. or pleads poſſeſſion for three years. Vide 8 H. 6. c. 9. 31 Eliz. c. 11. ſ. 3. 2 Bac.

Intr. Paſch. 10 Will. 3. B. R. Rot. 158.

If a man covenants to accept 1000l. bank ſtock on three days notice upon or before a particular day, it is no excuſe for him that the party to make the transfer had no ſtock before the day on which he was to make it. A man cannot be ſued for money he covenanted to pay on the performance of a particular act, if he prevents ſuch performance. S. C. 12 Mod. 248. R. cont. poſt. 686. The courts cannot take notice that bank ſtock is only aſſignable at the bank, and will not attend to a ſimple allegation of the fact.

Shales *verſ.* Seignoret.

COVENANT upon articles of agreement. The plaintiff declares, that it was covenanted and agreed between him and the defendant, that he in conſideration of twenty guineas by the defendant to him then paid, ſhould transfer to the defendant before or upon the nineteenth of *November* 1695. 1000*l.* of bank-ſtock; and that the defendant covenanted with the plaintiff to accept it, upon notice of three days, and to pay to the plaintiff for it 940*l.* and then the plaintiff avers, that no bank-ſtock is transferable by law but in the office of the bank of *England*, in the preſence of both the parties; and that he gave three days notice to the defendant that he would transfer to him the bank-ſtock in the office of the bank the nineteenth of *November*; and that he attended there the whole day to have transferred it; but that the defendant did not come to accept it; for which he brings this action for the 940*l.* *&c.* The defendant after *oyer* of the articles pleads, that the plaintiff nor none of his aſſigns had any intereſt in any bank-ſtock upon the eighteenth of *November*, *&c.* The plaintiff demurs. And the whole court was of opinion, that the plea was ill; becauſe though the plaintiff had not any bank-ſtock upon the eighteenth of *November*, yet if he had it the nineteenth, he might have performed the contract within the time; for the covenant was not, that he ſhould tranſfer any particular 1000*l.* of bank-ſtock which he had at the time of the covenant, but any 1000*l.* of ſtock. But then the whole court held, 1. That this action will not lie for the plaintiff in this caſe, becauſe it appears that the plaintiff has not transferred; and without tranſfer to the defendant, the defendant is not bound to pay the money, for the money was to be paid upon the tranſfer; and therefore no tranſfer, no money, *Co. Lit.* 304. *Dyer* 371.

2 *Mod.*

2 *Mod.* 266. *Otway v. Holdips.* But the matter in the declaration might have been a good excuſe for the plaintiff, if the defendant had ſued him for not transferring the bank-ſtock: or the plaintiff might have aſſigned his breach in the non-acceptance of the ſtock by the defendant. 2. The court held, that it did not appear to the court but that the bank-ſtock was transferrable at another place than at the office of the bank; for though the act ſays, that no transfer ſhall be but as the king ſhall appoint, and the king has appointed it to be at the office of the bank, and not in any other place; yet that ought to have been pleaded, or otherwiſe the court cannot take notice of it; and therefore notwithſtanding any thing that appears here to the contrary, the transfer might have been in any other place; and then a tender ought to have been made to the perſon. Sir *Bartholomew Shower* and Mr. *Northey* argued for the plaintiff; *Darnall* and *Wright*, king's ſerjeants, for the defendant. Judgment for the defendant.

SEALES v. SEIGNORET.

Dart *verſ.* Hall.

S. C. 12 Mod. 243. Holt. 673.

Mr. *Carthew* moved for a prohibition to be directed to ——————, to ſtay a ſuit againſt *Dart* for tithes of an old mill, *viz.* for every tenth toll diſh, upon a ſuggeſtion that it was an (*a*) old mill. But *per Holt* chief juſtice, the plaintiff ought in his ſuggeſtion to lay a preſcription *in non decimando*, and alſo bring an affidavit to the court of the truth of the fact. And ſo it was done upon debate in the time of *Hale* chief juſtice, between *Hughes* and the lord viſcount *Hereford*. See *Winch. Entr.* 552. *pl.* 1 *Brown verſus Nicholſon.*

(*a*) Vide 9 Ed. 2. ſt. 1. c. 5. Bunb. 73. pl. 123 Burn's Eccleſiaſtical Law, Tithes v. xvi. 1ſt. Ed. vol. 2. p. 436.

Lugg *verſ.* Lugg.

S. C. Salk. 592. 12 Mod. 236.

IT was decreed by commiſſioners delegates, of whom *Treby* chief juſtice of the common pleas was one, ſince the laſt term, that where *A.* had made his will, and thereby deviſed all his perſonal eſtate to *B.* and *C.* and afterwards *A.* married *D.* and had by *D.* ſeveral children, and then died, without having taken any notice of this will, that this marriage of *A.* with *D.* amounted to a revocation of this will, but that it was only a preſumptive revocation; and therefore if by any expreſſion, or any other means, it had appeared that the intent of *A.* was that this will ſhould continue in force, the marriage would not have been a revocation of it. And the ſentence in the ſpiritual court was affirmed. *Ex relatione m'ri Cheſhyre.*

Marriage and the birth of a child is a preſumptive revocation of a will of perſonalty. D. acc. 1 P. Wms. 304. Burr. 2172. 2182. and ſee particularly Dougl. 30. and alſo 2 Show. 242. pl. 240. But a preſumptive revocation only R. acc. Doug. 30. Vide 4th. Ed p. 413.

1 Eq. Abr. Wilſ. E. pl. 15.

The

The Governor and Company of the Bank of England *verſ.* Newman.

Wedneſday, May 3.

S. C. 12 Mod. 241.

The diſcounter of a bill payable to bearer cannot if payment is refuſed maintain an action for the money he advanced againſt the perſon to whom he advanced it, unleſs ſuch perſon indorſed the bill. S. C. Com. 57. R. acc. Salk. 128, poſt. 744. Semb. acc. poſt. 929. 930. 12 Mod. 517. Vide Bayley, 12. 17. 48. If ſuch perſon did indorſe it, he may. R. acc. poſt. 744. acc. ante 181.

BELLAMY ſigned a bill payable to *Newman* or bearer. *Newman* came to the bank of *England*, and aſked how much money they would give him for this bill. They took the bill, and gave him ſo much money, allowing ſo much for diſcount. After that the bank received 10,000*l.* of *Bellamy*; and afterwards they ſend a man to demand the money due upon this bill of *Bellamy*; and a demand was made of *Bellamy*'s ſervant, who did not pay the money. And afterwards *Bellamy* fails, and the bank ſue *Newman* for the money which he had received of them for this bill, as for ſo much money lent by them. And upon the general iſſue pleaded, it being tried before *Holt* chief juſtice in *London* the ſitting after the laſt term, the verdict was for the plaintiff againſt his opinion. And now a new trial was granted, becauſe this was a plain ſale of the bill. For *per Holt* chief juſtice, if a man has a bill payable to him or bearer, and he delivers it over for money received, without indorſement of it, this is a plain ſale of the bill, and he who ſells it does not become a new ſecurity. But if he had indorſed it, he had become a new ſecurity, and then he had been liable upon the indorſement. But upon a new trial the jury found for the plaintiffs.

Rex *verſ.* Flint.

S. C. Salk. 687. 12 Mod. 242.

Vide 8 Ann. c. 18. Lamb. 356. Dalton, 146. 155.

THE defendant was indicted, for that, that he being *communis piſtor* ſold *ſex collyros debitum pondus minime content.* And upon demurrer to this, judgment was, that the defendant *exoneretur*; becauſe the indictment is too uncertain, for it does not appear to the court to be an offence. Mr. *Northey* for the king cited the opinion of *Roll. Stile* 186.

Anonymous.

S. C. cit. Salk. 553.

A prohibition does not lie to the admiralty court for refuſing the copy of a libel.

HOLT chief juſtice denied to grant a prohibition to the admiralty court, upon a ſuggeſtion, that they there refuſed to give to the party ſued there a copy of the libel; becauſe the (*a*) ſtatute extends only to eccleſiaſtical courts, and not to the admiralty court. Upon the motion of Mr. *Hall.*

(*a*) 2 H. 5. ſ. 1. c. 3.

White

White *verſ.* Eldridge and his Wife.

TRESPASS againſt huſband and wife. Upon not guilty pleaded, verdict for the plaintiff. And now Sir *Francis Winnington* moved in arreſt of judgment, that the wife could not be charged for the treſpaſs of the huſband, no more than they can be charged for the converſion of goods *ad uſum ipſorum*. But the court over-ruled the exception.

Cro. Car. 406. 513. pl. 8. 2 Bulſtr. 421. 2 Lev. 145. Keb. 440. Bro. tit. Bar. and Feme, pl. 32. Leon. 312. 1 Roll. Abr. 2. pl. 7.

Rex *verſ.* Cole.

Guildhall, May 20.

S. C. 12 Mod. 243. Holt, 360. 1 Tremayne's Entr. 1981.

THE defendant *Cole* was indicted for that he being a bankrupt, and brought before the commiſſioners, refuſed to give them an account of his effects, *&c.* And the defence at the trial, upon not guilty pleaded, was, that he was an infant at the time of the debts contracted, and therefore could not be a bankrupt. And of this opinion was *Holt* chief juſtice. For (by him) though the debts of an infant are only voidable by him at his election; yet no man can be a bankrupt for debts which he is not obliged to pay. And the defendant therefore was acquitted.

A man cannot be bankrupt for a debt contracted in his infancy. R. acc. Rep. Temp. King. 46. 1 Atk. 146.

Lambert *verſ.* Oakes.

Guildhall, May 20.

S. C. Salk. 127. 12 Mod. 244. Holt, 117.

R. Signed a (*a*) note under his hand payable to *Oakes* or his order, *Oakes* indorſed it to *Lambert*. Upon which *Lambert* brought the action for the money againſt *Oakes*. *Per Holt* chief juſtice he ought to prove, that he had demanded, or done his endeavour to demand, this money of *R.* before he can ſue *Oakes* upon the indorſement. The ſame law if the bill was drawn upon any other perſon payable to *Oakes* or order. And the demand, to intitle *Lambert* to his action, muſt be after the indorſement. 2. *Oakes* had indorſed this blank bill to *Lambert*, *viz.* by the writing of his name only, upon diſcount; and therefore it was urged by Mr. *Northey*, that this was a plain ſale of the bill, and the indorſement ſhall not ſubject the indorſer to an action, becauſe the bill cannot be ſold, to entitle the vendee to take the benefit of it, without indorſement; and the practice among merchants is ſo. *But Holt e contra*. For their practice cannot alter the law. And the indorſement, though upon diſcount, will ſubject the indorſer to an action; becauſe it is a conditional warranty of the bill, and makes a new contract, in caſe the perſon upon whom it was drawn does not pay it. 3 *Per Holt* chief juſtice. If *A.* indorſes a bill

In an action againſt the indorſer of a note or bill the plaintiff muſt prove a demand, or an endeavour to make a demand upon the maker of the one or the drawer of the other within a proper time after the note or bill became payable. Vide Bayley, 28, 29. An indorſement in blank made on getting a bill diſcounted will make the indorſer liable to an action on the bill. A perſon to whom a bill is delivered with a blank indorſement may write over the indorſement what he will. Semb. acc. Salk. 126. pl. 4. 128. pl. 9. 130. pl. 15. In an action againſt the indorſer of a bill the plaintiff need not prove the hand of the drawer. Vide Bayley 63. b.

(*a*) In Salk. 12 Mod. and Holt ubi ſupra, this is repreſented to have been a bill; but that could not have been the caſe, becauſe upon a bill the law is clearly otherwiſe. Vide Bayley, 64. 65.

blank

LAMBERT v. OAKES.

blank to *B.* he thereby put it in the power of *B.* to overwrite what *B.* pleases. 4. If the indorsee does not demand the money payable by the bill, of the person upon whom it is drawn, in convenient time, and afterwards he fails, the indorsor is not liable. 5. If the action be brought against the indorsor, it is not necessary to prove the hand of the drawer; for though it be forged, the indorser is liable.

Todd *verſ.* Stokes, a Parſon who lived at Chicheſter.

Guildhall, May 24.

If a husband and wife part by agreement, and the former binds himself to allow the latter a separate maintenance, he is not responsible for any debt she may contract after the separation is generally known. S. C. Salk. 116. 12 Mod. 244. R. acc. 6 Mod. 147. though with a person who did not know of the separation. S. C. 12 Mod. 244. But until such separation is generally known he is. S. C. 12 Mod. 244. Vide Skin. 349. A general reputation in the place where the husband lives is sufficient, tho' there is no such reputation in the place where the debt was contracted. S. C. 12 Mod. 244. A husband is responsible for

THE plaintiff being an apothecary brought an action against the defendant for medicines for the defendant's wife, *&c.* Upon *non aſſumpſit* pleaded, upon the trial it was proved, that the defendant and his wife, upon discontent conceived between them, had been separated by consent for five years; and that upon the separation the defendant signed articles to certain trustees, by which he obliged himself to allow his wife twenty pounds a year; which he had done accordingly ever after: that the plaintiff, when he accommodated the defendant's wife with these medicines, did not know that she was a married woman, *&c.* And it was ruled by *Holt* chief justice, that the defendant was not bound to pay the plaintiff's bill. For though the plaintiff had not personal notice of their separation, and though it was not the general reputation in *London*, where the plaintiff lived, that the defendant and his wife were separated, yet since it was the general reputation in the place where the defendant lived, and that for five years past, it was enough to exempt the defendant's wife from being capable to charge the defendant, though for necessaries. But if the wife had come immediately from her husband after the separation, before it could have been publicly and generally known, and had taken up necessaries upon credit, the husband would have been liable. And therefore in this case the plaintiff was nonsuit.

Note, it was ruled by *Holt* chief justice at *Exeter Lent* assizes, 10 *Will.* 3. between *Langworthy* and *Hickmore*, that if the husband turns away his wife, and afterwards she takes up necessaries upon credit of a tradesman; the husband shall be liable to the tradesman to pay for them. But if the wife elopes, though the tradesman has no notice of the elopement, if he gives credit to the wife, the husband is

any necessaries his wife may get upon credit, if he turns her away. S. C. 12 Mod. 244. R. acc. Str. 1214. D. acc. post. 1006. But not if she elopes. S. C. 12 Mod. 244. R. acc. Str. 875. D. acc. post. 1006. Boreton v. Prentice. B. R. 3 M. 18 G. 2. Vide Str. 875. though the person furnishing them did not know of the elopement. S. C. 12 Mod. 244. Vide 6 Mod. 171. Salk. 119. pl. 13. A husband is not responsible for necessaries furnished his wife by a tradesman whom he has warned not to trust her. D. acc. post. 1006. Sed Vide Str. 1214. nor by any person, after a general notice to the world not to trust her. S. C. 12 Mod. 244. Sed vide Str. 1214. 1 Bac. Abr. 295.

not

not liable. If the wife tells her husband, that she will buy such a thing, which is necessary, and the husband tells her, that he will not allow it, and forbids the tradesman to give his wife credit for it, and afterwards the wife takes up that thing of the same tradesman upon credit given her by him; the husband is not liable. It is sufficient for the husband to give general notice, that people do not give credit to his wife.

Todd v. Stokes.

Dodd *verſ.* Beckamn and Carman.

BECKMAN being arrested at the suit of *Dodd*, put in bail to the action. And afterwards *Dodd* obtained judgment against *Beckman*. And after a *capias ad satisfaciendum* sued against *Beckman*, and *non est inventus* returned upon it, *Dodd* sued two *scire facias*'s against *Carman* as bail of *Beckman* in the aforesaid suit. And after two *nichils* returned, and judgment against the bail, he took the goods of *Carman* in execution. And now Mr. *Northey* moved, that *Carman* might have his goods out of the sheriff's hands, and that a *vacat* should be made of the judgment, upon *affidavit*, that *Carman* was not at *London* all the day in which the bail was supposed to enter into the recognizance, and therefore that he was personated, and for this reason that all ought to be set aside. And for this he relied upon *Cro. Jac.* 256, *Cotton*'s case. Upon which the court referred it to the master to be examined, who reported the fact to be thus, *viz.* That *Beckman* being arrested at the suit of *Dodd*, gave a bail-bond to the sheriff, to appear at the return of the writ. And at the return of the writ he put in bail before Mr. Justice *Rokeby*, to which not being sufficient, *Dodd*'s attorney excepted; and for want of justification of this bail, or of putting in of better-bail, obtained an assignment of the bail-bond; upon which *Beckman* came to *Dodd*'s attorney, and told him, that he would put in *Carman* as additional bail. Afterwards *Dodd*'s attorney went to search in the judge's book, and there he found *Carman* added to the bail-piece. And then he proceeded regularly in obtaining judgment against *Beckman*, and afterwards judgment against *Carman*, and in taking these goods of *Carman* in execution. The master reported also; that at the day when *Carman* is supposed to have been before the judge, and become bail for *Beckman*, he was at *Canterbury*, as appears by an *affidavit* made to that purpose by *Carman's* servant. But farther, that *Carman* had been bail for *Beckman* in two actions in the common pleas before Mr. Justice *Blencowe*, within five or six days after the time that he is supposed to have been entred as bail in Mr. Justice *Rokeby*'s book in this case, and that *Beckman* was bound in a bond with *Carman* for *Carman*'s debt about the same time, or

The court will not on motion set aside an award of execution obtained upon a scire facias, though the defendant was at the time of the award ignorant of the suit, unless the merits of the case are clear. Vide ante 439.

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or a very little time after; and that *Beckman* was inſolvent, and gone beyond ſea. Upon which the court refuſed to diſcharge the proceedings againſt the bail, but diſcharged the rule of reference. See 3 *Keb.* 694. 1 *Vent.* 301. *T. Jones* 64. *Beaſley's* caſe. 1 *Ventr* 49. *Paris's* caſe. *Palm.* 197. *Chapleyn v. Aileyn.* 19 *H.* 6. 44. 21 *Jac.* 1. *c.* 26. 4 & 5 *W & M. c.* 4. Sir *Bartholomew Shower* and myſelf counſel for *Dodd.*

Grimes *verſ.* Lovel.

7 Lmit 422 · 8 Lmit 644 S. C. 12 Mod. 242. Holt 593.

Saying a perſon has the French pox is actionable. Vide Com. Action on the caſe for defamation. D. 29. 2d Ed. vol. 1. p. 184. "The pox ſhall be intended to mean the French pox, where it is coupled with words charging the party ſpoken of with fornication. Vide Com. ubi ſupra. A man cannot ſue in the ſpiritual court on account of words which are actionable at law. R. ante acc. 212. and ſee Com. Prohibition G. 14. 2d ed. vol. 4. p. 507. 508.

A LIBEL was preferred in the eccleſiaſtical court for ſcandalous words, *viz.* "You are a damned bitch, "whore, a pocky whore, and if you have not the itch you "have the pox." And Mr. *Mulſo* moved for a prohibition, becauſe an action lies at common law. And he put this difference, where the word pox is joined with other words ſo that it cannot but be underſtood but of the *French* pox, there the action lies. And he cited *Cro. Eliz.* 2. Which *Holt* chief juſtice agreed, and ſaid, that the joining it with the word whore would make it be underſtood of the *French* pox, which is actionable. And he cited a caſe where the words were; He got the pox by a yellow haired wench in *Moorfields*; and they were held actionable. And a prohibition was granted.

Rigden *verſ.* Hedges.

S. C. but not exactly S. P. 12 Mod. 246.

IF a ſhip be arreſted by proceſs out of the admiralty court, for a matter ariſing within their juriſdiction; though ſhe be reſcued at land, the conuſance of the reſcue belongs to the admiralty; otherwiſe not. *Per Holt* chief juſtice. See 1 *Ventr.* 1.

BY *Holt* chief juſtice. If the *diſtringas* be returnrable at a day within the term, judgment may be entered on the crown ſide, though there be not four days remaining. But four days ought to be given, if there are ſo many. In the caſe of *Knox* and *Levaree*, who were tried for a miſdemeanor three days before the end of the term in the time of lord chief juſtice *Scroggs*, Sir *Samuel Aſtrey* certified, that judgment could not be entred; but upon conference between Sir *William Jones*, then attorney general, and the chief juſtice, it was ſettled, that the ancient practice of the court was according to the difference before, and that it was miſreported; and judgment was entred againſt them. *Ex relatione m'ri Jacob.*

The

The Bishop of St. David's *vers.* Lucy.

S. C. 12 Mod. 237.

LUCY promoted a suit *ex officio*, *&c.* before the archbishop of *Canterbury* against the bishop of *St. David's* upon several articles for simony and other offences. To which articles Dr. *Thomas Watson* the bishop of *St. David's* put in his answer. And proof being offered on the part of the promoter the bishop appealed to commissioners delegates. And pending the appeal he moved in the king's bench for a prohibition, upon a suggestion, that the matters contained in the articles were of temporal conusance, *&c.* And at the beginning Sir *Bartholomew Shower* argued for the prohibition; that it does not appear, that the bishop of *St. David's* was cited to appear in any court whereof the law takes notice; for the citation is, that he should appear before the archbishop of *Canterbury*, or his vicar general, in the hall of *Lambeth house*, to answer, *&c.* which is not any court whereof the law takes notice. For the archbishop has the same power over his suffragan bishops, as every bishop hath over the clergy of his diocese; but no bishop can cite the clergy before himself, but in his court. And therefore the citation ought to have been here, to appear in the *Arches*, or some other court of the archbishop. *&c.* But to this it was answered by *Wright* king's serjeant, that without doubt (*a*) the archbishop had jurisdiction over all the clergy, as well bishops as others within this province. And for that he cited the case of Dr. *Wood*, bishop of *Litchfield* and *Coventry*, who in the year 1687 was suspended by archbishop *Sancroft* for dilapidations, and the profits of the bishoprick were sequestered, and the episcopal palace was rebuilt out of them, and he died under that sequestration. He cited also the case of *Marmaduke Middleton* bishop of *St. David's*, who upon the eighth of *May* in the year 1582 was suspended by the high commissioners for misapplication and abuse of the charity of *Brecknock* (which is one of the crimes of which this bishop is accused.) *Whitgift's Register*, 177. And though that suspension was made by the high commission court, yet that will make no difference; because the (*b*) high commissioners have not any new jurisdiction, or greater, than the archbishop, by 1 *Eliz. c.* 1. *s.* 18. And *Holt* chief justice said, that the admitting of that point of the jurisdiction to be disputed, would be to admit the disputing of fundamentals, which the counsel of the other side attempt to subvert, not duly considering the respect due to the primate and metropolitan of *England*; for the archbishop of *Canterbury* has without doubt provincial jurisdiction over all his suffragan bishops, which he may exercise in what place of the province it shall please him; and it is not

An archbishop may cite any of his suffragan bishops to appear in any part of his province before either him, S. C. Salk. 734. 3 Salk. 90. or his vicar general, and punish them with deprivation or ecclesiastical censures for any offences contrary to their office as bishops. S. C. Salk. 134. Vide Com. Prerogative. D. 21. Ed. 1780. vol. 4. p. 439. or for a neglect of any part of their duty as bishops. S. C. Carth. 484. But not for any thing done by them as visitors. S. C. Carth. 484. Vide ante, 8. and the cases there cited. Simony, though it relates to a living he holds in commendam or forgery is contrary to a man's duty as bishop. S. C. Salk. 154. Carth. 484. Holt. 652. It is the duty of a bishop to tender the oaths upon an ordination. S. C. Carth. 484. A contract to resign a benefice is simoniacal. Vide Com. Eglise, n. 3. 2d Ed. vol. 3. p. 207. So is taking excessive fees. S. C. Carth. 484.

(*a*) Acc. 1 Bl. Com. 380. (*b*) Acc. Cro. Jac. 37.

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not material to be in the *Arches*, no more than any other place; for the *Arches* is only a peculiar, consisting of twelve parishes in *London*, except from the bishop of *London*, where the archbishop of *Canterbury* exercises his metropolitical jurisdiction; but he is not confined to exercise it there. And the citation is here, to appear before the archbishop himself, or his vicar general, who is an officer of whom the law takes notice; for the vicar general in the province is of the same nature as the chancellor in every particular diocese; and the dean of the *Arches* is the vicar general of the archbishop in all the province.

The power of the vicar general of an archbishop in a province, corresponds with that of the chancellor of a bishop in a diocese.

Then the counsel for the bishop of *St. David's* urged that the matters contained in the articles exhibited against the bishop before the archbishop were of temporal conusance, and not conusable before the archbishop. The first of which articles was, that the bishop of *St. David's* being incumbent of the church of *Borough-green*, in the county of *Cambridge*, covenanted with *William Brookes* for 200 *guineas*, to make him his curate, and to resign to him his rectory, when he should be requested to do it. And Sir *William Williams*, Sir *Thomas Powys*, Sir *Bartholomew Shower*, and Mr. *Northey* argued, 1. This article imports only contract made by the bishop as incumbent of the church of *Borough-green*, and not as bishop of *St. David's*; and therefore admitting that fact to be *simony*, they ought not to bring it *per saltum* before the archbishop; but it should be begun in the court of the bishop of *Ely*, who hath *Cambridgeshire* in his diocese; for this method will deprive the bishop of his appeal. 2. That this fact amounts only to a temporal contract, and which is not of spiritual conusance; for no matter is alledged in this article to be executed, which amounts to *simony*; for he only took money to make a curate, which is lawful, and the covenant to resign was never executed; so that it could not be *simony* within the 31 *Eliz. c.* 6. because there was not any resignation in pursuance of the covenant; and it is not *simony* within any of the canons which are in force in *England*. Besides, that since the 31 *Eliz. c.* 6. settles *simony*, it is a question, how far the king's bench will permit the spiritual courts to proceed and extend their notion of *simony*. Against which it was argued by the attorney general, serjeant *Wright* and Mr. *Cheshyre*, that as to the first objection, if a bishop makes a *simoniacal* contract, it is a personal offence in him, and contrary to his office of bishop, and is punishable by the metropolitan by the ecclesiastical censures. But if the archbishop had proceeded against the bishop of *St. David's*, by depriving him of the benefice of *Borough-green*, the objection might have been good; for the bishop of the diocese might and ought to have proceeded against him for that purpose, and not the archbishop. But these proceedings are for an offence committed contrary to the duty as being a bishop. And of this opinion

An archbishop cannot deprive a suffragan of a benefice which lies within the diocese of another suffragan for simony with respect to that benefice. S. P. 12 Mod. 238.

was

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was the whole court. And as to the ſecond objection, they ſaid, that though this was a contract, yet it is a *ſimoniacal* contract, and then it will be examinable in the ſpiritual court, not whether the contract ought to be performed or not, but to puniſh the party by eccleſiaſtical cenſures. This was proper before the 31 *El. c.* 6. and it is ſaved by the ſame act, *ſ.* 9. It is without doubt *ſimony*, for it is a contract to reſign a benefice for 200*l.* for by the ſpiritual law the buying of chriſm, *&c.* or (*a*) any other thing *quae ad ſpiritualia ſpectat*, is *ſimony*. But the common law takes no notice of any *ſimony*, but that which the ſtatute mentions; which ſtatute has not defined *ſimony* in ſuch manner as to ſay, what ſhall be *ſimony*, and what not, by the ſpiritual law. Then this fact, if it be *ſimony*, is conuſable in the ſpiritual court, as before the 31 *El. c.* 6. And if it be not *ſimony*, and the archbiſhop ſhall adjudge it *ſimony*, that will be good cauſe of appeal, but not of prohibition. That *ſimony* was of eccleſiaſtical conuſance before the ſtatute, is without doubt. 2 *Canon of the council of Chalcedon*, *Gen. Conc.* 397. If a biſhop or churchman commit *ſimony*, he ſhall be degraded; if a layman, he ſhall be anathematized. 2 *Gen. Conc.* 110. The taking of money for orders or inſtitution is *ſimony* by the council of *Chalcedon*. And by the 135 canon of the year 1603, it is *ſimony* to take any thing, where the uſage does not warrant it; and it is *ſimony* to take more than the uſage warrants, as more for viſitations than the uſage warrants. *Quod fuit conceſſum per totam curiam.* And *per Holt* chief juſtice, *ſimony* is an offence by the canon law, of which the common law does not take notice, to puniſh it; for there is not a word of *ſimony* in the ſtatute of *Elizabeth*, but of buying and ſelling. Then it would be very unjuſt, if eccleſiaſtical perſons might offend againſt the eccleſiaſtical duty in ſuch inſtances, of which the common law cannot take notice to puniſh them, and yet the king's bench ſhould prohibit the ſpiritual court from inflicting puniſhment according to their law. The clergy are ſubject to a law different from that to which laymen are ſubject, for they are ſubject to obey the canons, for the (*b*) convocation of the clergy may make laws to bind all the clerks, but (*c*) not the lay people. And if the clergy do not conform themſelves, it (*d*) will be cauſe of deprivation. Reſolved by all the judges of *England*. And by ſuch authority were the canons of the year 1603 made, which make *ſimony* ſo great an offence. And the ſaid canons have been always received, though ſome queſtion has been made of the canons in 1640. And many of the ancient canons are as old as any law that we have at this time.

(*a*) Vide Cro. El. 789. The common law takes no notice of any ſimony which is not mentioned in 31 El. c. 6. S. P. 12 Mod. 238. A wrong judgment in an eccleſiaſtical court is cauſe for an appeal. S. P. 12 Mod. 238. D. acc. poſt. 544. 2 T. R. 556. 3 T. R. 5. Not for a prohibition. S. P. 12 Mod. 238. D. acc. poſt. 544. 2 T. R. 556. 3 T. R. 5.

(*b*) Semb. acc. Salk. 412. pl. 2 672, 673.

(*c*) R. acc. Str. 1056. 2 Barnard, B. R. 351. D. acc. 1 P. Wms. 32. Vide Str. 1060.

Then the counſel for the biſhop of *St. David's* ſaid, that another article againſt the biſhop was, that he took exceſ-

(*d*) Acc. Cro. Jac. 37.

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five fees for conferring orders, institutions, visitations, &c. and (by them) that amounts to extortion, and therefore it is punishable by indictment at common law; and the rather because they shew custom for the fees which they say the bishop ought to have taken, and that makes it without doubt conusable at common law, because the spiritual court cannot try, custom, or not. But to that it was answered by the counsel of the other side, that these offences in the spiritual court, and by the canon law are *simony*; for orders ought to be free, and so it is declared by the statute of *Elizabeth*. *Quod fuit concessum per totam curiam*. And *per Holt* chief justice, by the canon law, and of common right no parson ought to take any thing for *christening* of children, burials, &c. but by custom they are allowed to take something. And procurations are suable only in the spiritual court, and are merely an ecclesiastical duty; and it is a question, whether the taking more for them than ought to be taken, can be extortion at common law.

Of common right a parson can take nothing for christenings. S. P. 12 Mod. 239. or burials S. P. 12 Mod 239. D. acc. Salk. 332. 334. 3 Bl. Com. 90. Vide post. 1588. But by custom he may. S. P. 12 Mod. 239. Adm. Salk. 332. 334. D. acc. 3 Bl. Com. 90. Vide post. 1588. Procurations can only be sued for in the spiritual court.

Then the counsel for the bishop said, that another article against him was, that he ordained a man, and did not administer to him the oaths according to the 1 *Will. & Mar.* and yet certified under his episcopal seal that he had taken the oaths, whereas he had not taken them; which is punishable by the statute 1 *Will. & Mar.* at common law, being a breach of the statute. But to that it was answered by the court, that the statute has made it now part of the office of a bishop, to tender the oaths upon ordination: And then the metropolitan may proceed against a bishop, if he does not obey the statute in this point, for proceeding contrary to his office of bishop. As if a statute appointed that the judges should do any thing, and they refused; this would be a forfeiture of their office, and a *scire facias* would lie to repeal their patents, without previous conviction.

Then the counsel for the bishop argued, that another article against him was, that he had ordained a man under age; that the bishop made his defence and said, that the churchwardens of ——— had certified to him, that he was of full age; to which the promoter answered, that that certificate was forged; for the said churchwardens did not certify, and one of them could not write: so this article imports forgery, and therefore examinable and punishable at common law. And since the act of uniformity has altered the law, they ought to proceed upon the said statute for ordaining under age. But the court said, that the distinction, which would answer almost all these objections, was this; that as to that which relates to the office of bishop, and is against his duty as a bishop, the spiritual court may proceed against him to (*a*) deprive him, but not

(*a*) Vide Sid. 217. 1 Keb. 721. 762.

punish

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puniſh (a) him as for a temporal offence. See Sir *John Savage*'s caſe, *Keilw.* 194. *a.* and 5 *Co.* 1. *Caudrey*'s caſe, where upon a ſpecial verdict found, it appeared that *Caudrey* was deprived by the high commiſſioners for preaching againſt the Common Prayer; and though there was other puniſhment appointed by the ſtatute, and not deprivation until the ſecond offence; yet it was held, that they might proceed by their own law, and deprive him; it being againſt the duty of his office as a miniſter, and they having power to purge their body of all ſcandalous members. And *per Holt* chief juſtice, as to cuſtomary fees, the matter of the cuſtom is not in queſtion, for then they ought to have laid a poſitive cuſtom to take ſuch a ſum; which is not here, but only that he took more than the uſual fees. But if a cuſtom had been laid, it ſeemed to him, that a prohibition would not have lain; becauſe it concerns mere eccleſiaſtical perſons and rights, and therefore may be founded upon their eccleſiaſtical conſtitutions. And *per Gould* juſtice it appears, that the ſpiritual court has juriſdiction in caſes of extortion in their officers and members by 2 *Inſt* 586. where a bill is ſaid to have been paſſed, 3 *R.* 2. to enable juſtices of peace to inquire of extortions in the biſhops and their officers; and the biſhops made proteſtations of their ancient rights, *&c.* And the caſe in 1 *Lev.* 138. 1 *Sid.* 217. 1 *Keb.* 721. 762. *Smalbrook v. Slader*, warrants the diſtinction taken before by the court. And (by him) in caſe of perjury, if it be committed in a cauſe of which the ſpiritual court has conuſance, as matrimony, *&c.* they ſhall proceed in the ſpiritual court to puniſh it; otherwiſe where it is committed in matter of (a) contracts, *&c.* 2 *H.* 4. 10. And *per Holt* chief juſtice it has been a queſtion, whether perjury in the ſpiritual court can be tried here; and in all the caſes where it has been, the perſons have been acquitted, and ſo it has been ended, but it is not yet ſettled.

The ſpiritual court may proceed upon a cuſtom concerning eccleſiaſtical perſons and rights only.

Perjury committed in a ſpiritual court is puniſhable there D. acc. Keilw. 39. b. pl. 7. And not elſewhere. Sed vide 5 Mod. 348. 2 Roll. Abr. 257. 16 Vin. 307. pl. 2. 313.

Another article was for the abuſe at the charity at *Brecknock* (b), and for putting out the ſchoolmaſter there, *&c.* and for detaining (c) a deed of exemplification, *&c.* And a prohibition was granted as to this article, but denied as to the reſt. And afterwards the biſhop was deprived before the archbiſhop, from which ſentence he appealed to the delegates. *Poſt.* 539.

(a) Vide Keilw. 39. b. pl. 7. (b) Of which he was a viſitor. Vide Carth. 484. (c) See the grant by which the charity was inſtituted, and all the books concerning it. Carth. 484.

Whitgrave *verſ.* Chancey. C. B.

S. C. Lutw. 180. Pleadings Lutw. 180.

A man who loſes at play at one meeting more than 100l. on tick, though to ſeveral perſons, is not under the 16 Car. 2. c. 7. ſ. 3. liable to pay any of them. R. cont. Salk. 345.

IN an action brought for 80*l.* the defendant pleaded that he loſt it to the plaintiff at play, and that at the ſame time he loſt 40*l.* to *J. S.* at play; and then pleaded the (*a*) ſtatute of gaming, *&c.* The plaintiff demurred. And adjudged a good plea, ſince both the ſums amount to more than 100*l* and were loſt at one ſitting. *Contra*, if the 40*l.* had been loſt by covin, to avoid the payment of the 80*l.* Adjudged *in C. B. Ex relatione m'ri Thornill* pl. 4, 5. Vide 9 Ann. c. 14. ſ. 2.

(*a*) 16 Car. 2. c. 7. ſ. 3.

A declaration for ſtopping up a water courſe without ſhewing how, is bad upon demurrer. But unobjectionable after verdict.

CASE for ſtopping a watercourſe. Not guilty pleaded. Verdict for the plaintiff. And it was moved in arreſt of judgment, that it was *obſtupavit et obſtruxit* generally, without ſhewing how, as *per ripas*, *&c.* But it was overruled And *Gould* juſtice ſaid, that 3 *Leon.* 13. *obſtupavit* generally was held good, but that it would be ill upon demurrer. *Holt* chief juſtice ſaid, that he had known it held both ways. And the plaintiff had his judgment by the three judges, *Holt non contradicente. Ex relatione m'ri Jacob.*

Machin *verſ* Molton.

S. C. 12 Mod. 252. Salk. 549. Carth. 476. 3 Salk. 90. 4 Vin. 538. pl. 20. Arguments of Counſel, 5 Mod. 450.

A ſuit for ſubtraction of tithes cannot be brought in any ſpiritual court out of the dioceſe in which the tithes are payable. R. acc. 1 Keb. 481. 501. 1 Lev, 96. D. cont. 2 Brownl. 28. Vide 32. H. 8. c. 7. ſ. 2.

A man may be cited out of the dioceſe in which he lives in cauſes which could not have been maintained againſt him in that dioceſe. R. acc. 1 Keb. 481. 501. 1 Lev. 96. Semb. acc. Godb. 191. Semb. cont. 2 Brownl. 28. Vide Com. Prohibition, F. 9 2d. Ed. vol. 4. p. 495. 4 Vin. 535.

MR. *Bridges* moved for the diſcharge of a rule, by which a prohibition was granted, *niſi*, *&c.* to the conſiſtory court of the archbiſhop of *York*; where *Molton* rector of the church of *South Collingham* in *Nottinghamſhire*, preferred a libel againſt *Machin* for ſubtraction of tithes. And the motion for the prohibition was grounded upon a ſuggeſtion that *Machin* lived within the dioceſe of *Lincoln*, and therefore ought not to be cited out of the dioceſe where he lived, by 23 *H.* 8. *c.* 9. *ſ* 2. And the cauſe that Mr. *Bridges* ſhewed to the court to diſcharge the rule, was, becauſe *Machin* had lands within the dioceſe of *York*, *viz.* in the pariſh of *South Collingham* in *Nottinghamſhire*; for tithes of corn growing upon which lands *Milton* libelled in the conſiſtory court of *York*: and when the citation was ſerved, *Machin* was there, though he lived generally within the dioceſe of *Lincoln*. And he cited Dr *Blackmore's* caſe, *Hardr.* 421. where it is ſaid by the court, that if a man be cited within the dioceſs, though he is not an inhabitant there but only comes there upon the account of trade or otherwiſe, that this is not within the ſtatute of 23 *H.* 8. *c.* 9. *ſ.* 2. But ſerjeant *Jenner* for the probibition cited 1 *Roll. Rep.* 328, *Moor v. Cockayne and Saunderſon*, where it is admitted, that if an executor living in the dioceſe of *A.* be ſued and cited in the dioceſe of *B.* where the will was proved,

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proved, a prohibition ſhould be granted. But *per Holt* chief juſtice, if *A.* lives in the dioceſe of *B.* and occupies lands in the dioceſe of *C.* if *A.* ſubtracts tithes in *C.* he may be cited and ſued there; and it is not within the ſtatute of *H.* 8. For when *A.* occupies lands in *C.* that makes him an inhabitant there, and out of the intent of the ſtatute. And if a man has goods in the dioceſe of *A.* only, and he makes his will, and conſtitutes *B.* who lives in the dioceſe of *C.* his executor, and dies; *B.* proves the will in the court of the biſhop of *A* *B.* may be cited in the dioceſe of *A.* for a legacy deviſed by this will, becauſe the reſidence of the executor does not give conuſance, but the probate of the will. To which *Rokeby* juſtice agreed. *Jenner* ſerjeant: The caſe in 1 *Roll. Rep.* 328. is *contra.* *Holt* chief juſtice: Then it has been over-ruled ſeveral times ſince. And though that ſtatute was made to prevent vexation, yet there are ſeveral exceptions. *Adjournatur.*

An executor may be ſued for a legacy in the court in which he proved the will, wherever he may live. R. acc. 1 Vent. 233. pl. 1.

And afterwards at another day Mr. *Bridges* againſt the prohibition argued, that if a prohibition ſhould be granted, there would be a failure of juſtice, becauſe *Molton* cannot maintain a ſuit in the court of the biſhop of *Lincoln* for the ſubtraction of theſe tithes. And Mr. *Broderick* of the ſame ſide ſaid, that the ſtatute of 32 *H.* 8. *c.* 7. *ſ.* 2. which ſays, that perſons withdrawing tithes ſhall be convened before the ordinary of the place where they were withdrawn, will amount to a repeal of 23 *H* 8. *c.* 9. *ſ.* 2. if it had been within the intent of the ſaid act, which he ſaid was never intended. But *Jenner* ſerjeant cited 13 *Co.* 6. *Porter v. Rocheſter*, *Palm.* 488. *Hob.* 185, *Jones v. Jones.* 1 *Rol. Rep.* 328. And as to ſuits upon wills, they might tranſmit them to the dioceſe where the party lives. [See *Godb.* 191. *Frances v. Powell.*] And that civilians had told him, that they can ſue a man in the ſpiritual court of the dioceſe where he reſides, for tithes which he ought to pay for lands in another dioceſe. But to that *Broderick* ſaid, that a ſuit for tithes was local. And for that he cited 1 *Keb.* 481. *Rogers v. Harding.* But *per Holt* chief juſtice, the ſtatute 32 *H.* 8. *c.* 7. did not intend to repeal any part of 23 *H.* 8. *c.* 9. *ſ.* 2. But the queſtion is here, whether there is any remedy in *Lincolnſhire* for this ſubtraction of tithes within the dioceſe of *York?* The civil law courts may tranſmit any cauſe into another civil law court, and ſo they do every day for cauſes ariſing in the admiralty of *France.* But here the queſtion is, whether the juriſdiction aroſe from the cauſe, or from the perſon? If a will be proved in the prerogative court of *Canterbury*, a ſuit upon it for a legacy, *&c.* muſt be in the *Arches*, which is the provincial court, though the party lives in another dioceſe. See the ſaving of the ſtatute 23 *H.* 8. *c.* 9. *ſ.* 5. for that, *Adjournatur.* And afterwards a prohibition was granted to the end that the parties ſhould declare upon it; ſo that the queſtion might come more judicially before the court. *Poſt.* 534.

Dr.

Intr. Mich. 9 Will. 3. B. R. Rot. 178.

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S. C. Com. 76. 12 Mod. 386. Pleadings poſt. vol. 3. p. 278.

14 Com Dig 28 270.

A bailiff may juſtify an act under any warrant he had at the time he did it.

And a traverſe that he did it by virtue of that warrant, is bad. S. C. 3 Salk. 354. Vide ante, 408. and the caſes there cited.

A power to examine, hear and puniſh, makes a man a judge. S. C. Salk. 200. 396. Holt. 84.

A power to puniſh by fine and impriſonment a judge of record. S. C. Salk. 200. 396. Holt, 184. 537. Carth. 491. cit. 3 Bl. Com. 24, 25.

No action lies againſt a man for what he does as judge. S. C. Salk. 396. Holt, 184. 395. R. 12 Co. 24. 2 Mod. 218. D. acc. 9 Ed. 4. 3. pl. 10. 1 Mod. 119. 184. Agr. Bl. 1145. Nor does an indictment. S. C. Salk. 396. Holt, 184. 395. D. acc. 12 Co. 24. Semb. 27. Aſſ. pl. 18. Bl. 1145.

Matter of record cannot be traverſed. S. C. Salk. 396. Holt. 395. 536. Carth. 491. D. acc. 8 Co. 121. a. Litt 260. a. 2 Inſt. 380. Finch. Law. lib. 4. c. 1. Ed. 1759. p. 231. 3 Bl. Com. 24.

London ſſ. *Memorandum quod alias ſcilicet termino Paſchae ultimo praeterito coram domino rege apud Weſtmonaſterium venit Johannes Groenvelt in medicinis doctor per Thomam Prune attornatum ſuum et protulit hic in curia dicti domini regis tunc ibidem quandam billam ſuam verſus Thomam Burwell, Richardum Torleſs, Willelmum Dawes et Thomam Gill in medicinis doctores, et Johannem Cole in cuſtodia mareſcalli, &c de placito tranſgreſſionis inſultus et impriſonamenti et ſunt plegii de proſequendo, ſcilicet Johannes Doe et Richardus Roe. Quae quidem billa ſequitur in haec verba, ſc. Johannes Groenvelt in medicinis doctor queritur de Thoma Burwell, Richardo Torleſs, Willelmo Dawes et Thoma Gill, in medicinis doctoribus, et Johanne Cole in cuſtodia mareſcalli mareſcalciae domini regis coram ipſo rege exiſtentibus de eo quod ipſi iidem Thomas Burwell, Richardus Torleſs, Willelmus Dawes, Thomas Gill et Johannes Cole, decimo quinto die Aprilis anno regni domini Willelmi tertii nunc regis Angliae, &c. nono vi et armis, viz. gladiis baculis et cultellis in ipſum Johannem Groenvelt apud London praedictum, viz. in parochia Beatae Mariae de Arcubus in warda de Cheape inſultum fecerunt et ipſum Johannem Groenvelt adtunc et ibidem verberaverunt vulneraverunt et male tractaverunt ita quod de vita ejus maxime deſperabatur et ipſum Johannem Groenvelt adtunc et ibidem impriſonaverunt et ipſum ſic in priſona per magnum tempus, viz. per ſpatium ſeptem dierum extunc proxime ſequentium ſine aliqua rationabili cauſa contra voluntatem ipſius Johannis Groenvelt ac contra legem et conſuetudines hujus regni Angliae ibidem detinuerunt et alia enormia ei adtunc et ibidem intulerunt contra pacem dicti domini regis nunc et ad damnum ipſius Johannis Groenvelt duarum mille librarum et inde producit ſectam, &c.*

Et modo ad hunc diem ſcilicet diem ſabbati proxime poſt tres ſeptimanas ſancti Michaelmis iſto eodem termino uſque quem diem praedicti Thomas Burwell, Richardus Torleſs, Willelmus Dawes, Thomas Gill, et Johannes Cole habuerunt licentiam ad billam praedictam interloquendi et tunc ad reſpondendum, &c. coram domino rege apud Weſtmonaſterium veniunt tam praedictus Johannes Groenvelt per attornatum ſuum praedictum quam praedicti Thomas Richardus Willelmus Thomas et Johannes Cole, per Richardum Swift attornatum ſuum, et iidem Thomas Richardus

In a juſtification by the cenſors of the college of phyſicians under the conviction of a practiſer in phyſic by them for mala praxis, it is ſufficient to ſtate generally that the party adminiſtered unwholeſome medicines. S. C. Carth. 491. Holt, 536. And the diſorder under which his patients laboured need not be ſhewn, A neglect in an inferior juriſdiction to examine upon oath will not make its judgment void. An arreſt and impriſonment includes an aſſault. S. C. Carth. 491. Holt, 536.

Willelmus

Willelmus Thomas et Johannes Cole defendunt vim et injuriam quando, &c. Et quoad venire vi et armis seu quicquid quod est contra pacem dicti domini regis tunc necnon verberationem et vulnerationem praedictas superius fieri suppositas dicunt quod ipsi non sunt inde culpabiles. Et de hoc ponunt se super patriam et praedictus Johannes Groenvelt inde similiter, &c. Et quoad residuum transgressionis et imprisonamenti praedictorum superius fieri suppositorum idem Thomas Richardus Willelmus Thomas et Johannes Cole dicunt quod praedictus Johannes Groenvelt actionem suam praedictam inde versus eos habere seu manutenere non debet quia dicunt quod jamdudum et diu ante praedictum tempus quo supponitur transgressionem et imprisonamentum praedicta fieri dominus Henricus nuper rex Angliae octavus per literas suas patentes sub magno sigillo suo Angliae sigillatas gerentes datum apud Westmonasterium vicesimo die Septembris anno regni sui decimo quas iidem Thomas Richardus Willelmus Thomas et Johannes Cole hic in curia proferunt recitando quod cum regii officii sui munus arbitrabatur, ditionis suae hominum felicitati omni ratione consulere, id autem vel imprimis fore, si improborum conatibus tempestive occurreret; apprime necessarium duxit, improborum quoque hominum, qui medicinam magis avaritiae suae causa quam ullius bonae conscientiae fiducia profitebantur, unde rudi et credulae plebi plurima incommoda orirentur, audaciam compescere, itaque partim bene institutarum civitatum in Italia et aliis multis nationibus exemplum imitatus, partim gravium virorum doctorum Johannis Chambre, Thomae Linacre, Ferdinandi de victoria, medicorum suorum, Nicolai Halsewell, Johannis Francisci et Roberti Yaxley medicorum ac praesipue reverendissimi in Christo patris ac domini domini Thomae tituli sanctae Ciciliae trans Tiberim sacrosanctae Romanae ecclesiae presbyteri cardinalis Eboracensis archiepiscopi et regni sui Angliae cancellarii clarissimi precibus inclinatus, collegium perpetuum doctorum et gravium virorum, qui medicinam in urbe sua London et suburbiis intraque septem millia passuum ab ea urbe quaquaversus publice exercerent instituti voluit atque imperavit, quibus tum sui honoris tum publicae utilitatis nomine curae ut speravit esset, malitiosorum quorum meminerit inscientiam temeritatemque tam exemplo gravitateque sua deterrere, quam per leges suas nuper editas et per constitutiones per idem collegium condendas punire, quae quo facilius rite peragi potuissent, memoratis doctoribus Johanni Chambre, Thomae Linacre, Ferdinando de Victoria medicis suis, Nicolao Halsewell, Johanni Francisco et Roberto Yaxley medicis concessit, quod ipsi omnesque homines ejusdem facultatis de et in civitate praedicta essent in re et nomine unum corpus et communitas perpetua sive collegium perpetuum, et quod eadem communitas sive collegium singulis annis imperpetuum eligere possent et facere de illa communitate aliquem providum virum et in facultate medicinae expertum in praesidentem ejusdem collegii sive communitatis, ad supervidendum recognoscendum et gubernandum pro illo

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As to the vi et armis, battery, and wounding, the defendants plead not guilty. And as to the residue of the trespass and imprisonment.

The letters patent of H. 8. incorporating and erecting the college of physicians in London,

with power to elect a president,

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illo anno collegium sive communitatem praedictam et omnes homines ejusdem facultatis et negotia eorundem; et quod iidem praesidens et collegium sive communitas haberent successionem perpetuam et commune sigillum negotiis dictorum communitatis et praesidentis imperpetuum serviturum, et quod ipsi et successores sui imperpetuum essent personae habiles et capaces ad perquirendum et possidendum in feodo et perpetuitate terras et tenementa reddditus et alias possessiones quascunque: Concessit etiam eis et successoribus suis pro se et haeredibus suis, quod ipsi et successores sui potuissent perquirere sibi et successoribus suis tam in dicta urbe quam extra terras et tenementa quaecunque annuum valorem duodecim librarum non excedentia, statuto de alienationibus ad manum mortuam non obstante; et quod ipsi per nomen praesidentis collegii seu communitatis facultcais medicinae London placitare et implacitari potuissent coram quibuscunque judicibus in curiis et actionibus quibuscunque, et quod praedicti praesidens collegium sive communitas et eorum successores congregationes licitas et honestas de seipsis ac statuta et ordinationes pro salubri gubernatione supervisu et correctione collegii seu communitatis praedictae et omnium hominum eandem facultatem in dicta civitate seu per septem milliaria in circuitu ejusdem civitatis exercentium secundum necessitatis exigentiam quoties et quando opus fuerit facere valerent licite et impune sine impedimento dicti nuper regis haeredum vel successorum suorum justiciariorum eschaetorum vicecomitum et aliorum ballivorum vel ministrorum suorum haeredum vel successorum suorum quorumcunque: Concessit etiam eisdem praesidenti et collegio seu communitati et successoribus suis, quod nemo in dicta civitate aut per septem milliaria in circuitu ejusdem exerceat dictam facultatem, nisi ad hoc per dictos praesidentem et communitatem seu successores eorum qui pro tempore fuerint admissus esset per ejusdem praesidentis et collegii literas sigillo suo communi sigillatas, sub poena centum solidorum pro quolibet mense quo non admissus eandem facultatem exercuerit, dimidio inde dicto domino regi et haeredibus suis, et dimidio dictis praesidenti et collegio applicando. Praeterea voluit concessit pro se et successoribus suis quantum in se fuit quod per praesidentem et collegium praedictae communitatis pro tempore existentes et eorum successores imperpetuum quatuor singulis annis per ipsos eligerentur, qui haberent supervisum et scrutinam correctionem et gubernationem omnium et singulorum dictae civitatis medicorum utentium facultate medicinae in eadem civitate ac aliorum medicorum forinsecorum quorumcunque facultatem illam medicinae aliquo modo frequentatium et utentium infra eandem civitatem suburbia ejusdem sive intra septem milliaria in circuitu ejusdem civitatis ac punitionem eorundem pro delictis suis in non bene exequendo faciendo et utendo illa, necnon supervisum et scrutinam omnium medicinarum et earum receptiones per dictos medicos seu aliquem eorum hujusmodi ligeis dicti nuper regis pro eorum infirmitatibus et hujusmodi curandis et sanandis dandarum imponendarum et utendarum quoties et quando opus

and make bye-laws for the government of all practisers in London, or within seven miles of it,

and to choose four persons yearly

to overlook such practisers,

and examine their medicines and prescriptions.

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and punish malpractices by fines, amerciaments, and imprisonments.

cpus fuerit pro commodo et utilitate eorum ligeorum dicti nuper regis; ita quod punitio hujusmodi medicorum utentium dicti facultate medicinae sic in praemissis delinquentium per fines amerciamenta et imprisonamentum corporum suorum, et per alias vias rationabiles et congruas exequeretur: Voluit etiam et concessit pro se haeredibus et successoribus quantum in se fuit, quod nec praesidens nec aliquis de collegio praedicto medicorum nec successores sui nec eorum aliquis exercens facultatem illam quoquomodo in futurum infra civitatem suam praedictam et suburbia ejusdem seu alibi summonerentur aut ponerentur neque eorum aliquis summoneretur aut poneretur in aliquibus assisis juratis inquestis inquisitionibus attinctis et aliis recognitionibus infra dictam civitatem et suburbia ejusdem imposterum coram majore et vicecomitibus seu coronatoribus dictae civitatis suae pro tempore existentibus capiendis, aut per aliquem officiarium seu ministrum suum vel officiarios sive ministros suos summonendis, licet eadem juratae inquisitiones seu recognitiones summonitae fuerint super brevi vel brevibus dicti nuper regis vel haeredum suorum de recto, sed quod dicti magistri sive gubernatores ac communitas facultatis antedictae et successores sui et eorum quilibet dictam facultatem exercens versus eundem nuper regem haeredes et successores suos ac versus majorem et vicecomites civitatis suae praedictae pro tempore existentes et quoscunque officiarios et ministros suos forent inde quieti et penitus exonerati imperpetuum; prout per easdem literas patentes inter alia plenius apparet. Et iidem Thomas Richardus Willelmus Thomas et Johannes Cole ulterius dicunt, quod virtute literarum patentium praedicti Johannes Chambre, Thomas Linacre, Fernando de Victoria, Nicolaus Halsewell, Johannes Franciscus et Richardus Yaxley medici, et omnes homines ejusdem facultatis in civitate praedicta fuerunt unum corpus et communitas perpetua sive collegium perpetuum; Postea-

The confirmation of these letters patent by the 14 & 15 H. 8. c. 8.

que per quendam actum in parliamento dicti nuper regis Henrici octavi apud Westmonasterium in comitatu Middlesex ultimo die Julii anno regni ejusdem nuper regis quintodecimo per prorogationem tento editum inter alia inactitatum fuit auctoritate ejusdem parliamenti, quod pro eo quod confectio praedictae corporationis fuit meritoria et valde bona pro reipublica hujus regni Angliae, et praeterea expediens et necessarium fuit, providere, quod nulla persona praedicti corporis politici et communitatis praedictae permitteretur exercere et practizare medicinam, Anglice practise Physick, *sed tantummodo tales personae quae essent profundae et modestae, Anglice* sad and discreet, *profunde literatae et maximae studiosae in arte medicinae, Anglice* groundedly learned and deeply studied in Physick, *in consideratione cujus, et pro ulteriori auctoritate praedictarum literarum patentium, ac etiam pro elargiamento ulteriorum articulorum pro praedicta republica habendorum et fiendorum, per dictum nuper regem cum consensu dominorum spiritualium et temporalium et communium in eodem parliamento assemblatorum inactitatum existit inter alia,*

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quod praedicta corporatio praedictae communitatis facultatis medicinae praedictae et omnia et singula concessiones articuli et aliae res contenta et specificata in predictis literis patentibus approbarentur concederentur ratificarentur et confirmarentur in eodem parliamento, et clare authorizarentur et admitterentur per idem parliamentum bona legitima et valida, Anglice available, *praedicto corpori incorporato et eorum successoribus imperpetuum, in tam amplo et largo modo prout poterit acceptari cogitari et construi per easdem literas patentes: Et ulterius inactitatum ordinatum et stabilitum existit per dictum actum, quod praedictae sex personae in praedictis literis patentibus nominatae ut principales et primae nominatae de praedicta communitate et societate eligerent eisdem duos alios ejusdem communitatis, qui ex tunc imposterum vocarentur et nominarentur electi, et quod praedicti electi annuatim eligerent unum eorundem fore praesidentem praedictae communitatis; et quoties aliqui loci praedictorum electorum contingerent fore vacui per mortem aut aliter, tunc superviventes praedictorum electorum infra triginta seu quadraginta dies proxime post mortem eorundem aut alicujus eorum eligerent nominarent et admitterent unum vel plures, prout necessitas requireret, de maxime eruditis et expertis hominibus de et in praedicta faculiate in London, supplere, Anglice to* supply, *locum et numerum octo personarum ita quod ipse vel ipsi qui sic eligeretur vel eligerentur prius examinaretur vel examinarentur stricte per praedictos superviventes secundum formam devisatam per praedictos electos, ac etiam per praedictos superviventes approbaretur vel approbarentur, prout per eundem actum inter alia plenius apparet. Et iidem Thomas Richardus Willelmus Thomas et Johannes ulterius dicunt, quod postea et diu ante praedictum tempus quo, &c. per quendam alium actum in parliamento dominae Mariae nuper reginae Anglae vicesimo quarto die Octobris anno regni sui primo apud Westmonasterium tento editum inactitatum fuit authoritatate ejusdem parliamenti, quod praedictum statutum et actus parliamenti praerecitatum in omnibus articulis et clausulis in eodem contentis extunc imposterum starent et continuarent in pleno robore vi et effectu; aliquo statuto lege consuetudine aut re aliqua facto habito vel usitato in contrarium in aliquo non obstante: Et pro meliori reformatione diversorum enormium contingentium reipublicae per malum usum et indebitam administrationem medicinarum, Anglice,* physick, *pro elargatione, Anglice* enlarging, *ulteriorum articulorum, pro meliori executione rerum in praedicta concessione contentarum, per eundem actum in praedicto parliamento dictae nuper reginae factum ulterius inactitatum fuit, quod quandocunque presidens collegii aut communitatis facultatis medicinae London pro tempore existens, vel tales quos praedictus praesidens et collegium annuatim secundum tenorem et intentionem ejusdem actus authorizarentur scrutare examinare corrigere et punire omnes offensores et transgressores in praedicta facultate infra praedictam civitatem et praecinctum in praedicto actu expressum mitterent vel committerent*

and the power given by that statute to choose two elects and a president.

The 1st. Mary, st. 2. c. 9.

talem

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talem offensoram vel offensores pro ejus vel eorum offenso vel inobedientia, Anglice disobedience, *contra aliquem articulum vel clausulum contentum in praedicta concessione vel statuto alicui guardae, Anglice* ward, *gaolae vel prisonae infra praedictam civitatem aut praecinctum praedictum (Turri London excepto) quod tunc de tempore in tempus guardianus gaolator sive custos guardiani gaolatores sive custodes guardarum gaolarum et prisonarum infra civitatem aut praecinctum praedictum (excepto prae-excepto) reciperet et reciperent in ejus vel eorum prisonas omnes et quemlibet talem personam et personas sic offendentes, qui sic mitteretur vel mitterentur sive committeretur vel committerentur ei vel eis ut praefertur, et ibidem salvo custodiret personam vel personas sic commissas in aliquibus prisonarum suarum ad propria custagia et onera praedictorum personarum vel personae sic commissarum sine ballio vel manucaptione, quousque tales offensor et offensores vel inobedientes, Anglice* disobedients, *exonerentur de praedicto imprisonamento per praedictos praesidentem et tales personas qui per praedictum collegium ad inde authorizarentur, sub poena quod quilibet talis guardianus gaolator vel custos in contrarium faciens perderet et forisfaceret duplice tales fines et amerciamenta qualia tales offensor et offensores aut inobedientes assessarentur solvere per tales quales praedicti praesidens et collegium authorizarent ut praefertur, ita quod idem finis et amerciamentum non esset ad aliquod tempus ultra summam viginti librarum, medietatem quarum fore applicandam, Anglice,* to be employed, *ad usum dictae nuper reginae haeredum et successorum suorum, alteram medietatem praesidenti et collegio, quibus omnibus forisfactis recuperandis per actionem debiti billam querelam vel informationem in aliquibus dictae nuper reginae haeredum vel successorum suorum curiis de recordo versus aliquem talem guardianum gaolatorem aut custodem sic delinquentem, in qua secta nullum essonium legit vadiatio vel protectio allocarentur nec admitterentur pro defendente: Et ulterius inactitatum fuit authoritate ejusdem parliamenti, quod omnes justiciarii majores vicecomites ballivi constabularii et alii ministri, et officiarii infra civitatem et praecinctum praedictum super requisitionem eis fiendam adjuvarent auxiliarent et assisterent praesidenti praedicti collegii et omnibus personis per ipsos de tempore in tempus authorizatis, pro debita executione praedicti actus vel statuti, sub poena pro non dando hujusmodi auxilium currere in contemptum dictae nuper reginae haeredum vel successorum suorum, prout per eundem actum inter alia plenius apparet. Et iidem Thomas Richardus Willelmus Thomas et Johannes Cole ulterius dicunt, quod praedictus Johannes Groenvelt per magnum tempus, scilicet per quinque annos ultimo praeteritos et amplius, infra civitatem London et circuitum septem milliarium ejusdem scilicet apud London praedictam in parochia et warda praedictis artem sive facultatem medicinae exercuit et utebatur et adhuc exercet et utitur; idemque Johannes artem sive facultatem illam sic exercens et utens, et se praetendens*

That the plaintiff practised in London.

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tendens eſſe valde peritum in eadem arte praedictum tempus quo, &c. ſcilicet primo die Aprilis anno regni domini Guelielmi tertii nunc regis Angliae, &c. octavo, ibidem ſuper ſe ſuſcepit et aſſumpſit ad curandum et ſanandum quandam Suſannam Withall

And undertook the cure of one S. W. the wife of W. W.

adtunc uxorem cujuſdam Willelmi Withall de quadam infirmitate ſive morbo dictae Sujannae paulo poſt puerperium ſuum et occaſione inde ſicut ſupponebatur eveniente, unde ipſa laborabat et detinebatur, pro quadraginta ſolidis ſibi dicto Johanni Groenvelt prae manibus ſolutis et aliis quadraginta ſolidis ei poſtea ſolvendis; Idem tamen Johannes Groenvelt curam ſuam adtunc et ibidem circa dictam Sujannam adeo indiſcrete male inartificialiter et imperite adhibuit, et tales inſalubres iniquas malas et perniciſſimas pilulas et noxia pharmaca ei adtunc et ibidem dedit et miniſtravit, quod eadem Suſanna non ſolum minime ſanata fuit, ſed valde magis et egregie infirma et magnopere et periculoſe in corpore ſuo laeſa devenit, et extunc hucuſque extremo dolore inde laboravit, ac triſtiſſima et miſerrima conditione languebat, et adhuc ſic inde aboleate et languida exiſtit intanabilis, ita quod de vita ejus deſperabatur et adhuc deſperatur occaſione malae imperitiae et perniciosae praxis ipſius Johannis Groenvelt in hac parte ſuper corpus ejuſdem Sujannae commiſſae et perpetratae: Et iidem Thomas Richardus Willelmus Thomas et Johannes Cole ulterius dicunt, quod virtute literarum praedictarum patentium ac vigore ſtatutorum praedictorum quidam Thomas Millington miles in medicinis doctor vir providus et in facultate medicinae expertus et adtunc unus de communitate collegii medicorum in London praedicti et unus adtunc octo electorum collegii ſive communitatis praedictae adtunc exiſtens ante praedictum tempus quo, &c. ſcilicet tricesimo die Septembris anno regni dicti domini regis nunc octavo apud collegium medicorum ſituat' in parochia de Chriſtchurch in warda de Farringdon infra London in praeſidentem collegii ſive communitatis praedictae debito modo electus et praefectus fuit, et in officio praeſidendentis collegii ſive communitatis praedictae exiſtens iidem praeſidens et collegium praedictae communitatis eodem triceſimo die Septembris anno octavo ſupradicto apud collegium praedictum in parochia de Chriſtchurch praedicta eligerunt ipſos Thomam Burwell, Richardum Willelmum et Thomam Gill, viros providos et in facultate medicinae expertos et adtunc de collegio praedicto exiſtentes doctores fore quatuor cenſores ſive gubernatores communitatis praedictae, ad ſupervidendum et ſcrutandum corrigendum et gubernandum omnes et ſingulos dictae civitatis medicos utentes facultate medicinae in eadem civitate ac alios medicos forinſecos quoſcunque facultatem illam medicinae aliquo modo frequentantes et utentes infra eandem civitatem et ſuburbia ejuſdem ſive infra ſeptem milliaria in circuitu ejuſdem civitatis ac ad puniendum eoſdem pro delictis ſuis in non bene exequendo faciendo et utendo illa, necnon ſupervidendum et ſcrutandum eorum medicinas et eorum receptiones per dictos medicos ſeu aliquem eorum pro infirmitatibus hujuſmodi ligeorum dicti

But conducted himſelf ſo unſkilfully and gave her ſuch unwholeſome medicines that ſhe became incureable.

That T. M. was elected preſident of the college,

and four of the defendants cenſors.

dicti domini regis et hujuſmodi curandis et ſanandis dandas imponendas et utendas, quoties et quando opus fuerit etcommodo et utilitati eorundum ligeorum, et ad puniendum eoſdem medices utentes dicta facultate medicinae in praemiſſis delinquentes per fines amerciamenta et impriſonamentum corporum ſuorum et per alias vias rationabiles et congruas ſecundum formam et effectum literarum patentium praedictarum et ſtatutorum praedictorum; Qui quidem Thomas Richardus Willelmus et Thomas adtunc et ibidem officium illud ſuper ſe juſceperunt, et cenſores ſive gubernatores collegii ſive communitatis praedictae debito modo devenerunt, et ſic uſque praedictum tempus quo, &c. et poſtea continuaverunt et extiterunt; Et iidem Thomas Richardus Willelmus Thomas et Johannes Cole ulterius dicunt, quod poſtea et ante praedictum tempus quo, &c. ſcilicet quinto die Februarii anno regni domini regis nunc octavo, apud collegium medicorum in parochia de Chriſtchurch in warda de Farringdon infra praedicta quaedam querimonia ex parte praedictorum Willelmi Withall et Suſannae uxoris ejus facta et exhibita fuit eiſdem Thomae Richardo Willelmo et Thomae adtunc cenſoribus ſive gubernatoribus collegii praedicti ut praefertur exiſtentibus verſus praefatum Johannem Groenvelt pro praedicta indebita imperita mala et perniciosa praxi ſuper corpus praedictae Suſannae per eundem Johannem Groenvelt ſic ut praefertur facta et perpetrata; et ſuperinde praedictus Johannes Groenvelt poſtea, ſcilicet eodem quinto die Februarii anno octavo ſup-adicto apud London praedictum in parochia Beatae Mariae de Arcubus in warda de Cheape praedicta, debito modo ſummonitus fuit per ipſos Thomam Richardum, Willelmum et Thomam tunc cenſores ſive gubernatores collegii praedicti ad comparendum coram eiſdem cenſoribus ſive gubernatoribus collegii praedicti apud collegium praedictum nono die Aprilis tunc proxime ſequenti de et ſuper praemiſſis examinandus et reſpondendum; quodque ante praedictum tempus quo, &c. ſcilicet eodem nono die Aprilis anno regni dicti domini regis nunc nono, coram praefatis Thoma Richardo Willelmo et Thoma adtunc cenſoribus ſive gubernatoribus collegii praedicti ut praefertur exiſtentibus apud collegium praedictum venit praedictus Johannes Groenvelt in propria perſona ſua, et praedicti cenſores ſive gubernatores ſuper ind adtunc et ibidem procedebant ad examinandum et inquirendum in materiam querimoniae praedictae, et ſuper atteſtationem diverſarum credibilium perſonarum adtunc praeſentium veritatem querimoniae praedictae in praeſentia ipſius Johannis Groenvelt affirmantium et ſuper auditum ipſius Johannis Groenvelt et quicquid in ſui ipſius defenſione aut excuſatione dicere potuit, et ſuper conſiderationem totius materiae praedictae iidem Thomas Richardus Willelmus et Thomas cenſores ſive gubernatores collegii praedicti ſic ut praefertur exiſtentes adtunc et ibidem virtute literarum patentium et ſtatutorum praedictorum adjudicaverunt praedictum Johannem Groenvelt de indebita imperita et mala praxi praedicta fore culpabilem; et proinde

That a complaint was made to them as ſuch on the behalf of W. and S. W.

and plaintiff was ſummoned thereupon.

That plaintiff appeared, and defendant the cenſors after hearing evidence in plaintiff's preſence and plaintiff's defence,

adjudged plaintiff guilty of mala praxis.

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Fined him 20l. and ordered him to be imprisoned twelve months, unless, &c.

That they made their warrant for the apprehension of plaintiff directed to the other defendant,

who by virtue thereof took him.

inde finem viginti librarum legalis monetae Angliae super ipsum Johannem Groenvelt adtunc et ibidem imposuerunt; et ulterius adjudicaverunt, quod idem Johannes Groenvelt pro delicto suo praedicto committeretur gaolae dicti domini regis de Newgate in London, et haberet et subiret imprisonamentum in eadem gaola ad ejus propria onera et custagia sine ballio aut mainucaptione per spatium duodecim septimanarum tunc proxime sequentium, nisi citius exoneraretur per praesidentem collegii praedicti et tales personas quae per collegium praedictum ad inde legitime auctorizatae forent aut aliter per debitum legis cursum: quae quidem adjudicatio censorum sive gubernatorum illorum in scriptis posita et recordata fuit, ac penes ipsos censores sive gubernatores jam remanet minime adnullata sed in pleno vigore existit: Et praedicti Thomas Richardus Willelmus Thomas et Johannes Cole ulterius dicunt, quod iidem Thomas Richardus Willelmus et Thomas, ea intentione ut executio judicii sive adjudicationis praedictae fieret, virtute literarum patentium ac statutorum praedictorum adtunc et ibidem per quoddam praeceptum sive warrantum suum in scriptis, recitando querimoniam et judicium sive adjudicationem praedictam ad largum, sub manibus et sigillis suis eidem Johanni Cole ministro suo ad hujusmodi praecepta sua exequenda existenti mandaverunt, quod ipse corpus praefati Johannis Groenvelt caperet, et ipsum custodi gaolae de Newgate praedictae deliberaret, ibidem remansurum sine ballio aut mainucaptione per spatium praedictum duodecim septimanarum, nisi citius per praesidentem collegii praedicti et tales personas quales per collegium praedictum auctorizatae forent et aliter per debitum legis cursum deliberatus foret; virtute cujus warranti praedictus Johannes Cole praedicto tempore quo, &c apud London praedictum in parochia Beatae Mariae de Arculus in warda de Cheape praedicta praefatum Johannem Groenvelt cepit, et eundem simul cum warranto praedicto sub manibus et sigillis eorundem quatuor censorum praemissa specificante custodi gaolae praedictae adtunc deliberavit, ibidem in forma praedicta detinendum; prout ei bene licuit; idemque Johannes Groenvelt superinde in prisona ibidem per tempus praedictum in narratione praedictam entionatum detentus fuit: Quae quidem captio imprisonamentum et in prisona detentio praedicta praedicti Johannis Groenvelt in forma praedicta et ex causa praedicta facta sunt idem residuum transgressionis et imprisonamenti praedicti unde praedictus Johannes Groenvelt se modo queritur: Et hoc parati sunt verificare: Unde petunt judicium, si praedictus Johannes Groenvelt actionem suam praedictam inde versus eos habere seu manutenere debeat, &c.

B. Shower.
Law. Agar.
Jo. Keene.

Et

'Et praedictus Johannes Groenvelt dicit, quod ipse per aliqua per praedictos Thomam Burwell, Richardum Torleſs, Willelmum Dawes, Thomam Gill et Johannem Cole ſuperius placitando allegata ab actione ſua praedicta quoad reſiduum tranſgreſſionis impriſonamenti et in priſona detentionis praedictum verſus eos habenda praecludi non debet; quia dicit, quod bene et verum eſt, quod ipſe idem Johannes Groenvelt per magnum tempus, ſcilicet per quinque annos proxime ante exhibitionem billae ipſius Johannis Groenvelt praedictae, fuit et adhuc eſt medicinae doctor, et artem ſive facultatem medicinae per totum tempus praedictum infra civitatem London praedictam et circuitum ſeptem milliarium ejuſdem exercuit et utebatur, prout ipſi praedicti Thomas Burwell, Richardus Torleſs, Willelmus Dawes, Thomas Gill et Johannes Cole ſuperius placitando allegaverunt; ſed idem Johannes Groenvelt proteſtando quod dominus Henricus nuper rex Angliae non conceſſit per aliquales literas patentes quales iidem Thomas Burwell, Richardus Torleſs, Willelmus Dawes, Thomas Gill et Johannes Cole ſuperius placitando allegaverunt, proteſtandoque etiam quod non habetur aliquod tale recordum actus parliamenti dicti nuper regis Henrici octavi quale ipſi iidem Thomas Burwell, Richardus Torleſs, Willelmus Dawes, Thomas Gill et Johannes Cole ſuperius placitando ſimili er allegaverunt, proteſtandoque etiam quod ipſe idem Johannes Groenvelt curam ſuam circa dictam Suſannam Witball in praedicto placito ipſorum Thomae Burwell, Richardi Torleſs, Willelmi Dawes, Thomae Gill, et Johannis Cole nominatam non indiſcrete male inartificialiter vel imperite appoſuit nec aliquas inſalubres iniquas malas vel perniciosiſſimas pillulas vel noxia pharmaca ei dedit vel adminiſtravit, prout iidem Thomas Burwell, Richardus Torleſs, Willelmus Dawes, Thomas Gill et Johannes Cole, per placitum ſuum praedictum ſuperius allegaverunt. Proteſtandoque etiam quod nulla querimonia ex parte praedictorum Willelmi Witholl et Suſannae uxoris ejus facta vel exhibita fuit eiſdem Thomae Richardo Willelmo et Thomae Gill verſus ipſum Johannem Groenvelt pro indebita imperita mala vel pernicioſa praxi ſuper corpus praedictae Suſannae per eundem Johannem Groenvelt fieri et perpetrari ſuppoſita, prout ipſi iidem Thomas Richardus Willelmus Thomas et Johannes Cole, ſuperius placitando allegaverunt, quodque nullum tale judicium ſive adjudicatio praedictorum Thomae Richardi Willelmi et Thomae redditum fuit contra ipſum Johannem Groenvelt quale ipſi iidem Thomas Richardus Willelmus Thomas et Johannes Cole per placitum ſuum praedictum ſuperius allegaverunt; Pro placito idem Johannes Groenvelt replicando dicit, quod ipſi praedicti Thomas Burwell, Richardus Torleſs, Willelmus Dawes, Thomas Gill, et Johannes Cole de injuria ſua propria in ipſum Johannem Groenvelt inſultum fecerunt et ipſum maletractaverunt impriſonaverunt et per praedictum ſpatium ſeptem dierum in priſona detinuerunt, modo et forma prout praedictus Johannes

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Admits that he is a doctor of phyſic,

but proteſting againſt the patent of H. 8.

the 14 & 15 H. 8. c. 8.

That plaintiff did not conduct himſelf unſkilfully or give unwholeſome medicines.

that W. and S. W. made no complaint;

and that there is no ſuch judgment as above alleged.

Replies de injuria.

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hannes Groenvelt ſuperius verſus eos narravit, Et non virtute warranti eidem Johanni Cole per placitum praedictum ſuperius ſuppoſita fore facti; Et hoc petit quod inquiratur per patriam.

Nath. Wright.
Jo. Girdler.
Ed. Northey.

Demurrer.

Et praedicti Thomas Richardus Willelmus Thomas et Johannes Cole dicunt, quod praedictum placitum praedicti Johannis Groenvelt modo et forma praedictis ſuperius replicando placitatum materiaque in eodem contenta minus ſufficientia in lege exiſtunt, ad eundem Johannem Groenvelt ad actionem ſuam praedictam inde verſus ipſos Thomam Richardum Willelmum Thomam et Johannem Cole habendum manutenendum, ad quod quidem placitum ſive replicationem dicti Johannis Groenvelt modo et forma praedictis placitatum iidem Thomas Richardus Willelmus Thomas et Johannes Cole neceſſe non habent nec per legem terrae tenentur aliquo modo reſpondere; Et hoc parati ſunt verificare; Unde pro defectu ſufficientis replicationis praedicti Johannis Groenvelt in hac parte iidem Thomas Richardus Willelmus Thomas et Johannes Cole ut prius petunt judicium, et quod praedictus Johannes Groenvelt ab actione ſua praedicta inde verſus ipſos Thomam Richardum Willelmum Thomam et Johannem Cole habenda praecludatur, &c. Et pro cauſis hujus morationis in lege ſuper replicationem praedictam iidem Thomas Richardus Willelmus Thomas et Johannes Cole oſtendunt curiae hic et dicunt, quod ubi praedictus Johannes Groenvelt in dicta replicatione ſua dicit inter alia, quod bene et verum eſt quod ipſe per magnum tempus, ſcilicet praedictos quinque annos, &c. fuit et adhuc eſt medicinae doctor, &c. prout ipſi praedicti Thomas Richardus Willelmus Thomas et Johannes Cole ſuperius placitando allegaverunt, ſatis et manifeſte liquet et conſtat curiae hic, quod in placito ipſorum Thomae Richardi Willelmi Thomae et Johannis Cole praedicto non allegatur, ſed ipſi tantum allegaverunt inde, quod praedictus Johannes Groenvelt artem ſive facultatem medicinae per tempus illud exercuit et utebatur et adhuc exercet et utitur, ſe pretendens eſſe valde peritum in eadem; quae allegatio multum differt ab illa quam praedictus Johannes Groenvelt per eandem replicationem ſuam ſupponit ipſos feciſſe: Quodque proteſtationes praedicti Johannis Groenvelt ſunt vanae ſupervacuae et omnino ſuperfluae, ac prima earum eſt ſententia imperfecta et in ſenſu deficiens, et ſecunda earum proteſtationum eſt negativa pregnans ambigua et incerta; Quodque ac praecipue praedictus Johannes Groenvelt traverſat virtutem warranti praedicti, quae non eſt traverſabilis, exiſtens validitas ac materia legis, ubi traverſare debet confectionem vel exiſtentiam ejuſdem warranti, ſeu deliberationem inde dicto Johanni Cole, &c. ulterius praedictus Johannes Groenvelt traverſat ſive negat, quod iidem Thomas Richardus Willelmus Thomas et Johannes Cole, ſcilicet omnes eorum

virtute

virtute warranti praedicti dictum Johannem impriſonaverunt, &c. et hoc in exitum offert ubi ipſi ſuperius allegaverunt eundem Johannem Cole ſolum virtute warranti illius dictum Johannem Groenvelt cepiſſe et in priſonam deliberaſſe, ac ipſos Thomam Richardum Willelmum et Thomam warrantum illud ei feciſſe: Ac etiam dicta traverſia caret forma pro defectu verborum iſtorum ſcilicet [abſque hoc] vel [abſque tali cauſa] quae in hujuſmodi traverſiis imponi ſolent et debent.

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Et praedictus Johannes Groenvelt dicit, quod placitum praedictum per ipſum Johannem Groenvelt modo et forma praedictis ſuperius replicando placitatum materiaque in eodem contenta bona et ſufficientia in lege exiſtunt, ad actionem ipſius Johannis Groenvelt praedictum verſus ipſos Thomam Richardum Willelmum Thomam et Johannem Cole habendum manutenendum; quod quidem placitum materiamque in eodem contentam idem Johannes Groenvelt paratus eſt verificare et probare prout curia, &c. Et quia praedicti Thomas Richardus Willelmus Thomas et Johannes Cole ad replicationem illam non reſpondent, nec illam hucuſque aliqualiter dedicunt, idem Johannes Groenvelt petit judicium, et damna ſua occaſione tranſgreſſionis inſultus et impriſonamenti praedictorum ſibi adjudicari. Sed quia curia domini regis nunc de judicio ſuo de et ſuper praemiſſis reddendo nondum adviſatur, dies inde datus eſt partibus praedictis, &c.

Joinder in demurrer.

This caſe was ſeveral times argued at the bar by Mr. *Robert Eyre*, Mr. ſerjeant *Darnall*, &c. for the plaintiff; and by Sir *Bartholomew Shower*, Mr. ſerjeant *Levinz*, &c. for the defendants. And now in *Trinity* term 12 *Will.* 3. *Holt* chief juſtice delivered the opinion of the court, that judgment ought to be entered for the defendants. And at the beginning he ſaid, that though it had been argued that the replication was good, yet they all held the contrary; for it is ill, as well in matter as in form. The defendants in their plea ſhew, that a warrant was granted, and that by virtue thereof the plaintiff was arreſted and impriſoned; to which the plaintiff does not make any anſwer, that there was not ſuch warrant, nor traverſes it, but only ſays that he was not arreſted by virtue of it. If he had denied that there was any ſuch warrant, it had been a good traverſe; for then *Cole* would not have had authority to have arreſted the plaintiff. But if the plaintiff was arreſted for any other cauſe, and not upon this warrant, then the plaintiff ſhould have ſhewn the other cauſe. As ſuppoſe there were two warrants, the one good and the other ill, and the plaintiff had been arreſted upon the ill warrant, he ought to ſhew it ſpecially. But if *Cole* had a good warrant at the time of the arreſt, though he had declared that he had arreſted

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the plaintiff upon the warrant that was insufficient, yet in an action brought against *Cole* he might have justified under the good warrant, having had it in his custody at the time of the arrest: For the single question would be, whether he had good authority at the time of the arrest; And this is like the case in 34 *Edw.* 1 *Fitzh. avowry* 232. cited in 3 *Co.* 26. *a.* that if a man distrains for one thing, yet in his avowry he may avow the taking for what he pleases. As if a man distrains his tenant for that which he cannot justify, but at the same time rent is arrear, he may avow for the rent arrear, and is not obliged to avow for that for which he took the distress; nor can the plaintiff in replevin traverse the taking for the rent arrear, but can only plead in bar to the avowry, *riens arrear*. So here the plaintiff cannot say that *Cole* did not take him by virtue of the good warrant; for if he had such warrant in his custody at the time of the arrest, he was arrested by it. And the traverse is an ill traverse in this manner. But the plaintiff should have traversed, that there was any such warrant; or he might have said, that it was granted afterwards, *absque hoc* that there was any such warrant at the time of the arrest. Therefore the replication is ill; and then the question will be, whether the plea in bar is good? And they all held that it was.

A man who distrains for one cause, may avow the taking for another. D. acc. Godb. 110. 2 Leon. 196. and the cause of the taking cannot be traversed.

The exceptions that were taken to this plea by the plaintiff's counsel were several; but those upon which they seemed principally to insist, are four:

1. That the plea is uncertain, so that the defendants have not intitled themselves to a sufficient jurisdiction.

2. That admitting that the defendants have intitled themselves to a sufficient jurisdiction, yet they have exceeded their jurisdiction, by imposing a fine, and imprisonment also: For though they might have committed the plaintiff in execution for the fine, yet they could not impose both a fine and imprisonment as a punishment.

3. That there is no answer to the assault, and therefore the plea is ill.

4. That it does not appear that the plaintiff is a member of the college; and the defendants have not authority to punish others.

As to the first exception, which is the only objection material, *Holt* chief justice said, that the defendants have intitled themselves to a sufficient jurisdiction. For, 1. They have jurisdiction over the person of the plaintiff, since he practised physic in *London*. 2. Over the subject matter, *viz.* the

the unſkilful adminiſtration of phyſic. 3. The fact for which the plaintiff was puniſhed, was committed within the limits of their juriſdiction, *viz.* in *London*. Then where a man has juriſdiction in all theſe particulars over another man, it is apparent, that whether the matter of fact be ſuch as it is adjudged or not, it is not traverſable; but the plaintiff is concluded, and ſhall not falſify the judgment. But it is objected, that though the matter is within the defendant's juriſdiction, yet it is not certainly alleged; whereas by the opinion of *Coke*, 8 *Rep.* 121 it ought to be certainly alleged, ſo that iſſue may be taken upon it, it being traverſable. And that is the reaſon why it ſhall be traverſable, becauſe the party grieved has no remedy by error or attaint.

But *Holt* chief juſtice anſwered, that he was of a contrary opinion, *viz.* that it was not traverſable. And, 1. He ſaid, that a man convict by the defendants in purſuance of their judicial authority cannot traverſe the fact of which he is convict. 2. If he could, yet the fact is certainly enough alleged here 3. Though there were a defect in the conviction, yet that would not entitle the plaintiff to an action againſt the defendants, being the cenſors, *&c.* And, 1. That the fact of which the plaintiff is convict is not traverſable, becauſe the authority of the defendants is abſolute, to hear and determine the offence; and when in purſuance of the ſaid authority they have adjudged the plaintiff guilty, he cannot arraign their judgment, but is concluded; for perſons who are judges by law, ſhall not be liable to have their judgments examined in actions brought againſt them. Now it is plain, that the cenſors have judicial power. It is true, that ſome perſons have power to commit, who are not judges, as the conſtable may commit for an affray committed in his preſence; and he is liable to an action if the fact is falſe. The difference is, that he does not commit for puniſhment, but for ſafe cuſtody. So commiſſioners (*a*) of bankrupts may commit a man for refuſing to be examined concerning the eſtate of the bankrupt; but (*b*) they are not judges; and their (*c*) proceedings are traverſable, becauſe their power of impriſonment is only *quouſque*, *&c.* But where a man has power to inflict impriſonment upon another for puniſhment of his offence, there he hath judicial authority. 2. To conſider the particulars of their power. It extends to all phyſicians practiſing within *London*, or ſeven miles round; and it is, to examine, hear, convict and puniſh them, for any ill practice committed by them; which are all the eſſentials that create a judge. 3. The cenſors are juſtices of record, and that which they do is matter of record. For where there is a juriſdiction erected *de novo* with power to fine and impriſon, it is a court of record; for courts of record only can fine. Therefore it is reſolved, that in

(*a*) Vide 1 Jac. 1. c. 15. f. 8.

(*b*) D. acc. Bl. 1145. 1147. Semb. acc. poſt. 580. 8 Co. 121. a.

(*c*) D. acc. 8 Co. 121. a.

No other courts than ſuch as are of record can fine. D. acc. 8 Co. 38. b. 41. a. 60. b. 120. a. 11 Co. 43. a. 3 Bl. Com. 24. nor impriſon. D. acc. 10 Co. 103. a. 8 Co. 120. a. 11 Co. 43. a. 3 Bl. Com. 24.

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(a) S. C. poſt. F. N. B. 73. D. 8 Co. 41. a. 60. b. 11 Co. 43 b.

In debt for the arrears of an account before auditors, the defendant cannot wage his law. S. P. Salk. 200. D. acc. 2 Inſt. 380.

(n) recaption in the common pleas, and judgment againſt the defendant, he ſhall be fined and impriſoned. But in the ſame caſe, if the writ is *vicontiel*, he ſhall be only amerced. And for a full authority he cited 10 *Co.* 103. *a.* where it was held, that in debt at common law for the arrears of an account before auditors, the defendant might wage his law; and therefore ſince there is no ſtatute, which by expreſs words takes away wager of law in ſuch caſe, the queſtion is, why it does not lie? and there it is reſolved, that *Weſtm.* 2 13 *Ed.* 1, *ſt.* 1. *c.* 11. (which enacts, that where the lord aſſigns auditors to his bailiff, and he is found in arrear, the auditors ſhall commit to priſon,) giving power to the auditors to commit the defendant to priſon, does thereby make them juſtices of record, foraſmuch as none but ſuch can impriſon; and therefore their judgment cannot be traverſed; and for that reaſon the defendant is ouſted of his law. Then if auditors aſſigned by the lord to his bailiff are juſtices of record, *a fortiori* the cenſors are ſuch, having a much larger juriſdiction; and then conſequently no act of theirs can be traverſed. Nor can it be aſſigned for error, that judges did that which they ought not, as that they entered a verdict for the defendant, where the jury gave it for the plaintiff. And as a judge ſhall not be queſtioned at the ſuit of the parties, no more ſhall he be queſtioned at the king's ſuit before another judge. 27 *Aſſiſ. pl.* 18. where *A.* was indicted at the king's ſuit, for that, that he was juſtice of *oyer* and *terminer*, and ſeveral perſons were indicted before him of a treſpaſs, and he made an entry upon the record, that they were indicted of felony; and judgment was demanded, if he ſhould anſwer, ſince he was a judge by commiſſion, which is of record; and that preſentment would defeat the record, which is to aver againſt that which he did as judge of record; and the indictment was held void. Objection. The opinion of *Coke*, 8 *Co.* 121. *a.* that the cauſe of the fine and impriſonment is traverſable. *Holt* chief juſtice anſwered, that it is an opinion *obiter*, and not pertinent to the caſe there; becauſe Dr. *Bonham* was committed for practiſing without licence, and not for mal-practice; and the power of commitment does not extend to practiſing without licence, nor can they inflict the ſaid puniſhment for ſuch an offence. But *Coke* enlarges upon their power, and includes a commitment for mal-practice. But *Coke* was tranſported, that the doctor was a member of the univerſity, and of his univerſity (as one may ſee by his excurſions in praiſe of it) which he looked upon as affronted by that proſecution. And as the ſaid opinion was not judicial, ſo it has not any authority in law for its foundation. *Coke* himſelf ſays, that they ought to make a record of their proceedings; then they are judges of record, and therefore, according to himſelf, 12 *Co.* 24. their acts are not traverſable. Objection. That the party has no remedy, neither

Miſconduct of judge cannot be aſſigned for error. D. acc. 12 Co. 24. Vide Com. Pleader. 3 B. 16. 2d. Ed. vol. 5. p. 301.

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neither by writ of error, nor otherwise. Answer, That he hath a remedy as good as a writ of error. 2. Admit that he hath not, yet that will not entitle him to a traverse. 1. He agreed that the plaintiff cannot have a writ of error, because it is a court newly instituted, impowered to proceed by methods unknown to the common law; as there is no need to have an indictment, or such formal judgment, as in other cases; as there is no need to say *ideo consideratum, &c.* but only *quod solvat, &c.* He compared it to convictions before justices of peace out of sessions, upon which though error does not lie, yet a *certiorari* lies; for it is a consequence of all jurisdictions, to have their proceedings returned here by *certiorari*, to be examined here. There a *certiorari* was awarded, to remove an indictment for felony, where the party convicted was burnt in the hand, but no judgment given, so that he could not have a writ of error. Where any court is erected by statute, a *certiorari* lies to it; so that if they perform not their duty, the king's bench will grant a *mandamus*. There was a mistake made by the commissioners of sewers, grounded upon this, that where the 23 *H.* 8. *c.* 5. says, that the commissioners in several cases there mentioned shall certify their proceedings into chancery; afterwards by 13 *El. c.* 9. it is enacted, that thereafter the commissioners shall not be compelled to certify or return their proceedings, which they interpreted to extend to a *certiorari*; and thereupon they refused to obey the *certiorari*, but they were all committed: and yet the statute does not give authority to this court to grant a *certiorari*, but (*a*) it is by the common law that this court will examine, if other courts exceed their jurisdictions. So a *certiorari* lies upon a conviction of forcible entry, upon the view of a justice of peace. And there is no reason that this case should be different from all others. In this case the plaintiff moved for a *certiorari* after the action brought, but the king's bench did not think proper to help him in his action; and that is the reason why it was denied. 2. If no *certiorari* lay, it does not follow, that because their proceedings are not examinable, that therefore they are not a court of record; for their jurisdiction is not diminished, because there is no appeal from it; but it is the stronger, because so great a trust is reposed in them. So that the force of the argument must be, that because no appeal lies from them, there is the less reason that their proceedings should be traversable. And that this is no ground for a traverse, appears by many precedents. As if in a criminal case the jury gave a hard verdict, no attaint lies; nor is the judge punishable, if by misdirection the jury gave an ill verdict. In 12 *Co.* 23. it appears to be the law of the *star-chamber*, that if the party was acquitted against plain proof, the judge and jury should be fined; but that is now exploded, and *fol.* 24, 25. and *Nudigate*'s case, *fol.* 25. is contrary.

To a court newly erected with power to proceed by methods unknown to the common law, a writ of error does not lie. S. P. Salk. 144. 263. Holt, 184. 537. Carth. 494. Vide Com. Pleader, 3 B. 7. 2d Ed. vol. 5. p. 289.

A certiorari does. S. P. Salk. 144. 263. Holt, 184. 537. Carth. 494. Vide 2 Mod. 230. Cro. El. 489. post. 580. Cowp. 524. 836. Dougl. 534. 2d. Ed n. 113. Com. Certiorari. a. 1. 2d. Ed. vol. 2. p. 16. 1 Bac. 349. or a mandamus.

(*a*) Vide post. 580.

In criminal cases the jury is not liable to an attaint. Nor the judge punishable for misdirection.

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A jury is not finable for giving a verdict againſt evidence. Nor if they follow a miſdirection of the judge in point of law liable to an attaint. Such miſdirection cannot be aſſigned for error.

Preſentment in a court-leet is traverſable in replevin. D. acc. Carth. 73. 1 Show. 61, Holt, 408. but not in treſpaſs. R. cont. Carth. 73 and vide Dyer, 13. b. Cowp. 459.

Nor in an action againſt the judge.

The matter for which a fine is impoſed is not traverſable.

No action lies againſt a judge for fining a juryman illegally.

contrary. That juries have been fined, appears by *Moor*, 730. 2 *Leon.* 132. *Yelv.* 23. but all thoſe caſes are anſwered in *Buſhel*'s caſe in *Vaugh.* 135. And it was reſolved by all the judges of *England* (except *Kelynge* chief juſtice) that juries were not finable for giving verdict againſt evidence. In *Cro. El.* 309. it was held, that if the jury find according to the direction of the judge in matter of law, although he be miſtaken, the jury ſhall not be liable to attaint; and the miſdirection of the judge cannot be aſſigned for error; ſo that the party is without remedy againſt whom the verdict is found, and yet he is concluded by the verdict, to ſay that it is not true. Objection. That there is not any jury here. Anſwer. That will not diſtinguiſh the caſe; for in 7 *H.* 6. 13. *a.* 8 *Co.* 41. *a.* it is ſaid, that *finis finem litibus imponit*, and the cauſe for which it was ſet is not traverſable. A preſentment in a court-leet is traverſable, but no action lies againſt the ſteward for awarding proceſs upon it. Such preſentment is traverſable in replevin, not in treſpaſs, nor in an action againſt the judge. But where a fine is impoſed, the matter for which, &c. is not traverſable. For where the power veſted by the law in the jury is transferred to the judge, why the party ſhould rather have his traverſe to the condemnation of the judge, than to the verdict of the jury, who find him guilty, there is no reaſon. And conſequently by this ſtatute the original power of the jury at common law being veſted in the cenſors, it is equally peremptory. *Paſch.* 29 *Car.* 2. *Hammond v. Howell*, 1 *Mod.* 184. 2 *Mod.* 218. *Hammond* being one of the jury with *Buſhel*, was fined and impriſoned for not finding *Pen* and *Mead* guilty of a riot; and after that judgment was given in the common pleas, that the fine was illegal, and *Buſhel* was diſcharged, *Hamond* brought an action of falſe impriſonment againſt Sir *John Howell* recorder of *London*. The defendant in his plea ſhewed the proceedings before the commiſſioners of *oyer* and *terminer*, that *Pen* and *Mead* were indicted, and pleaded not guilty, that the jury found them not guilty againſt plain evidence and the direction of the court in matter of law; that the plaintiff was one of the jury, and fined forty marks, and committed in execution for his fine; the plaintiff replied, *de ſon tort demeſne, abſque hoc* that they found againſt evidence: and it was held, that the action did not lie; becauſe the defendant being recorder, was in the commiſſion of *oyer* and *terminer*, and judge of record. And the preſent caſe does not differ from the ſaid caſe; for here the cenſors have juriſdiction over the plaintiff and his profeſſion, as the recorder had there; and the particular fact was within *London*, within the limits of their juriſdiction. And in *Howell*'s caſe it was admitted, that a writ of error would not lie upon the order for impoſing the fine, but that was not eſteemed a ſufficient ground to maintain the action. Objection, *Hardr.* 480. *Terry v. Huntingdon.*

Error does not lie upon an order made by juſtices of oyer and terminer to fine a jury.

don. Where in trover for goods levied by warrant of the commissioners of excise, the question was upon the whole matter apparent upon the special verdict, that the commissioners had adjudged low wines to be strong waters, whether an action would lie against the officer; and it was held that it would; because they had exceeded their jurisdiction, no duty being imposed upon low wines. But here the subject matter and the person are under the jurisdiction of the censors. As if two justices adjudge *A.* to be the father of a bastard, if the child is a bastard, *A.* is concluded by the judgment of the justices, and cannot falsify it, and say that he is not the father; but his only remedy is by appeal: but if the child was born in wedlock, then the judgment was *coram non judice* and void, and consequently no person concluded by it. But it is admitted in the said case, that if the commissioners had had jurisdiction of the cause, though they had given a wrong judgment, as if they had adjudged small beer to be strong, their judgment could not have been examined in an action. Objection. *Cro. Car.* 394. *Nicholls v. Walker*, where upon a special verdict in trespass the case was, that a parish in reputation, which had all parochial rights a long time before and at the making of the 43 *El. c.* 2. was rated to the poor of another parish, and the said rate was confirmed by two justices; and for refusing to pay, the overseers by virtue of a warrant of two justices distrained; and judgment was given for the plaintiff, because it was a distinct parish as to the 43 *El. c.* 2. and if the inhabitants of one parish make a rate upon the inhabitants of another parish, for maintaining the poor of the first parish, the inhabitants have exceeded their authority, and it is an illegal tax, and the justices have no power to confirm such rate, (unless it be in case of contribution by the one parish to the poor of the other, which was not the case there) and so there was no ground for the warrant of the justices for the distress, for their jurisdiction is only in case of rates well assessed. 2. Admit that this conviction was traversable, yet the plea is certain enough. It is shewn, that the plaintiff gave the woman such unsound medicines and noxious drugs, that she became worse. Now suppose this fact might be traversed, there is no defect in the plea; for if it had been laid more particularly, it must have been tried by a jury at last; for the judges do not understand medicines sufficiently to make a judgment, whether they were sound or not; and therefore it is enough to aver generally, that they were unsound and noxious drugs. As in case against a physician it is sufficient to say, that he administered physick unskilfully, *&c.* without shewing the particular defect in his skill. There is another objection; that it is not shewn under what distemper the wife laboured. Answer, That if she had not any distemper, the plaintiff's case is the worse, for then he should not have administered physick. As if a splenetick person

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An action will lie against the officer for executing the process of a limited jurisdiction in cases over which it has no cognizance.

The filiation of a bastard cannot be falsified but by appeal.

But the filiation of a child born in wedlock, is void.

A place which was reputed to be a distinct parish, and had all parochial rights at the time of making the 43 El. c. 2. is a distinct parish as to that statute.

A rate by one parish upon another is void.

And the justices have no power to confirm it.

In case against a physician for unskilfulness the plaintiff need not specify the particular defect in his skill.

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Any person having judicial power may administer an oath.

person comes to a physician, when in fact he is well, it would be a fault in the doctor to administer physick to him. There is another objection, that the witnesses were not examined upon oath. And by *Holt* chief justice, where judicial power is given to persons by statute, they may by consequence of law administer an oath; but to that, he said, he would not give a positive opinion. But admitting that they might have administered an oath, the omission of it is but error in the proceedings, and does not make the judgment void, like the case of the *Marshalsea*, 10 *Co.* 76. *b.* where one process is issued instead of another.

As to the second objection, that they have fined the plaintiff, and imprisoned him also; it is answered by the words of the letters patent, which give power to do it; and so do the justices in many cases at common law.

As to the third objection, it is well enough. For as to the *vi et armis*, battery and wounding, they plead not guilty; and as to the residue, &c. which includes the assault, &c. they justify.

As to the fourth objection, that it does not appear that the doctor was a member of their body, he answered, that if he was a practiser of physick in *London*, as he has admitted himself to be, the censors have sufficient authority over him, whether he be of their body or not, by the express words of the letters patent. And for these reasons they all held the plea to be good. And judgment was given for the defendants.

College of Physicians *verf.* Levett.

A graduate doctor of one of the universities cannot practise physick in London, or within seven miles of it, without licence from the college of physicians. Vide ante 456.

THE plaintiffs brought debt against the defendant for 25*l.* for having practised physick within *London* five months, without licence. Upon *nil debet* pleaded, it was tried before *Holt* chief justice of the king's bench in *London* at *Guildhall* on *Tuesday* the eighteenth of *November* 1701, in *Michaelmas* term 10 *Will.* 3. And the defendant's defence was, that he was a graduate doctor of *Oxford*. But it was ruled by *Holt*, upon consideration of all the statutes concerning this matter, that he could not practise within *London*, or seven miles round, without licence of the college of physicians. And by his direction a verdict was given for the plaintiffs.

Adjudged accordingly on a special verdict, *Mich.* 4. *G.* 1. *B. R.* 1717. *College of physicians verf. Dr. West.* 10 *Mod.* 353. who was a graduate at *Oxford*.

Trin

Trin. Term

11 Will. 3. B. R. 1699.

Sir John Holt *Chief Juſtice.*

Sir Thomas Rokeby
Sir John Turton
Sir Henry Gould
} *Juſtices.*

Wiggon *verſ.* Branthwait.

S. C. 12 Mod. 259. Holt, 758.

Wreck may be claimed by preſcription. acc. Vaugh. 159. 2 Wilſ. 23. 6 Mod. 149. F. N. B. 91. D. acc. 5 Co. 106. b. 2 Inſt. 168. Adm. Bro. Wreck. pl. 1. Semb. acc. Bro, Preſcription, pl. 32. De ſon tort. pl. 38. The office of lord high admiral of England has exiſted immemorially. Words of reſtriction in the operative clauſe of a grant apply to all the things following the laſt antecedent word of grant. All the appurtenances of a manor in the

TReſpaſs for taking of goods. The caſe was thus. The abbot of *Bromhall* was ſeiſed in fee in right of his monaſtery of the manor of *Bromhall*, and he and all thoſe whoſe eſtate he had, had time whereof, &c. had wreck of the ſea. The manor by the diſſolution of the monaſteries came to *Henry* VIII. by which means the wreck being a royal franchiſe, was veſted in him *in jure coronae*. And he being ſo ſeiſed, granted the office of lord high admiral of *England* to the viſcount *Liſle*, with all wrecks of the ſea and all other profits to the ſaid office appertaining. And afterwards he granted the manor, &c. to *B.* under whom the plaintiff in the action claims. But becauſe that (as the defendant's counſel urged) the wreck being granted to the lord *Liſle* before, and not recited in the grant to *B.* it did not paſs by the king's grant to the patentee; therefore they ſeiſed the goods for the king. But *Holt* chief juſtice over-ruled this matter upon the evidence at the trial in *Suffolk*. Becauſe the wreck appertaining to the manor by preſcription, could not paſs, as appertaining to the office of lord high admiral, to the lord *Liſle*. And it being moved, that it might be found ſpecially, he refuſed. And therefore Mr. *Whittaker* tendered a bill of exceptions which was ſealed, and a writ of error brought, and errors aſſigned. And upon the firſt argument

hands of the crown paſs by a grant of the manor with the appurtenances, though they are not particularly recited in the grant. Vide Com. Grant, G. 7. 2d Ed. vol. 3. p. 449. G. 10. 2d Ed. vol. 3. p. 450.

the

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the judgment was affirmed, *nisi*, &c. Mr. solicitor general (Sir *John Hawles*) argued, that the wreck would pass by the words *maris ejecta*, which clause was not restrained with, appertaining to the office, &c. there being other distinct matters granted, to which the restriction at the end must be applied. But *per Holt* chief justice, in regard that there is but one *concessit*, or word of grant, all the clauses shall be taken to depend upon one another, and the clause of restraint will extend to them. Otherwise if there had been any word of grant intermediate. And of that opinion was the whole court. But afterwards upon the rule for judgment *nisi*, &c. Mr. *Whittaker* came, and argued, that the restraining clause, of *eidem spectantia et pertinentia*, did not extend to wreck of the sea: because wreck could not belong to the said office by prescription, for the office itself begun within time of memory. *Spelm. verbo Admiralty.* And therefore it must be compared to the case in 9 *Co.* 27. *b.* where the king grants *bona et catalla felonum dicto manerio spectantia et pertinentia*; there because goods and chattels of felons lie in grant, and cannot be appendant to the manor, therefore it amounts to a new grant of them. So here, because wreck cannot be appendant to the office by prescription, it will amount to a new grant of all the wrecks of *England* then in the king's hands. 2. He insisted upon the same objection that the solicitor general had made before, and cited some cases, to prove, that the words of restraint should not be applied to them, but that the *necnon* would make them several sentences. 1 *Leon.* 119. 2 *Roll. Abr.* 51. 14 *Vin.* 79. pl. 17. And for the matter of non-recital, he cited *Dyer.* 77. *a.* But *per Holt* chief justice, wreck may be claimed by prescription; and for all that appears, wreck may belong to the lord high admiral by prescription. For the office of lord high admiral is an ancient office, time whereof, &c. though perhaps it was not vested in a single person, or in the same manner as it is now. In *Dyer* 152. *b.* there is a prescription, for the lord high admiral to grant the office of register of the admiralty for life. And that is an answer to the first objection. As to the second, the case in 1 *Leon.* 119. 2 *Roll. Abr.* 51. 14 *Vin.* 79. *pl.* 17. is because the general words follow the special, and without such construction the special words would be void. And *Holt* chief justice said, that he made no doubt but wreck belonged to the admiral about the five ports, and such places where he was most conversant in ancient time. Judgment was affirmed absolutely. *Ex relatione m'ri Jacob.*

Rex

Rex *verſ.* Foſter.

Foſter was indicted for that he had ingroſſed *magnos et exceſſives numeros volucrum terarum (Anglice* wild fowl) *mortuarum*, with *(a)* deſign to make them dearer, *&c.* Mr. *Robert Eyre* moved to quaſh it for the uncertainty, becauſe they do not ſhew how much, *&c.* And he cited *Cro. Car.* 380. *magnam quantitatem ſtraminis et fœni* held ill. And the caſe of the *King* and *Roberts* ſince the revolution, 1 *Show.* 389. 4 *Mod.* 100 where a ferryman was indicted for extortion in taking fourpence a ſcore for ſheep carried over, where he ſhould but have taken twopence a ſcore, *&c.* The defendant upon not guilty pleaded was convicted, but judgment was arreſted, becauſe the indictment did not ſhew, for how many ſcore he had taken fourpence. And the indictment againſt *Foſter* was quaſhed.

An indictment for ingroſſing great numbers of dead wild fowl with a deſign to make them dearer quaſhed for uncertainty. Vide 1 Roll.Rep.134. 2 Bulſtr. 317. Bro.Indictment pl.6. 1 Lev. 203. 2 Hawk.c. 25.ſ. 76. 1ſt.Ed. p.238.Str. 497. Com. Indictment, G. 3. 2d. Ed. vol. 3 p. 505.

(a) Vide 4 Mod. 103.

Foſter *verſ.* Hexam. Ante 427.

THE caſe of conuſance demanded by the biſhop of *Ely* was this term moved again. And then the conuſance was allowed *niſi*, *&c.* And *Holt* chief juſtice demanded a ſight of the record of the caſe in *Edward* 3. but they had only a copy of it. Upon which *Holt* ſaid, that the record itſelf ſhould have been in court, where the judgment is grounded upon the record, as it is here the entry being *inſpectis record'*, *&c.* And he ſaid that the demand ought to be entered as of *Hilary* term, and ſo continued by *curia adviſare vult*, *&c.* And he ſaid, that they had no need to have pleaded ſo many allowances; but they might have pleaded but one only, and have relied upon it. 21 *Edw.* 4. 44. *accord.* For if a franchiſe lies in grant, and cannot be claimed by preſcription, and allowance in the king's bench, or eyre, or confirmation by patent, will be ſufficient.

Lacy *verſ.* Williams. Ante 227.

Intr. Mich. 10 Will. 3. B. R. Rot. 586.

S. C. Carth. 472. Salk. 568. Holt, 614. 12 Mod. 261.

ERROR was brought upon the judgment given in this caſe in the common pleas, *ante* 229. and the general errors were aſſigned. And the ſame point was argued here, as in the common pleas, *viz.* Whether a recovery, in which there was no tenant to the *præcipe* before the writ of *ſummoneas ad warrantizandum*, iſſued, and then a tenant was

A recovery is good though the tenant to the præcipe had no freehold at the return of the writ, ſo long as he had before judgment. Vide ante. 227.

made

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made to the *praecipe* pending the writ of ſummons, and before the return of it, and the recovery afterwards paſſed; whether this common recovery be good? And it was urged by Mr. *Pratt* in the writ of error for the plaintiff in error, that the recovery was not good. For (by him) though a common recovery is a common aſſurance, yet it has forms peculiar to it, which ought to be obſerved; as if there is no tenant to the *praecipe* pending the ſuit, and a recovery is ſuffered, it will be void; but according to 1 *Roll. Abr.* 868. *b.* 31. 10 *Vin.* 443. *pl.* 3. *Cro Car.* 282. it will be good againſt the parties by eſtoppel, but not againſt the iſſues in tail, which is the preſent caſe. In ſuppoſition of law the tenant ought to have the lands at the time of the ſuing of the writ, otherwiſe he cannot render them as the writ ſuppoſes. But if he purchaſes the lands pending the writ, that will make the writ good; *contra* if they come to him by deſcent, pending the writ. 4 *Ed.* 3. 5. 1 *H* 6. 1. 18 *Ed.* 4. 26. But if there is no tenant at the return of the writ, the writ is abated; but the court cannot abate an abateable writ without plea. 9 *Ed.* 4. 12. *per Littleton.* There is no difference between a writ abated and abateable as to a ſtranger, for though the tenant does not take advantage by it by plea, yet that will not prejudice a ſtranger. In 7 *H.* 6. 19, 20. entry of the diſſeiſee upon the tenant pending the writ abated it And a recovery in formedon againſt the tenant pending the writ abated it. 3 *H.* 6. 34. But alienation by tenant, or recovery againſt him, by covin, will not abate it; for in ſuch caſe he continues tenant as to the demandant until judgment that he ought, &c. but in the former caſe he does not continue tenant until judgment, and therefore the writ is abated. See *Bro. Briefe* 108. 182. Judgment againſt him by eſtoppel ſhall be good againſt him. 2. The count ſuppoſes the tenant to be the tenant of the lands, otherwiſe to what purpoſe do they make a demand againſt him. 3. The voucher ſuppoſes, that the tenant has ſeiſin of the lands, for it would be abſurd to vouch another, to warrant lands to him which he hath not. And the definition of a warranty ſuppoſes ſeiſin in the lands warranted. *Co. Litt.* 365. *a* 9 *Edw.* 3. 12. The vouchee may counterplead the voucher by non-tenure, or entry pending the writ and if the vouchee does not plead this, but vouches over the ſecond vouchee may plead this counterplea. 21 *H.* 6. 24. 49. Voucher is in nature of an action, *Co. Litt.* 102. *a* and every one ought to have cauſe of action at the beginning of it. *Bro. Briefe* 77 Voucher comes in the room of *warrantia chartae*, and differs only in this, that voucher muſt be after an action, but *warrantia chartae* may before an action brought againſt him; but *warrantia chartae* cannot be brought but by him who is tenant of the land, *Hob.* 21. and for the ſame reaſon a man who is not tenant of the land cannot vouch. Then here the tenant

nant cannot vouch the vouchee, and though the vouchee has not counterpleaded it, ſo that it will be good againſt him by eſtoppel, yet the iſſue in tail will not be bound by eſtoppel of the anceſtor, for he claims *per formam doni*. 3 *Co.* 3. *b.* 12 *Edw.* 4. 14. *b.*

Objection. If the tenant purchaſes the land, pending the writ, that will make the writ good, *&c.* Anſwer. That rule is laid down upon caſes upon pleas in abatement, and therefore muſt be underſtood, where the purchaſe is before the time for pleading in abatement is expired.

Objection. Where non-tenure is pleaded to avoid a recovery, he pleads that he was not tenant at the purchaſing of the writ *nec unquam poſtea*, which goes to the time of the judgment. Anſwer. 1. That is not a ſubſtantial part of the plea. 1. The *nec unquam poſtea* muſt be underſtood from the purchaſe of the writ until the time of the pleading; for it does not appear in any of the caſes, that the demandant replies, that the purchaſe was after the time of the pleading.

Mr. *Keene* for the defendant in error argued *e contra*, that there is no reaſon for avoiding a common recovery, except that the recompence will not inure to the iſſue in tail. 3 *Co.* 5. *a. b. Owen v. Morgan. Hob.* 259. And here the recompence in value will enure well to the iſſue. It has been generally taken, that there muſt be a tenant at the time of the return of the writ; but thoſe books muſt be underſtood of a recovery, where the tenant and vouchee appear at the ſame day, and judgment is then given. *Hob.* 262. 12 *Ed.* 4. 14. becauſe it is a recovery from the ſaid day. A writ is ſaid to be depending until judgment. And therefore if the vouchee counterpleads the voucher, that the tenant had nothing, *&c.* at the time of the voucher, he ought to ſay, *nec unquam poſtea*. 45 *Ed.* 3. 2 *Raſt. Ent.* 273. *a.* 367. *a. Noy.* 126. In this caſe it had been good in an adverſary action, becauſe it had been his own act. 41 *Ed.* 3. 5. 8 *Ed.* 3. 32. 10 *Ed.* 3. 21. And he cited alſo the caſe of *Sambourn v. Belt*, 1 *Show.* 347, where in a writ of error brought to reverſe a common recovery, the errors were held to be ill aſſigned, becauſe it was ſaid only, that there was not any tenant to the *praecipe* at the return of the writ, where it ſhould have been, nor at any time afterwards before judgment.

Holt chief juſtice. If the vouchee comes in, and counterpleads the voucher by non-tenure of the tenant, he ought to ſay, *die impetrationis*, *&c. nec unquam poſtea*. The ſame law if the tenant pleads non-tenure in abatement. But if the

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the tenant comes in by act of law, as by deſcent, pending the writ, that ought to be pleaded ſpecially. The general rule is, that if the tenant gain the freehold after the writ purchaſed, and at any time before judgment, it makes the writ good. And there is good reaſon for it, for why ſhould the recovery be ill, but becauſe it is againſt a man who had nothing at the time of the recovery, which fails in that caſe? In *ſcire facias* againſt terre-tenants after a recovery they ought to plead, that the tenant had nothing in the land then, *&c.* nor at any time after; and without adding *nec unquam poſtea* it would be an ill plea. And as the writ is made good by a ſubſequent purchaſe, ſo the vouchee is made good by a ſubſequent entry into warranty by the vouchee. And therefore there is here a good tenant, and a good vouchee and a good recovery And as to the matter of the cauſe of action, the demandant might have good cauſe of action, though the tenant has not the lands; for the demandant's right is the cauſe of action, and not the other's being tenant to the *praecipe*. And therefore if the tenant hath the lands to render before judgment, it will be good. To which the other judges agreed. Judgment was affirmed, *niſi*. And the laſt day Mr. *Squib* came, and argued to the ſame purpoſe as Mr. *Pratt* before, and cited 18 *Edw.* 4. 13. 18 *Edw.* 4 26 *per Littleton*. But the court continuing of their former opinion, judgment was affirmed abſolutely. And *Holt* chief juſtice ſaid, that the reaſon of the recompence in value in the caſe of common recoveries is *ratio una ſed non unica*; for where a recovery is againſt tenant in tail, it will bar the reverſion expectant upon it, and yet the recompence in value cannot go to that, which was a great ſtrain, and ſhews the favour allowed to common recoveries.

Farow *verſ.* Chevalier.

S. C. Salk. 139. Holt. 176.

In covenant the breach may be aſſigned generally. R. acc. Cro. Car. 176. pl. 23. Vide ante 106. Com. Pleader, c. 45. 2d. Ed. vol. 5. p. 40. See alſo, 1 Lev. 94. Cro. Jac. 486. Upon a covenant not to ſell goods without leave, a breach that the covenantor ſold to A. B. and C. and divers other perſons unknown to the plaintiffs, on divers days and times between two particular days, is good.

COvenant was brought by a maſter againſt his ſervant, upon a covenant not to buy or ſell without his maſter's leave; and the breach was aſſigned, that he had *diverſis diebus et vicibus* between ſuch a day and ſuch a day, ſold to *A. B.* and *C* and divers other perſons unknown to the plaintiff, goods to the value of 800*l.* and another breach was laid for having bought goods in the ſame manner. Upon iſſue joined, verdict for the plaintiff. And it was moved in arreſt of judgment, that the perſons were uncertain to whom the ſale was made; and the time in which the ſale was made, was uncertain alſo; which ought to have been ſpecially ſhewn. To which Mr. *Hall* for the plaintiff anſwered, that the perſons have no need to be ſhewn, for

avoiding

avoiding prolixity in pleading. 3 *Cro.* 916. *Braban v. Bacon*, 2 *Cro.* 565. *Cro. Car.* 610. laid generally. And as to the time, *diverſis diebus et vicibus* was well enough. *Raym.* 8, 9, 10. *Stile* 420. 428. *Holt* chief juſtice. In an action of covenant the breach may be aſſigned generally. But in debt upon a bond conditioned to perform covenants, the replication (*a*) ought to be more certain. Where an act is deſcribed to be done between ſuch a day and ſuch a day, *diverſis diebus et vicibus*, in another action brought for the ſame thing, one may aver, that the former action was for the ſame thing, *&c.* To which *Gould* juſtice agreed. But (by him) where an (*b*) action is brought upon a penal law, one ought to ſhew the particular facts, and *diverſis diebus et vicibus* will not be good, becauſe there a man is intitled to diſtinct penalties. *Contra* in covenant. Judgment for the plaintiff. *Ex relatione m'ri Jacob.*

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(*a*) D. acc. ante 107. Vide Com. Pleader, F. 14. 2d. Ed. vol. 5. p. 104.

(*b*) Vide poſt. 581.

Parkhurſt *verſ.* Foſter.

Intr. Trin. 9 Will. 3. B. R. Rot. 363.

THE plaintiff brought an action of treſpaſs againſt the defendant, for billetting a dragoon upon him, and forcing him to find him meat, drink, hay and ſtraw for his horſe, *&c.* Upon not guilty pleaded, ſpecial verdict, that the plaintiff kept a houſe at *Epſom, et demiſit conclavia, Anglice* lodgings, *talibus quales* came there *propter ſalubritatem aeris*, or to drink the waters, or for their pleaſures; and that during the time of their abode there the plaintiff dreſſed meat for them at fourpence the joint, or ſold them meat ready dreſſed, if they pleaſed, and alſo ſmall beer at twopence the mug, and alſo found for them ſtable room, hay and oats for their horſes, paying eightpence a night for hay, and fourpence a gallon for oats; and that he had no licence to ſell ale from the juſtices; and that he did not ſell any of the ſaid proviſions to any other perſon: then they find the defendant conſtable, and bring him within the act for billeting ſoldiers, *&c.* and that he billeted the ſoldier upon the plaintiff, and that the ſoldier compelled the plaintiff to find him meats *&c.* And the queſtion was, whether the plaintiff was ſuch a perſon as the act of 4 *&* 5 *W. & M. c.* 13. *ſ.* 18. intends to make liable to have ſoldiers billeted upon him? And the whole court was of opinion that he was not. For this act is a great invaſion of the liberties of the ſubject; and therefore if the words of the act will be ſatisfied, without including ſuch a perſon as the plaintiff is deſcribed to be, it ſhall not be extended to him. And he is not within any of the words of the ſtatute; for lodgers cannot come by authority of law upon their journey without a previous contract, and the plaintiff may refuſe any of them, if he pleaſes; and therefore he is more limitted than him whom the act deſcribes.

Letting lodgings and providing the lodgers with ſmall beer, ſtable room, and horſe meat, will not ſubject a man to have ſoldiers quartered upon him. S. C. Salk. 387. 5 Mod. 427. Carth. 417. 12 Mod. 254. Vide Burn's Juſtice, Soldiers, 5. 14th. Ed. vol. 4. p. 221.

Treſpaſs lies againſt a conſtable for billeting a ſoldier upon a man not compellable to receive him. S. C. Salk. 387. 5 Mod. 427. Carth. 417.

In ſuch caſe the compulſion of the ſoldier in obliging the man on whom he is billeted to find him meat, &c. is the compulſion of the perſon who billeted him.

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deſcribes. 2. They have not any beer to ſell, but only what ſerves their family; and therefore it cannot be an alehouſe. Beſides, that he is not obliged to ſell at certain rates; and therefore he is not comprehended within any of the perſons deſcribed in the act. But then Mr. ſerjeant *Wright* and Mr. *Cowper* for the defendant had taken exception, that there is a variance between the verdict and the declaration; and according to 2 *Roll. Abr.* 717. if there is more in the declaration than in the verdict, the variance will be fatal, if that which exceeds is material. The plaintiff here declares, that the defendant billetted a dragoon upon him, and compelled him to find for the dragoon meat, *&c.* The verdict finds, that the defendant billeted the dragoon there, but that the dragoon compelled the plaintiff to find him meat, *&c.* Now this action being conceived at common law, (for it cannot be upon the ſtatute, becauſe it does not conclude *contra formam ſtatuti*) the defendant will not be anſwerable for conſequential damage, but every one muſt anſwer for his own damage; otherwiſe perhaps, if it had been brought upon the ſtatute. *Holt* chief juſtice. But at common law if a man does an unlawful act, he ſhall be anſwerable for the conſequences of it, eſpecially where, as in this caſe, the act is done with intent that conſequential damage ſhall be done. This caſe was argued, *Hil.* 10 *Will.* 3. by Sir *Bartholomew Shower* for the plaintiff, and by Mr. *Cowper* for the defendant; and *Paſch.* 11. by Mr. *Broderick* for the plaintiff, and ſerjeant *Wright* for the defendant. And this *Trinity* term judgment for the plaintiff by the whole court.

Anonymous.

A computation of time *from the doing of an act* commences the inſtant the act is done. R. acc. ante 280. and ſee the caſes there cited.

A computation *from the day on which the act is done* not until the ſubſequent day. R. acc. ante 280. and ſee the caſes there cited.

(*a*) S. C. cit. poſt. 1096. 3 Will. 274.

AN action was brought upon a policy of inſurance for inſuring the life of Sir *Robert Howard* for one year from the day of the date. The policy was dated 3 *Sept.* 1697, and Sir *Robert* died the third of *September* 1698, at one of the clock in the morning. And *per Holt* chief juſtice, *a die datus* excludes the day of the date; but *a datu*, or *a confectione*, is from the act done, and ſo commences the ſame day that it is dated or delivered. See 5 *Co.* 1. *Co. Lit.* 16. *b.* Alſo another diſtinction was taken in this policy, where though he died upon the laſt day, and the law makes no fractions of a day, yet he being bound to inſure the life of Sir *Robert* for a whole year, and the year was not complete until the ſaid day was expired, it will be a breach. Yet *Holt* chief juſtice cited a caſe, where (*a*) *A.* was born the third of *September*, and the ſecond of *September*, twenty-one years after, he made his will: and it was held a good will, becauſe the court would not make a fraction of a day; and conſequently being of the age of twenty-one years, he might deviſe his lands. Sir *Bartholomew Shower* would have given evidence,

evidence, that by the cuſtom, and in the underſtanding of inſurers, policies begin the day that they bear date, though they are mentioned to begin from the day of the date; but it was over-ruled. This was at *Guildhall* upon a trial before *Holt* chief juſtice this term. *Ex relatione m'ri Jacob.* ANONYMOUS.

Rex *verſ.* Corporation of Malden in Eſſex.

S. C. Salk. 431.

A *Mandamus* was directed to the bailiffs, &c. of the borough of *Malden*, reciting that by their conſtitution they ought to elect yearly two bailiffs out of ſuch aldermen, &c. who had not been bailiffs within three years before; commanding them to proceed to an election, &c. They return the letters patent to be, that they ſhould elect bailiffs out of the aldermen generally without any reſtriction, and that they had elected two of them *ſecundum formam et effectum literarum patentium.* And the return was diſallowed, becauſe they ſhould either have denied the conſtitution mentioned in the writ, or have ſhewn that they had elected according to it; but this return being general, that they had made the election out of the aldermen, was not any anſwer to the writ; for that might be true, and yet ſome of the aldermen might be elected, who had been bailiffs within three years before, and ſo not within the qualifications of the conſtitution ſhewn in the writ. And the *ſecundum formam tenorem et effectum literarum patentium* will not aid it, becauſe the conſtitution ſhewn in the return, varying from that ſhewn in the writ, will be underſtood of the letters patent ſhewn in the return, and not of thoſe in the writ. But if they had been agreeable, it had been good. And peremptory *mandamus* was granted.

A return to a mandamus for the election of a corporate officer muſt either expreſsly deny the right of election mentioned in the writ, or ſhew an election under it.

A return ſtating a different right, and an election under that, is bad.

The Inhabitants of King's Langley *verſ.* the Inhabitants of the Pariſh of St. Peter's in St. Alban's

S. C. Salk. 605. 12 Mod. 260.

MR. ſerjeant *Wright* took exceptions to an order made at the general quarter ſeſſions of the juſtices of peace, upon an appeal to them made from an order made by two juſtices, for removal of a poor perſon to the laſt place of his ſettlement. And the exception was, that the appeal was lodged at the next quarter ſeſſions, and it appears upon the face of the order, that it was not then determined, but it was adjourned over for further conſideration. And it was held by the whole court, that they might well adjourn an appeal upon debate for further conſideration.

The quarter ſeſſions may adjourn an appeal from an order of removal.

Rex *verſ.* Harris. Ante 440.

If poſſeſſion under a writ of reſtitution on an inquiſition for a forcible entry is avoided immediately after execution by a freſh force, the party ſhall have a ſecond writ of reſtitution without a new inquiſition. S. C. 12 Mod. 268.

If the avoidance is not immediate, not. S. C. 12 Mod, 268.

The ſecond writ muſt be applied for within a reaſonable time after the avoidance. S. C. 12 Mod. 268. with ſome difference. Carth. 496. Com. 61. 5 Mod. 443 Holt, 324. 3 Salk 313

Three years is an unreaſonable time. S. C. 12 Mod, 268. Carth. 496. Com. 61. 5 Mod. 443. Holt, 324. 3 Salk. 313.

Where an inquiſition for a forcible entry is quaſhed after reſtitution granted, if the reſtitution was juſt, awarding re-reſtitution is diſcretionary.

If tortious, of right.

Where the execution of a traitor arraigned at the bar in B. R. is countermanded, and not put in force before a new term commences, it cannot be awarded without again bringing the criminal to the bar.

INquiſition (*a*) of a forcible entry into the rectory of, *&c.* was taken the eighteenth of *October*, 7 *Wil.* 3. 1695, and reſtitution thereupon was granted (*b*); which reſtitution a little time after was ſet aſide upon a (*c*) *vi laica removenda*; and the fifteenth of *December*, 10 *Will.* 3. 1698, a new reſtitution was granted; upon which the inquiſition was removed into the king's bench by *certiorari*. And Sir *Bartholomew Shower*, Mr. *Eyre*, *&c.* moved ſeveral times, as well the laſt term as this preſent *Trinity* term, who have a re-reſtitution. And the firſt thing that they urged was, that this ſecond reſtitution was irregularly obtained. 1. Becauſe the juſtices had exceeded their power, by putting the party in poſſeſſion immediately after the inquiſition taken, and therefore they could not grant another reſtitution after it. But *per Holt* chief juſtice, if poſſeſſion be delivered by *habere facias poſſeſſionem*, or grant of reſtitution, and that is avoided immediately by a new force; there the party ſhall have a new *habere facias poſſeſſionem*, or a new writ of reſtitution. But if after the reſtitution awarded the party enjoys quiet poſſeſſion, and then he is removed by a new force, there he muſt reſort to a new remedy. It hath turned ſometimes upon the return of the former writ of reſtitution before the new force, and where ſuch writ is not returned. But it is the former diſtinction which will determine the caſe one way or the other. 2. It was argued by Sir *Bartholomew Shower* and Mr. *Eyre*, that the grant of this ſecond reſtitution was not good, becauſe it was not granted in convenient time. For the intent of the ſtatute of *Henry* VI. was to give ſpeedy remedy; at leaſt after ſuch delay as was here, there ought to be ſome proceſs to renew the inquiſition, upon which the party ſhould come in, and ſhew what he could ſay, why reſtitution ſhould not be granted; for his poſſeſſion might become lawful by ſubſequent conveyance, or otherwiſe. And it is agreeable to the reaſon of the common law; for in perſonal actions, after the year and day, a man could not have execution of any judgment, but was driven to his action of debt upon the judgment; and in real actions he muſt have had a *ſcire facias*, as now in perſonal actions by the ſtatute of *Weſtm.* 2. 13 *Ed.* 1. *c.* 45. *ſ.* 3. Mr. *Eyre* urged alſo, that in criminal cauſes where execution is deferred, it cannot be awarded, without bringing the priſoner to the bar. And alſo, that if the King had pardoned the offence, no reſtitution ſhould go. *Cro. Jac.* 148. *Yelv.* 99. To which *Holt* chief juſtice agreed, and he cited *Knightley*'s caſe, who was indicted for high treaſon in conſpiring the aſſaſſination of the king, and being arraigned at bar in the king's bench confeſſed the indictment, and

S. P. 12 Mod. 268. Vide Cro. Jac. 495. Hutt. 21.

(*a*) On 8 H. 6. c. 9. (*b*) Preſently. Vide 12 Mod. 268. (*c*) Vide Rex. Or, 59. F. N. B. 54. Com. Digeſt, n. 12. 2d. Ed. vol. 3. p. 213. 2 Inſt. 54. Moor, 462. pl. 649. 3 Bulſtr. 71. 74.

judgment

judgment of death was pronounced againſt him in *Eaſter* term, and execution was countermanded, ſo that *Trinity term* paſſed, and then in the long vacation they had a deſign to execute it; and upon that all the judges of *England* met, to conſider what could be done; and it was reſolved by all, that in regard a term had intervened without execution done, it could not be awarded without bringing *Knightley* to the bar. And *per Holt* chief juſtice, it would be the ſame thing if *Trinity* term had not been paſt but only begun; ſo that *Knightley* was impriſoned until *Michaelmas* term, and in the mean time he obtained a pardon. And the whole court after conſideration had, were of opinion, that re-reſtitution ought to be granted; for this irregularity in delay of the award of reſtitution for ſo long a time; for it ought to be done immediately, or otherwiſe great inconveniencies would follow. And *Holt* chief juſtice founded his opinion upon 8 *Co.* 119. *b.* Dr. *Bonham's* caſe, and the caſes there put, where auditors have power to commit ſervants failing in their accounts, by *Weſtm.* 13 *Ed.* 1. *ſt.* 3. *c.* 12. it ought to be done immediately. 27 *H.* 6. 8. So by 15 *R.* 2. *c.* 2. commitment by a juſtice of peace for a forcible entry ought to be forthwith. And there is no difference in reaſon, why reſtitution upon the 8 *H.* 6. *c.* 9. ſhould not be immediately as well as the commitment upon the 15 *R.* 2. *c.* 2. There is rather greater reaſon, becauſe the conviction upon the 15 *R.* 2. *c.* 2. is not traverſable, as the inquiſition upon 8 *H.* 6. *c.* 9. is. And it would be a great miſchief, and againſt the reaſon of the common law, if it ſhould be otherwiſe; becauſe the title in ſo long time might be altered. And though poſſeſſion intimates that the perſon poſſeſſed is the rightful owner, and ſo ſome reaſon fot reſtitution; yet where a long ſpace of time intervenes, the ſaid reaſon is not of force. And *Holt* chief juſtice commanded the judgment to be entered ſpecially. Becauſe it appears upon *affidavit* made to this court, that reſtitution was not awarded until three years after the inquiſition; re-reſtitution is awarded for that irregularity. But Mr. *Northey* prayed the court, that ſince re-reſtitution was matter of favour of the court, and not of right, the court would not grant it, unleſs they would conſent to try the right; and that it was refuſed to be granted in the vicar of *Hadley's* caſe in this court, until the right was ſettled by a trial. But *per Holt* chief juſtice, he has known re-reſtitution granted in this manner, *viz.* that they ſhould bring the writ of re-reſtitution with them to the aſſizes, and if the verdict upon the trial ſhould be for them, that they ſhould execute it immediately. And (by him) where the firſt reſtitution was juſt, and the inquiſition is quaſhed, there the granting of re-reſtitution is diſcretionary; but where the firſt reſtitution was tortious, there re-reſtitution ought to be granted of right. And (by him) juſtices of peace may re-

Juſtices of peace in caſe of a forcible entry, may remove the force on view; but cannot grant reſtitution. Vide 15 R. 2. c. 2. 8 H. 6. c. 9. Com. Forcible Entry, D. 1. 2d. Ed. vol. 3. p. 364.

REX v. HARRIS. Reſtitution by whom granted.

move the force upon the view; but they cannot grant reſtitution. Re-reſtitution was granted by the whole court.

Rex *verſ.* Sudbury, Heapes, et al'.

A riot cannot be committed by fewer than three perſons. S. C. 12 Mod. 262. D. acc. 1 Vent. 251. 3 Inſt. 176. 4 Bl. Com. 146. Vide Str. 196. Burr. 1262.

On an indictment againſt ſeveral perſons for aſſembling riotouſly and being ſo aſſembled riotouſly committing a battery upon J. S. the defendants cannot be found guilty of the battery only. Vide 3 Mod. 72.

THE defendants were indicted for that, that they *riotoſe, routoſe et illicite* aſſembled themſelves, *et ſic aſſemblati exiſtentes, riotoſe, routoſe, &c. commiſerunt* a battery upon *Mary Ruſſel.* Two of them were found guilty, and the others were acquitted. And it was moved in arreſt of judgment, that theſe perſons being indicted for a riot, and only two found guilty, it is the ſame thing as if they had all been acquitted; becauſe two cannot be guilty of a riot, and ſo the verdict was repugnant. Mr. *Mundy* for the king argued, that the principal charge was the aſſault and battery; and the *riotoſe, &c.* was only to expreſs the manner, and a kind of aggravation of the offence. And they ſhould be intended to be guilty of the battery, which was well laid, and no notice ſhould be taken of the reſt. And he compared it to the caſe 1 *Saund.* 228. where in an action laid *per conſpirationem, &c.* one only is found guilty, and judgment for the plaintiff, becauſe the conſpiracy is only circumſtance, *&c. Jones*, 93. 2 *Inſt.* 562. But *per Holt* chief juſtice, it is a ſpecial offence, and is laid as a riot, for the *riotoſe* extends to all the facts, and the battery is but part of the riot. In the caſes cited the (*a*) difference is between an action upon the caſe, and a formed action of conſpiracy; in the latter one only cannot be guilty, *contra* in the other. But here the defendants being acquitted of the riot, are acquitted of the whole of which they are indicted, and no judgment can be given for the king. But if the indictment had been, that the defendant, with divers other diſturbers of the peace, *&c.* had committed this riot and battery, and the verdict had been as in this caſe, the king might have had judgment. But in the principal caſe it was arreſted.

(*a*) Vide ante 379.

Chace *verſ.* Sir Ralph Box.

Certificate of the cuſtom of London concerning the advancement of children by their fathers. Vide 1 Eq. Abr. Cuſtoms of London and York. D. 4th. Ed. p. 154. 2 Eq Abr. A. 1ſt. Ed. p. 262. Com. Gardian. G. 2. 2d. Ed. vol. 3. p. 420. Co. Litt. 176. b. 13th. Ed. n. 8. Burn's Eccleſiaſtical Law. Wills. Diſtribution. III. 1ſt. Ed. vol. 2. p. 737.

UPON a reference to the recorder of *London* by the lord chancellor, to certify what is the cuſtom in *London* concerning the advancement of children by their fathers, *&c.* which would exclude them from having ſhares of the perſonal eſtates of their fathers after their death; ſerjeant *Lovell*, recorder of *London*, certified (*a*) the cuſtom to be thus, *viz.* If the father gives to the child 1500*l.* and in his will declares, that he has advanced him, and afterwards dies, the child ſhall have no part of the reſidue of the perſonal eſtate of his father. But if he had ſaid by his will, that he

(*a*) The certificate is ſet out verbatim in 1 Eq. Abr. ubi ſupra, and is not ſo comprehenſive as it is here repreſented to have been.

had

had given 1500*l.* [which was a ſufficient advancement] yet upon putting it in *hotchpot* after the death of his father, he ſhall have his ſhare of the perſonal eſtate of his father, *&c.* And if a man marries his daughter, and gives her a portion, if he does not take any notice of it in the will, this will be a ſufficient advancement, and ſhe ſhall have no ſhare of her father's perſonal eſtate after his death. *Ex relatione m'ri Selby.* Note: Mr. *Cheſhyre* was alſo preſent in chancery when Mr. Recorder made this certificate; but he did not intirely agree with Mr. *Selby* about the certificate *ut ſupra.*

CHACE v. BOX

Maſon *verſ.* White, Marks et al'.

Intr, Paſch. 11 Will. 3. B. R. Rot. 211.

THE plaintiff brought an action upon his caſe againſt the defendant *White* as attorney, and the other defendants, for entering judgment againſt him without his aſſent, or without his having been arreſted, or any proceſs ſued againſt him, and without having made any warrant of attorney to *White*; upon which a *fieri facias* iſſued, and his goods were taken, *&c.* Judgment by default; and a writ of inquiry being executed and returned, now ſerjeant *Wright* moved in arreſt of judgment. 1. That the declaration is againſt *White*, one of the attornies *de curia domini regis de banco hic*; where it ought to be, at *Weſtminſter*; for one cannot underſtand what place *hic* means, and therefore one cannot know what court the plaintiff means. *Sed non allocatur.* For *per curiam*, *de curia domini regis de banco* is the common pleas; and the judges will take notice that the common pleas is at *Weſtminſter*, and therefore *hic* is at *Weſtminſter.* 2. A ſecond exception was, that the plaintiff has not ſaid who were juſtices of the court; whereas he ought to have mentioned the chief juſtice by name, *et ſociis ſuis*, *&c.* *Sed non allocatur.* For though in pleading of a fine they plead that thr fine was levied before the chief juſtice by name, *et ſociis ſuis*, yet there is no neceſſity here to name the juſtices of the court. 3. A third exception was, that it is ſaid in the declaration that the defendants, the twenty-firſt of *December*, 5 *W. & M.* procured judgment to be entered, *&c.* Now the twenty-firſt of *December* always happens out of term, and the court will take notice of that; but every judgment muſt be entered of ſome day in the term; and alſo that they proſecuted a *fieri facias* the twenty-third of *December*, *&c.* which is out of term. But to this it was anſwered by Mr. *Northey*, that the declaration ſays, that they procured the judgment then to be entered as of *Michaelmas* term before, which is good. And of that opinion was the whole court. And as to the writ he ſaid, that it was *emanari cauſavarunt* ſuch a day, *&c.* But *Wright* ſaid, that that would be taken to be the *teſte*; and he is concluded by the *teſte*, and cannot aver againſt it. To which *Holt* chief

"The court of our lord the king of the bench here" in pleadings in any of the courts at Weſtminſter ſhall be intended to mean the common pleas. Vide Str. 302. Though the names of the juſtices of that court are not mentioned.

A judgment may be ſtated to have been entered in vacation as of the term preceding.

And a writ may be repreſented to have iſſued in vacation. R. acc. Burr. 2586. Bl. 683.

Marcy v. White. (a) Vide ante 212. and the cases there cited.

chief justice said, that a mon cannot aver that a writ was of another *teste* than it bears; but (a) one may aver *quod non emanavit* at the time alleged. This action is for a great wrong, and therefore no favour for the defendants. Judgment for the plaintiff.

Rex *verf.* Orme and Nutt.

A certiorari to remove an indictment from the Old Bailey is not to be granted except upon special cause. Vide Com. Certiorari D. 2d. Ed. vol. 2. p. 22. On an indictment for a libel, it is a sufficient cause that the recorder thinks himself affected by the libel. An indictment for a libel must set forth who the person libelled was. An indictment for a libel upon persons to the jurors unknown is insufficient even after verdict.

THE defendants were indicted, by indictment found at the *Old Bailey*, for making, printing and publishing a false and scandalous libel against divers good subjects of the king to the jurors unknown, to the intent and purpose to defame the said subjects of the king to other subjects of the king to the jurors *cognitis, et cognoscendis*, and to move strife among the liege subjects of the king to the jurors unknown. *cognitos, et cognoscendos, &c.* And this indictment, after several motions, was removed into the king's bench by *certiorari*, which *certiorari* the court was very unwilling to grant; but upon information that the recorder, before whom the defendants were to be tried, looked upon himself as affected by the libel, a *certiorari* was granted. And it being tried before *Holt* chief justice, at *nisi prius* at *Guildhall*, the defendants were found guilty. And now Sir *Bartholomew Shower*, Mr. *Montague*, and Mr. *Hutton*, moved in arrest of judgment, that this libel did not appear to be prejudicial to any one, for the jurors did not know the persons who were affected by the libel; therefore they could not properly say that the matter was false and scandalous, when they did not know the persons of whom it was spoken; nor could they say that any one was defamed by it. Wherefore, &c. judgment was staid until, &c. Note, this libel was intituled, *The list of adventurers in the ladies invention, being a lottery, &c.*

Intr. Hil. 9. Will. 3. B. R. Rot. 437.

Iveson *verf.* Moore.

S. C. Salk 15, Holt, 10. Carth. 451. 12 Mod. 262. Pleadings post. vol. 3. p. 291.

No action lies for a public nuisance. S. C. Com. 58. Comb 480. R. acc. Moor, 180. pl. 321. D. acc. Co. Litt. 56. a 5 Co. 73. a W. Jon. 222. 2 Bl. Com. 219. 2 Wilf. 58. Vide 4 Vin. 506. pl. 3. except on account of special damage. S. C. Com. 58. Comb. 480. D. acc. Co. Litt. 56. a. Moor, 180. pl. 321. 5 Co. 73. a. W. Jon. 222. 2 Bl. Com. 220. Vide 4 Vin. 506. pl. 2. Com. Action on the case for a Nuisance. C. 2d. Ed. vol. 1. p. 215, 216. Stopping up a common high way is a public nuisance. S. C. Com. 58. Comb. 480. The prevention of customers from coming to a colliery, per quod the benefit of the colliery was lost; and coals dug up depretiated is such a special damage as will enable a man to maintain an action for a public nuisance. S. C. Com. 58. Comb. 480. In such action the declaration cannot be excepted to after verdict, because it does not name any of the customers. S. C. Com. 58. Comb. 480. Vide 1 Vent. 348. Str. 606. Bull. Ni. Pr. 7. Burr. 2424. Where the court is divided no rule can be made. R. acc. ante, 271. D. acc. 3 Mod. 156.

Eborum ff. *Memorandum quod alias, scilicet termino sancti Michaelis ultimo praeterito, coram domino rege apud Westmonasterium venit Henricus Iveson per Willelmum Calvert attornatum suum, et protulit hic in curia dicti domini regis tunc ibidem quandam billam suam, versus Johannem Moor armigerum et Ruth am uxorem ejus, Samuelem Wright, Jeremiam Colley, Henricum Smith et Petrum Clakey, in custodia marescalli, &c. de placito transgressionis super casum; Et*

sunt

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ſunt plegii de proſequendo, ſcilicet Johannes Doe et Richardus Roe; Quae quidem billa ſequitur in haec verba, ſcilicet, Eborum ſſ. Henricus Iveſon queritur de Johanne Moor armigero et Rutha uxore ejus, Samuele Wright, Jeremia Colley, Henrico Smith et Petro Clakey in cuſtodia mareſcalli mareſcalciae domini regis coram ipſo rege exiſtentibus, pro eo videlicet, quod cum praedictus Henricus Iveſon decimo quarto die Maii anno regni domini Willelmi tertii nunc regis Angliae, &c. nono et diu antea et ſemper poſtea hucuſque poſſeſſionatus fuit et adhuc poſſeſſionatus exiſtit pro quodam termino annorum adtunc et adhuc venturo et inexpirato de et in quadam carbonaria, Anglice a colliery, *et minera carbonum, exiſtente ſubter ſolum et terram et in viſceribus cujuſdam clauſi ſive parcellae terrae ſituatae et jacentis in parochia de* Whitkirke *in comitatu praedicto vocatae* Whitkirke-field, *et prope adjacentis cuidam altae viae regiae in parochia praedicta ducente ex boreali parte ex villa de* Wetherby *in comitatu praedicto in per et trans quandam moram ibidem vocatam* Winmore *et abinde in per et trans quandam venellam ibidem vocatam* Aulſhaw-lane, *et abinde in per et trans villam de* Whitkirke *praedictam et ſic retrorſum, necnon de et in quadam alia carbonaria et minera carbonum exiſtente ſubter ſolum et terram et in viſceribus cujuſdam clauſi more ſive parcellae terrae in parochia praedicta vocatae* Halton-moor *ſituatae et jacentis et prope adjacentis communi altae viae regiae producenti ex boreali parte a villa de* Whitkirke *praedicta in per et trans praedictam moram vocatam* Winmore *et abinde in per et trans venellam praedictam vocatam* Aulſhaw lane *et abinde in per et trans villam de* Halton *praedictam in comitatu praedicto et ſic retrorſum, in per et trans quam quidem venellam vocatam* Aulſhaw-lane *carbones e mineris praedictis acquiſiti et effoſſi a clauſis praedictis ad loca vicina circumjacentia carriari et portari ſoliti fuerunt et intendebantur; Cumque etiam eodem decimo quarto die Maii praedictus Henricus Iveſon magnam quantitatem, viz. ducentas carractatas, carbonum e mineris praedictis effoſſorum in clauſis praedictis ſeparalibus venditioni exponi paratorum habuit; Praedicti Johannes, Rutha, Samuel, Jeremias, Henricus Smith et Petrus praemiſſorum non ignari, ſed machinantes et fraudulenter et malitioſe intendentes eundem Henricam Iveſon de uſu et beneficio carbonariarum ſuarum impedire decipere et deprivare, et emptoris carbonum extra carbonarias praedictas effoſſorum e carbonariis praedictis alienare et ſeducere, ipſoque ad carbonariam praedicti Johannis Moor prope adjacentem in parochia praedicta appropriare et procurare, poſtea ſcilicet praedicto decimo quarto die Maii anno regni dicti domini regis nunc nono ſupradicto, quatuor carractatas magnorum lapidum et unam radicem magnae fraxini in via praedicta in venella praedicta apud parochiam praedictam poſuerunt et locaverunt, et lapides et radicem fraxini praedictos ibidem remanere per ſpatium unius menſis permiſerunt et continuaverunt, per quos quidem lapides et radicem fraxini via praedicta in per et trans venellam praedictam in tantum*

obſtupata

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obſtupata et obſtructa fuit, quod carucae et carriagia pra carriatione et aſportatione carbonum e carbonariis et mineris praedictis acquiſitorum et effoſſorum in per et trans viam praedictam per venellam praedictam tranſire non potuerunt; Per quod idem Henricus Iveſon beneficium commodum et advantagium carbonariarum ſuarum praedictarum per totum tempus praedictum totaliter perdidit et amiſit, et carbones e carbonariis praedictis acquiſiti pro defectu emptorum ex cauſa praedicta ſic impeditorum et obſtructorum magnopere deteriorati et depretiati devenerunt; Ad damnum ipſius Henrici quingentarum librarum; Et inde producit ſectam, &c.

The plaintiff declares, that he the fourteenth of *May* 9 *Will.* 3. *et diu antea et ſemper poſtea hucuſque*, was and yet is poſſeſſed for a certain term of years then and yet to come and unexpired, of a certain colliery in a cloſe in the pariſh of *Whitkirke* in *Yorkſhire*, *et prope adjacen. communi altae viae regiae, ducenti* from ſuch a place to ſuch a place, *et ſic retrorſum*, and that he uſed to carry his coals dug out of the ſaid colliery, *in per et trans* one of the places, in, through and over which the ſaid common highway led; and that he, the ſaid fourteenth of *May*, had two hundred loads of coals dug out of the ſaid colliery, *venditioni exponi parat* and that the defendants intending to deprive, &c. the plaintiff of the uſe and benefit of his colliery, and the buyers of coals dug out of the ſaid colliery to alienate and ſeduce, and to appropriate them, and procure them to come to the defendant *Moore*'s colliery next adjoining, &c. the ſaid fourteenth of *May* ſtopped ſuch a place, in, through and over which the ſaid highway led, which continued ſtopped, &c. for a month, ſo that the plaintiff's carts and carriages for carrying of the ſaid coals, &c. could not paſs, &c. *per quod* the plaintiff *per totum tempus praedictum totaliter perdidit* the benefit and profit of his colliery, and his coals dug out of his ſaid colliery *magnopere depretiati et deteriorati devenerunt, pro defectu emptorum ex cauſa praedicta ſic impeditorum*, &c. *ad damnum* 500*l.* Upon not guilty pleaded, a verdict was given for the plaintiff. Upon which it was againſt the action ſeveral times moved in arreſt of judgment by Mr. *Northey*, Mr. *Buxton*, Mr. *Ward*, and Mr. *Hutton*, for the defendants. And it was argued on the other ſide, that the action would well lie, by Sir *Bartholomew Shower*, Mr. *Mulſo*, and Mr. *Cheſhyre*, for the plaintiff. And now this term the court pronounced their opinions in ſolemn arguments.

And *Gould* juſtice was of opinion, that the declaration would have been good upon a demurrer, and that the action would have laid; but without doubt (by him) it is good after a verdict, which has found the damnification. The objection

objection againſt this action is, that it is founded upon a matter which is a public nuiſance, and that the plaintiff has received thereby no ſpecial damage, that is to ſay, no damage more peculiar to himſelf than any other of the king's ſubjects; and therefore the plaintiff cannot have an action for a publick nuiſance, but the remedy muſt be by indictment, *&c.* at the king's ſuit; but if he had received any ſpecial damage, he might have had an action, though the nuiſance was publick in its nature. But to this he anſwered, that though he agreed that an action would not lie for a publick nuiſance, without ſpecial damage, for avoiding multiplication of ſuits, and therefore in this caſe if the plaintiff had concluded only *per quod* his carts or carriages could not paſs, it would not have lain, nor have been maintainable, yet he was of opinion, that ſome ſpecial damage appears to be done to the plaintiff by this ſtoppage of the way, which is not common to the reſt of the king's ſubjects: and this appears in the *per quod*, the buſineſs of which is, to cloſe the action, and ſhew the cauſe of it. 1 *Roll. Abr.* 89. 1 *Vin.* 556. 1 *Danv.* 174. *pl.* 8. If it be firſt conſidered in the general part of it, *viz. per quod* the plaintiff *proficuum*, *&c.* of the colliery *totaliter perdidit*, *&c.* Secondly, if it be conſidered with the addition, that the coals *pro defectu emptorum ex cauſa praedicta ſic impeditorum deteriorati devenerunt et depretiati*; though it is not ſhewn that there were any buyers in particular. 1. In actions upon the caſe, where damages are only recoverable, a preciſe certainty of the damages is not neceſſary to be ſhewn in the declaration, 1 *Leon.* 236. and therefore this general method of ſhewing his damage will be well enough. As if an action be brought by the maſter for battery of his ſervant, who cannot maintain the action, unleſs, (*a*) he has received ſpecial damage by it, as loſs of the ſervice of his ſervant, yet if he declares that he has loſt the ſervice of his ſervant *per magnum tempus*, it is well enough. In 9 *Co.* 53. in *quod permittat* the plaintiff declared of the erection of a nuiſance, *ad nocumentum liberi tenementi ſui*, and did not ſhew how; but becauſe that it would be only for damages, it ſhould be left to the inqueſt, as is ſaid in 3 *Ed.* 3. there cited, that the aſſize would ſay it in certain. Now here the *per quod proficuum*, *&c. amiſit*, reſembles the caſe in 1 *Roll. Abr.* 89. 1 *Vin.* 556. 1 *Danv.* 174. *pl.* 8. where in an action for digging of turfs in a place where the plaintiff claimed common, *per quod* he could not have his common *in tam amplo et beneficiali modo*, *&c.* it was held a good declaration; and yet without the *per quod* the action will not lie, as is agreed in the ſaid book. 2. But then ſecondly, there is here a farther ſpecial damage, *viz.* that the coals *pro defectu emptorum ex cauſa praedicta ſic impeditorum deteriorati et depretiati devenerunt*. And as to the objection, that the plaintiff has not ſhewn who were the buyers, *&c.* he anſwered, 1. That coals are a thing vendible in their nature. 2. That there

(*a*) R. acc. 1 Bulſtr. 173. Semb. acc. ante 146. poſt. 1275. Vide 3 Bac. 567. 5 Bac. 167.

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there is a difference, where the damage is the result of a single instance, as in case for words, by the speaking whereof the plaintiff *maritagium amisit*, there (*a*) the plaintiff ought to shew that there was a communication of marriage between him and *J. S.* &c. But where the damage is complicated, and is greater or less, according to the fewness or number of instances, there the law is otherwise. And if the law were not so, it would be very inconvenient; for in the present case it would be almost impossible for the plaintiff to shew all the names of his customers, &c. And besides, it would be a very great difficulty upon him, for if he fails in the proof of any of the persons named in his declaration, it would be against him; and he would be so restrained to those named in the declaration, that he could not prove any others but them. In indictment of barratry the (*b*) indictment is general, because it consists of multiplicity of facts; but the court in justice will (*c*) compel the prosecutor to assign some particular instances; and if he proves them, he shall be admitted to prove as many more of them as he pleases, to aggravate the fine. 2. This action is brought against a wrong-doer; and in such cases a general method of declaring has been admitted in all the courts, though liable to greater objections than this present case admits; as to declare that (*d*) he was, and yet is, possessed of a messuage, and used to have common, &c. *tanquam ad messuagium praedictum spectantem et pertinentem*, and the defendant to deprive him of his common, &c. adjudged a good declaration, because against a wrong doer. See 9 *H.* 6. 43. 45. 27 *H.* 6. 1. 3. Since there is no need of a precise certainty in point of damages, there will be no difference, where the damage is done in a private way, and where in a publick way; because there is no difference between damages in the first instance, and damages in the second instance; and then the case of *St. John v. Moody, intr. Trin.* 27 *Car.* 2. *Rot.* 1501. 1 *Vent.* 274. 2 *Lev.* 148. 3 *Keb.* 528. 531. is a case in point; where the plaintiff declared, that he was possessed of a wood, and that he had a way leading from such a place to his wood, and that the defendant, intending to deprive him of the benefit and profit of his wood, obstructed the way, *per quod* he lost the profit of his wood in selling and disposing of it; and the judgment was, after verdict, for the plaintiff, and affirmed upon error. The present case is like the case of Mr. *Harris* the counsellor, who brought an action upon his case for false and scandalous words spoken of him, *per quod* he (*e*) lost his clients, without naming them. And the case in 1 *Roll. Abr.* 63. 1 *Vin.* 478. *pl.* 31. is a case in point, *per quod* he lost his customers generally. And *Morley v. Pragnell, Cro. Car.* 510. where in an action brought by an inn-keeper the plaintiff declares, that the defendant intending to annoy him and his family, *et hospites suos*, erected a tallow furnace, &c. *per quod* he lost several guests,

(*a*) R. acc. 1 Roll. Rep. 79. pl. 24. Vide 1 Roll. Abr. 35. 1 Danv. 81. 1 Vin. 393. pl. 7. 1 Sid. 397. 1 Lev. 261.

(*b*) D. acc. 1 T. R. 752. 754.

(*c*) D. acc. 1 T. R. 754.

(*d*) Vide ante 266. and the cases there cited.

(*e*) Vide 1 Roll. Abr. 63. 1 Vin. 478. pl. 31.

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Loſs of tenants is a ſufficient ſpecial damage to enable a man to maintain an action for a public nuiſance.

And though the declaration in ſuch action does not name the tenants, it cannot be excepted to after verdict.

But it will be bad even after verdict if it does not ſhew that the plaintiff had tenants.

gueſts, and his family became unhealthful, and he loſt ſeveral ſums of money which he might have gained; and the judgment was for the plaintiff; and the caſe is reported agreeably to the truth, for he ſaid he had ſearched the roll of it. See 11 *H.* 4. 44. *b.* He cited alſo a caſe lately adjudged in *C. B.* between *Baker* and *Moore intr. Hil.* 8 *Will.* 3. *C. B. Rot.* 316. where in caſe the plaintiff declares, that there was, and time whereof, &c. had been, *quaedam communis via in Lambeth, ducens* from the river *Thames, in per et trans* a certain place called *Bark-lane uſque ad* ſuch a place, &c. that the defendant erected a wall croſs the ſaid way, which ſtopped the paſſage, and continued it from ſuch a day until the impetration of the plaintiff's original writ, *ita quod ligei domini regis* could not uſe the ſaid way as before, &c. *per quod tenentes diverſorum meſuagiorum* of the plaintiff, ſituate in, &c. *a meſuagiis, &c. receſſerunt, &c. per quod* the plaintiff loſt the profits of his houſes, &c. And *J. O.* then king's ſerjeant, moved in arreſt of judgment, that the action would not lie, 1. becauſe this damage was not ſpecial enough; but the whole court was of another opinion, and over-ruled it: 2. becauſe he ſhould have named his tenants in particular; *ſed tota curia contra.* [See 9 *H.* 7. *pl.* 4. 21 *H* 6. 7. 30. 32. *a.* 13 *H.* 7. 26.] but upon another exception, *viz.* that the plaintiff did not ſhew himſelf poſſeſſed of any tenement in which there was a tenant, judgment was arreſted; for the plaintiff could not be damnified, if he had not any houſes. So in this caſe if the plaintiff had not ſhewn that he had a colliery, it had been ill. He cited alſo the caſe of *Hart v. Baſſet, T. Jon.* 156. 4 *Vin.* 519. *pl.* 7. as a ſtrong caſe for him: and he ſaid that there was here ſpecial damage, which was not common to all; and therefore he was of opinion, that this declaration would have been good upon a demurrer. But admitting the contrary, yet it would be good after a verdict; and the judgment in the caſe of *St. John* and *Moody* was given upon account of the verdict, though they inclined that it would have been ill upon demurrer. And then he cited many caſes, where (*a*) a verdict aided imperfections. *Allen*, 22. 1 *Leon.* 236. 1 *Ventr.* 13. and concluded, that the caſe is within the words of the ſtatute of *Elizabeth*, that after the right tried, the entry of the judgment ſhall not be ſtaid by any default of form. And therefore he was of opinion, that the plaintiff ought to have his judgment.

(*a*) Vide ante 110. 3 T. R. 25.

Turton juſtice was of opinion that the plaintiff ought to have judgment, it being after verdict; and cited 1 *Keb.* 846. 2 *Saund.* 346. *Peters v. Opie*, 1 *Vent.* 126. *T. Jon.* 125. caſes to prove the omnipotency of a verdict. But he made a doubt, if it would have been good upon a demurrer.

But *Rokeby* juſtice and *Holt* chief juſtice argued *e contra*, that the judgment ought to be arreſted. And *Rokeby* juſtice ſaid, that he would admit, that no particular perſon could have an action for the general ſtopping of a way. 1. Becauſe

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Because the offender is punishable at the king's suit. 2. Because multiplicity of actions is to be avoided; and if one man may have an action, for the same reason a hundred thousand may: but if the stopping be a particular damage to a particular person, he may have an action: but then the particular and special damage must be particularly and certainly alleged, which is wanting in this action, and therefore it does not lie. It is agreed, that if the *per quod* had been omitted, the action would not have lain, because the complaint had then been only of a general and common nuisance and damage. But here the *per quod* is too uncertain; for it is only, that he lost the sale of his coals; and he does not shew, that he could have sold them, &c. Objection. Damages in the *per quod* ought not to be shewn certainly. Answer. That is to be understood, where the action is maintainable of itself without the *per quod*; but if the *per quod* is the ground of the action, there the damages ought to be shewn certainly and specially. But if the plaintiff had shewn here any person in particular, who intended to buy of him, and by reason of this stopping of the way refused, &c. the action would have well lain. But now it is like the case 3 *Bulst.* 75. where in an action for slander of his title, *per quod* he could not make a lease, &c. judgment was arrested, because the plaintiff did not shew a communication to have a lease, &c. Admitting the case of *Hart v. Basset*, *T. Jon.* 156. 4 *Vin.* 519. *pl.* 7. to be law, yet there is there some special damage. So in the case of *Maynel v. Saltmarsh*, 1 *Keb.* 847. where an action was brought for stopping a way, *quae fuit maxime propinqua via*, *per quod* he could not carry his corn, so that the rain rotted the corn, &c. And it is no objection to say, that perhaps the plaintiff did not know his customers; for that is a good reason why he should not have the action, for he ought not to recover damage for a thing that he does not know whether it is damage to him or not. And therefore he was of opinion, that judgment ought to be arrested.

Where a per quod is the ground of the action the damages under the per quod must be shewn specially. D. acc. post. 493.

Where the per quod is not the ground of the action it need not. D. acc. post. 493.

In an action for slander of title, per quod plaintiff could not make a lease, he must shew a communication for a lease.

Holt chief justice also argued for the defendant. And he made two questions. 1. Whether the plaintiff ought to have an action, because his coal mine was contiguous to the highway, and the way was a great convenience to him to carry his coals, and therefore the stopping was an obstruction of that convenience? 2. If there ought to be farther some special damage, to support the action; whether this damage is specially enough shewn? And as to the first point he was of opinion, that the plaintiff could not have an action for the stopping of this way, because his coal mine was near it; for though it is a convenience to him, yet the situation does not give him any greater right to the way, than any other of the king's subjects. But actions upon the case for nuisances are founded upon particular rights; but where there is not any particular right, the plaintiff shall not have

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an action. And that is the reaſon of the caſe of *Pineux* and *Hovenden*, *Cro. El.* 664. Every one who brings an action ſhall have it proportionable to his right. Therefore *Coryton v. Litheby*, 2 *Saund.* 115. 1 *Vent.* 167. 2 *Lev.* 27. two ſhall join in an action of account of their joint right. Objection. That the plaintiff ſuſtains here a particular damage. Anſwer. That he ſuſtains no more particular damage than any other of the king's ſubjects, who have all the ſame right to paſs by this way. In indictment for ſtopping a highway, the indictment concludes, *ad nocumentum omnium, &c. per viam illam tranſeuntium, &c.* The ſtopping of any man is a particular damage to him, but the ſtopping of a way is a common damage to all. Objection. The *per quod proficuum amiſit* ſhall be good, as in the caſe of ſtopping of a water-courſe, *per quod* he loſt the profit of his mill. Anſwer. There the action will well lie without the *per quod*, becauſe he who has the mill has a particular right to the water-courſe; and that was the reaſon of the caſe of *St. John v. Moody*, *ante* 490. for there the way was private. But there is no ſuch caſe in the law as this preſent caſe. The caſe of 27 *H.* 8. 27. is no authority for this action; for there *Baldwin* chief juſtice was of opinion againſt the action, and his opinion has been held law ever ſince. 4 *Vin.* 519. *pl.* 5. *Co. Lit.* 56. *a.* But he agreed the caſe of the particular damage, becauſe no indictment lies for it. 2. By him, the plaintiff does not appear by this declaration to have ſuſtained any particular damage, for if a particular damage is neceſſary to maintain the action, ſuch particular damage ought to be laid in a ſpecial manner, and it ought to be ſhewn in what it conſiſts; now here though it is laid, that the plaintiff loſt his cuſtomers, *&c.* that is not ſpecial enough, but it ought to be ſhewn, that cuſtomers were coming to buy, and were obſtructed, whereby, *&c.* And 1 *Roll. Abr.* 63. 1 *Vin.* 478. *pl.* 13. though in point, yet has always been denied to be law; and it is adjudged in 1 *Roll. Rep.* 79. *pl.* 24 *contra.* And the difference is, where the words are actionable by themſelves; there the damage need not be ſhewn ſpecially. 1 *Roll. Rep.* 79. 1 *Roll. Abr.* 35. 36. But where the words are not actionable by themſelves, there the ſpecial damage will not maintain the action, unleſs it be ſpecially ſhewn; and in ſuch caſe, as the preſent, without ſhewing who were the cuſtomers, *&c.* 1 *Roll. Abr.* 58. *pl.* 1. 2 *Bulſtr.* 276. Now there is no difference between an action like this brought for ſuch a nuiſance, and an action for words not actionable. In both caſes it is the ſpecial damage which will make them maintainable, and therefore it ought to be ſpecially ſhewn. He cited likewiſe a caſe, which was alſo cited by the counſel at the bar, between *Pain* and *Partridge* in this court, *intr. Paſch.* 2 *W. & M. R. R. Rot.* 43. and adjudged *Paſch.* 3 *W. & M.* 3 *Mod.* 289. 1 *Show.* 243. 255. *Salk.* 12. *Comb.* 180. *Carth.* 191.

Caſe lies for ſtopping plaintiff's water-courſe leading to his mill without a per quod. Semb. acc. Skinn. 65. 175. and vide Carth. 84. 3 Lev. 133. ante 102.

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An action will not lie againſt a perſon bound to keep a boat at a public ferry, for not doing ſo, even at the ſuit of a perſon exempted from paying toll.

191. *Holt.* 6. *poſt. vol.* 3. *p.* 293. where upon error out of the common pleas the caſe was thus; the plaintiff declared, that the town of *Littleport* was an ancient town, *&c.* and that there was a river called *Milney* river, over which all the king's ſubjects ought to have paſſage; that the proprietors, *&c.* uſed, *&c.* to find a ferry boat for the paſſengers, and for that had uſed time whereof, *&c.* to have reaſonable toll; but that there was a cuſtom within the town, that all the inhabitants of the ſaid town ſhould paſs in the ſaid ferry boat toll free; that the plaintiff was an inhabitant of the ſaid town, and that the defendant was proprietor, *&c.* and ought to find the ferry boat; but that he did not keep a ferry boat, *per quod*, *&c.* and two queſtions were made in that caſe.

A cuſtom may be laid in a town.

1. Whether the cuſtom was good, being laid in a town? and adjudged, that it was: 2. Whether the action would lie? and adjudged that it would not: for though the plaintiff had ſome particular damage, yet ſince that proceeded from a general nuiſance, an indictment was a more proper remedy, and not an action; for the particular right was, in being exempt from the payment of toll, and not in the paſſage, for that was common to all; it was held alſo in the ſaid caſe, that the proprietor of the ferry was obliged in ſuch manner by the preſcription, that he could not change the ferry boat to a bridge, ſo as to diſcharge himſelf of the maintaining of a ferry boat by building a bridge. He cited alſo the caſe of *Maynell v. Saltmarſh*, *intr. Mich.* 14. or *Hil.* 14 *&* 15 *Car.* 2. *B. R. Rot.* 271. 1 *Keb.* 847. where the plaintiff declared, that there was a highway leading from *A.* to *B.* and that the plaintiff had a cloſe in the town of *A.* ſowed with a great quantity of corn, *viz. &c.* and ſhews what, *&c.* and that he lived in the town of *B.* and that this way was the moſt convenient, *et maxime propinqua via*, for carrying his corn from his cloſe in *A.* to his houſe in *B.* and that he had ſo many loads of corn ready to be carried, *&c.* and that the defendant ſtopped the way, ſo that he could not carry his corn, *&c.* and in the mean time the rain fell, and ſpoiled his corn; after verdict for the plaintiff judgment was given for the plaintiff in the common pleas *ſub ſilentio*; and upon error brought in the king's bench, error was aſſigned, that the action would not lie; but it was adjudged that it would. But the ſaid caſe differs from the preſent caſe, becauſe there was a ſpecial damage to the plaintiff. As to the caſe of *Hart v. Baſſet*, *T. Jon.* 156. 4 *Vin.* 519. *pl.* 7. he ſaid, he had no need to deny it, becauſe the plaintiff declared that he was farmer of the tithes of *B.* and that the way was near to the plaintiff's land, and convenient for the carrying away of the tithes to his barn; that the defendant had ſtopped the way, by which the plaintiff was compelled to go round about, *&c.* And if it was as Mr. juſtice *Gould* cited it, that he was driven to a greater expence, that makes it better than it is in the report of *T. Jon.* 156. Beſides

Building a bridge will not diſcharge a man from an obligation to keep a ferry boat.

Deſtruction of his corn by rain is a ſufficient ſpecial damage to intitle a man to maintain an action for a public nuiſance.

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there is another ingredient, that (*a*) he was liable to an action, if he permitted the tithes to lie upon the ground beyond a convenient time; and all this matter is shewn specially; but if there was no more than the bare going round about, it is a hard case. As to the objection, that perhaps the plaintiff did not know his customers, and therefore could not shew them, &c. he answered, that then there is no reason that the plaintiff should have this action, for it is necessary that they should come if they could; and therefore if he cannot prove some, who would have come, there is no ground for this action. If actions should be suffered to be brought for imaginary damages, where none can be proved, the maxim of the common law, that no action will lie for a common nuisance, would be destroyed. And therefore he was of opinion, that judgment ought to be arrested. He cited the case of *Vertue v. Bird.* 1 *Vent.* 310. 2 *Lev.* 196, 3 *Keb.* 766. *Note*, in this case, upon one of the former motions in arrest of judgment, a rule was made, that judgment should be arrested, *nisi*, &c. And now the court being divided, the plaintiff could not have the rule discharged, nor have his judgment. But if upon the former motion the court had been divided, judgment (*b*) would have been for the plaintiff. But now, because it cannot be entered without continuances, there must be a rule for judgment, which cannot be had, the court being divided. But if upon motion for a prohibition, a rule was made to hear counsel, and all to stay in the mean time, and upon the hearing of counsel the court was divided, they might proceed in the spiritual court. Agreed by *Holt* to have been done before. And afterwards, by consent of *Holt*, this case was argued before all the justices of the common pleas and barons of the exchequer, at *Serjeants Inn*; and (*c*) they all were of opinion for the plaintiff, that the action well lay.

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(*a*) R. acc. ante 187. q. v.

(*b*) R. acc. 3 Mod. 156.

On motion for a prohibition where a rule is made to hear counsel, and stay proceedings in the interim, if the court is divided on hearing counsel, the court below may proceed.

(*c*) Vide 12 Mod. 267.

Trevivan *verſ.* Tooker.

EJECTMENT. Upon special verdict the case was thus. *A.* was seised of a house, orchard, meadow, and divers other lands, in fee; and makes a feoffment in fee of them, to the use of himself for life; and after his death, as to one moiety of the house, orchard, and meadow, to the use of *B.* wife of *A.* for her life, and after her death, then to the use of *C.* son of *A.* for his life, and after their deaths, then as to one moiety of all and singular the premises, to the use of *D.* the wife of *C.* for her life, and as to the other moiety, to the use of the heirs male of *C.* and as to the other moiety after the death of *A. B. C.* and *D.* to the use of the heirs males of *C. A.* died. Then *C.* died. And to the question was, whether *D.* should take during the life of *B.* the limitation being, after the deaths of *A. B.* and *C.* And it was held, that it should be taken respectively, for the share of

Under a feoffment to the use of A. for life, remainder as to part of the estate to the use of B. for life, and after their deaths to the use of C. C. shall take immediately upon the death of A. so much of the estate as is not included under the limitation to B. notwithstanding B. may be then living.

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of every one after their reſpective deaths. And *Holt* chief juſtice ſaid, that this was no more than *Pollard*'s caſe, cited 5 *Co.* 8. *b.* Leaſe of one acre to *A.* for life, and of another to *B.* for life, and of a third to *C.* in tail, and after the determination of all the eſtates, then to *D*; and held, that *D.* ſhould take reſpectively after the ſeveral determinations. And ſo the caſes of *Aylett v. Chopping.* *Yelv.* 183. 2 *Cro.* 259. and *Cook v. Gerrard*, 1 *Saund* 180. and juſtice *Wyndham*'s caſe, 5 *Co.* 7. And though the caſes in *Saunders* and *Coke* are in caſe of a will, it is the ſame thing, for the judgment was not founded upon that. The plaintiff, which was *D.* had judgment by the whole court. *Ex relatione m'ri Jacob.*

Pullen *verſ.* Palmer.

Vide Bl. 787.

IN an action upon the caſe for a falſe return made to a *mandamus*, the return was ſet out to be made *modo et forma* ſequenti, *&c.* And after verdict for the plaintiff, ſerjeant *Wright* moved in arreſt of judgment, that this was not certainly enough ſhewn to be the very return that the defendant had made; and therefore that the declaration was ill. *Sed non allocatur.* For, *per curiam*, it is well enough. And judgment for the plaintiff.

Harvey *verſ.* Williams.

S. C. 12 Mod. 267.

Intr. Hil. 10 Will. 3. B. R. Rot. 160.

Vide 2 T.R. 113.

IN *indebitatus aſſumpſit*, the defendant pleaded that the plaintiff was bankrupt, and therefore the defendant could not pay, for fear a commiſſion ſhould be ſued, *&c.* Upon demurrer, judgment for the plaintiff.

The city of London *verſ.* Vanacker.

S. C. 12 Mod. 269. 5 Mod. 438. with the arguments of counſel. Carth. 480. Holt, 431.

Every corporation can of common right make bye laws concerning its franchiſes. S. C. Salk. 142. Though they are to be executed out of the

UPON a *habeas corpus* directed to the mayor, aldermen, and ſheriffs of the city of *London*, to remove the body of *Vanacker*, with the cauſe; they return, that the city of *London* is an ancient city and a county of itſelf, and that the citizens of the ſaid city have been time whereof, *&c.* a body politick known by divers names, *&c.* that king *John* by

local limits of the corporation. Vide Str. 462. T. Jon. 144. 2 Show. 95. Or for the government of the corporation. D. acc. Hob. 211. Burr. 1829. 1831. Or to compel their members to ſerve an office into which they have elected them. S. C. Salk. 142. R. acc. 2 Lev. 252. 1 Will. 235. Though the neglect be puniſhable by indictment. In ſuch bye law it is not neceſſary that there ſhould be an exception in favour of perſons out of their ſenſes. A bye-law that a member elected into an office by the corporation ſhall ſerve unleſs he ſhall before the time appointed for his entering upon the office ſwear before the court of the corporation that he is not worth a certain ſum of money, and bring ſix other members to be approved of by the corporation court to ſwear that they believe him, is good, though the corporation is to have the penalty. S. C. Salk. 142. So a bye-law that he ſhall before the time appointed for his entering upon the office declare in the corporation court his intention to accept it, and enter into a bond to oblige himſelf ſo to do, is good. S. C. Salk. 142. So is a bye law that he ſhall declare his intention to accept, unleſs he has a reaſonable excuſe, though the determination upon the ſufficiency of the excuſe is left to the corporation court, and the corporation is to have the penalty. If the corporation court rejects a reaſonable excuſe, it may be inſiſted upon in an action for the penalty. A corporator is bound to take notice of his election to any office either by the corporation. S. C. Salk. 142. or a ſelect part of it. S. C. Salk. 142. An omiſſion by the perſon who has the peculiar privilege to elect to a public office is a forfeiture of the franchiſe. D. acc. 12 Mod. 673. A cuſtom extends to things within the reaſon of it though they had their origin within the time of legal memory. Vide poſt. 654. 4 Co. 4. a.

is letters patent bearing date, &c. granted to them the sheriffwick of the said city of *London* and county of *Middlesex*, and that they should make the sheriffs of themselves; they return the statute of *Magna Charta*, and divers other statutes confirming their liberties; they return also a custom to make bye-laws, and that if any of their laws or customs be defective, or difficult to be understood, or if any matter arise for which convenient remedy was requisite, that then the common council should ordain convenient remedy, so that they be honest, profitable, and reasonable; they return also, that there is, and time whereof, &c. hath been, a court of record held before the mayor, aldermen, &c. in the inner chamber of the *Guildhall*; they return also an act of common council, made 7 *Car.* 1. reciting several acts of common council before made concerning sheriffs, and for that, that they were found inconvenient, because the penalty of refusers was too mild, and therefore the city might be prejudiced for want of persons to execute the said office of sheriffs, they were all repealed; and it was enacted, that the election should be yearly upon *Midsummer-day*, and that if there were occasion for a new election, then upon such day as the court of aldermen should appoint, and that he who should be elected, being a freeman of *London*, should serve, and should not be discharged, unless he came voluntarily before the court of aldermen, and swore that he was not worth 10,000*l.* and brought six compurgators with him, such as the lord mayor and court of aldermen should approve, who should swear, that they believed in their consciences that he swears that which is true: and if any freeman elected sheriff, and proclaimed in the hustings, should not come at the next court of aldermen to be held in the inner chamber of the *Guildhall*, and there declare that he will accept the said office, and become bound in a bond of 1000*l.* to appear in the ——— at the vigil of *St. Michael* next ensuing, and accept it, not having reasonable excuse to be allowed by the lord mayor and court of aldermen, nor being discharged, &c. that then he should forfeit 400*l.* one hundred pounds to be paid to the subsequent sheriff, the other three hundred pounds to the use of the mayor and commonalty of the city of *London*, the which 400*l.* should be recoverable in the court of the mayor, &c. then they shew, that the defendant was elected sheriff, and proclaimed, &c. and that he did not come, &c. by which he forfeited the 400*l.* for which a plaint was levied, &c. And after this case had been argued by Mr. *Northey* and Mr. *Broderick* for the defendant, and by Mr. Recorder *Lovell* and Sir *Bartholomew Shower* for the city; now *Holt* chief justice pronounced the opinion of the court, that the bye-law was good, and that therefore a *procedendo* ought to be granted. And (by him) the principal objections which have been made against this bye-law, are reducible to four, 1. That the subject matter,

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of which the bye-law is made, is not within the cuſtom of the city to make bye-laws, becauſe the ſheriffwick was granted within time of memory, and therefore the cuſtom cannot extend to it; and becauſe the ſheriffwick of *Middleſex* is without the city, and therefore cannot be affected by the cuſtom within the city. 2. That it is unreaſonable, becauſe it impoſes an oath upon the perſon elected of his inſufficiency, and that he ſhall bring alſo compurgators with him, &c. 3. That the mayor and aldermen are judges of the reaſonableneſs of the excuſe, and ſo judges in their own cauſe, ſince the words of the bye-law are, ſuch reaſonable excuſe as the mayor and aldermen ſhall judge proper, and not a reaſonable excuſe generally. 4. That no proviſion is made that the party elected ſhall have notice; ſo that if he was beyond the ſea he is bound to take notice, which is very unreaſonable and inconvenient. The firſt objection is diviſible into two parts. 1. That no bye law can be made, by virtue of the cuſtom of the city, concerning the ſheriffwick, becauſe it is a franchiſe veſted in the city by the charter of king *John*, within time of memory. But to this he anſwered, that admitting that the cuſtom could not warrant ſuch a bye-law, yet it might be made of common right; for of common right every corporation may make a bye-law concerning any franchiſe granted to them, becauſe it concerns the welfare of the body politick, and is (as Lord *Hobart*, *Hob.* 211. ſays) included in the very act of incorporation. And that is to the body politick, as reaſon is to the body natural, to govern themſelves. And then if a franchiſe be granted to a corporation, it is under a truſt, that the corporation ſhall manage it well, which cannot be done but by a bye-law. 2. The corporation having power to make bye-laws for the well governing of the city, that ought to be the touchſtone, by which their bye-laws ought to be tried; and if it be for their benefit, the bye-law will be good. Now this bye-law is for the good of the city, and of the king, *viz.* that reſponſible perſons ſhould be ſheriffs, &c. And it is not neceſſary to be confined to matters concerning the franchiſe of the city only; but it is ſufficient if it is for the good of the city; as 5 *Co.* 62. *b.* chamberlain of *London*'s caſe, *cit.* 8 *Co.* 127. *a.* concerning the bringing of cloth to *Black-well-hall*, and paying hallage; it was held, that it bound all, though it did not concern the franchiſe of the city. 3. The very conſtitution of the charter of king *John*, which grants this franchiſe to the city, obliges the citizens to make bye-laws concerning it; for the charter appoints, that they ſhall make ſuch as they pleaſe out of themſelves ſheriffs, &c. ſo that they ought not to execute it by themſelves, nor by deputy, but ought to appoint two perſons to execute the office; who as ſoon as they are appointed by them are abſolute ſheriffs and immediately attendant upon the king's courts. And it would be in vain to give them ſuch power to elect ſheriffs, &c. if they could not

Bye-laws for the government of a corporation muſt be beneficial to the corporation.

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The acceptance of a charter binds a corporation to comply with the terms of it.

not compel the persons elected to serve. The acceptance of the charter obliges the body politick to perform the terms upon which it was granted; and as every citizen is capable of the benefit of the franchise, so he ought to submit to the charge also. And as those who accepted the charter were bound by it, so are all those who are made freemen since. As if a common be granted to a corporation, the benefit accrues to the particular members. And therefore as they have advantage by some franchises, so they ought to submit to the charges of others. But he said, that he would take it for granted, that this franchise to elect their sheriffs is very beneficial to the city; and of that opinion was *Charles II.* when a *quo warranto* was sued, to seize that among other franchises into the king's hands. 4. Since it is part of the constitution by which this franchise is granted to them, that the office of sheriff shall be executed by citizens elected out of themselves, if they did not make election, it would be a forfeiture of their franchise. For all franchises which are granted are upon condition that they should be duly executed, according to the charter that settles the constitution. And that being a condition annexed to the grant, the citizens cannot make an alteration; but if they neglect to perform the terms of the patent, it may be repealed by *scire facias*. Therefore it is necessary that they should have a coercive power, to compel persons to take the office upon them, and that without any custom, or otherwise this office might be lost by the city. And therefore he was of opinion, that without a custom they might have made such a bye-law as this. But, however, admitting that it could not be good without a custom, yet he was of opinion, that the bye-law was warranted by the custom. For though the subject matter has its original within time of memory, yet since it is for the good of the city, it is within the custom, for the custom is general. And there is no necessity that the subject matter should be of time whereof, &c. For general customs may be extended to new things which are within the reason of the customs, 5 *Co.* 82. *b.* *T. Jon.* 204. authorities in point. Objection. The defendant may be indicted for refusing to serve, &c. which is a more proper remedy. Answer. That will not prevent the forfeiture of the franchise that will incur, if the city does not appoint to execute the office, &c. And it is like the case in *Littleton's Reports*, 94, 105, 128. 2. No indictment will lie in this case, because the refusal is not at the time when the defendant ought to enter upon his office, but before. If the defendant had refused at the vigil of *St. Michael* he might be indicted; but not for this refusal before, because, notwithstanding such refusal, he might enter upon the office at the day. As to the second part of the objection, that they cannot make a bye-law concerning the sheriffwick of *Middlesex*, to compel the defendant, &c. to serve there, because it is out of their jurisdiction in another county,

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and therefore to be compared to the caſe of the conſervancy of the river of *Thames*, where they cannot make laws out of the liberties of the city; *Holt* chief juſtice anſwered, 1. That though the execution of the office is to be done out of the city, yet the ſheriffwick is within the city, as being a franchiſe belonging to them, and therefore within their juriſdiction. 2. That the perſons elected are citizens, and therefore under their juriſdiction. 3. That all the acts requiſite to be done, are to be done in *London*; as appearance, *&c.* As to the ſecond objection, that it is unreaſonable to impoſe an oath upon the party; and not only ſo, but to bring alſo ſix compurgators, citizens of *London*, who are to have part of the fine, who ſhall ſwear, *&c.* ſuch as the lord mayor and court of aldermen ſhall judge fit, *&c.* he anſwered, that it is a favour to the defendant; for it muſt be granted, that he is bound, when elected, to ſerve, and that was reſolved in *Larwood*'s caſe; and he cannot diſable himſelf by any allegation: but here the bye-law admits an excuſe, *viz.* that he is not worth 10,000*l.* and admits alſo the oath of the party himſelf, which is a greater favour; only it requires the oath of ſix compurgators, which is not unlawful, for a voluntary oath may be taken. *Cro. El.* 469. *pl.* 21. 1 *Sid.* 232. And as to the compurgators, it is only an imitation of the common law; where a man ſhall diſcharge himſelf by wager of law; and though the books mention eleven, yet it is the courſe in the common pleas, to have but ſix, as here. And it is reaſonable that the mayor, *&c.* ſhall have the refuſal to admit of them, to the end that they be not infamous perſons, *&c.* But it was objected, that there was no exception, if a man choſen ſhould be *non compos.* Anſwer. Such perſons are underſtood to be excepted in all laws; and therefore it would be ridiculous to make an expreſs exception. As to the third objection, that this bye-law is unreaſonable, becauſe by it the man elected is obliged to appear at the next court of mayor, *&c.* and unleſs he have ſuch reaſonable excuſe as ſhall be allowed by them, he ſhall incur the penalty of the 400*l.* *&c.* ſo that they are judges in effect in their own cauſe; he anſwered, if the mayor, *&c.* allow the excuſe, the city will be bound for ever; and if they refuſe to admit a reaſonable excuſe it is not final, becauſe it may be controverted in an action brought for the penalty. And (by him) this act of common council ought to be expounded according to the ſtatute 23 *H.* 8. *c.* 5. concerning the commiſſioners of ſewers, where though they are impowered to proceed according to their diſcretions, yet their diſcretion ought to be grounded upon reaſon and law. 5 *Co.* 100. *a.* As to the fourth objection, that this bye-law makes no proviſion that the party ſhall have notice, and perhaps he may be beyond the ſea, *&c.* he anſwered, that in judgment of law every citizen is intended to be inhabiting within the city, and ought to be preſent at all public court

courts and assemblies, and therefore he is privy to all public acts; and if he be absent it is his own neglect, of which he shall not take advantage. Objection. That the election is made by the liverymen, who are a small number compared with all the citizens. Answer. 1. That it does not appear by this return that the election is by the liverymen, but must be supposed to be by all the citizens. 2. But secondly, admit that it was so, yet every citizen is obliged to take notice of what is done by them, for the same reasons that all persons are obliged to take notice of acts of parliament. And though heretofore laws newly made used to be proclaimed, yet that was but an act of grace. 3. It is a notorious act; and in all cases where a man ought to be present in person, or by his representatives, he shall take notice of all acts done there, *&c.* 4. The proclamation upon the hustings is sufficient notice, and agreeable to the reason of the common law. As if a *praecipe* be brought against a man, summons upon the land is sufficient. The same law of a proclamation in the county court in case of out-law, because the tenant is supposed commorant upon the land, and every man of the county at the county court. So citizens are supposed present at their own courts. And if a man has occasion to be absent, he knows whether he is liable to be elected, and therefore ought to take care to be informed, and so no inconvenience to the party. But otherwise it would be very inconvenient, if it should be in the power of the citizens to withdraw themselves, so that no notice could be given, and so the office not be executed. And therefore he concluded, that this notice was good, being agreeable to the reason of the common law. Then he inveighed against the obstinacy of the defendant, for endeavouring to oppose that which had been the practice for so many years, and for which there had been bye-laws of the same nature almost ever since the grant, in the time of *Ed.* 3 19 *H.* 8. 37 *H.* 8. and 27 *El*, And therefore for these reasons he and all his brothers the justices were of opinion, that a *procedendo* should be granted. Which was granted accordingly. And afterwards this same bye law was drawn in question in the common pleas, and the same judgment given there, *Pasch.* 12 *Will.* 3. and between the city of *London* and *Wood*, 12 *Mod.* 669. who was fined for refusing to serve the office of sheriff, being duly elected, *ut supra.*

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Sir William Courtney. *v.* Bower and Kingston, C. B.

Intr. Hil. 6 Will. 3. C. B. Rot. 1322.

Wrecked goods pay no customs. D. acc. ante, 388. R. acc. Vaugh. 159. D. acc. Molloy. B. 2. c. 5. s. 9. dub. Moor. 224. and vide 5 G. 1. c. 11. s. 13. Nor do such as are flotsan.

IN trespass brought by the plaintiff against the defendants, upon not guilty pleaded, a special verdict was found, in which the single question was, if wreck and *flotsam* goods ought to pay custom. And after several arguments at the bar, this case having been depending for three or four years, the judges delivered their opinions in solemn argument.

And

COURTNEY v. BOWEN.

And *Nevill*, *Powell*, and *Blencowe*, were of opinion for the plaintiff, who was lord of the manor, and claimed this wreck and *flotſam* by preſcription, that they ought not to pay cuſtom. But *Treby* chief juſtice delivered his opinion for the defendants, being cuſtom-houſe officers, that they ought to pay cuſtoms. Note, this caſe was tried before *Holt* chief juſtiee at *Exeter*, he being then juſtice of aſſize there, 1696. and upon the great importunity of the king's counſel he permitted it to be found ſpecially; but was clear of opinion that no cuſtom ought to be paid for wreck, *&c.* Afterwards error was brought upon this judgment *in B. R.* and after ſeveral arguments at bar by the counſel on both ſides, the judgment of the common pleas was affirmed, without any other reaſon given by the court than the authority of the caſe of *Shepherd v. Goſnold* in *Vaugh.* 159. *Mich.* 13 *Will.* 3. *B. R.*

The Mayor and Corporation of the City of York *verſ.* Toune. B. R.

S. C. 5 Mod. 444.

Q. Whether a corporation can maintain indebitatus aſſumpſit for a fine to which it is intitled. Vide Carth. 90. Burr. 1717. Dougl. 700. 2d. Ed. n. 155. 2 Will. 95. 1 Term Rep. 616.

THE plaintiff's brought *indebitatus aſſumpſit* againſt the defendant for a fine impoſed upon him for not ſerving the office of ſheriff of the city of *York*, being duly elected according to the cuſtom, and according to the cuſtom fined for refuſal, *&c.* And upon demurrer to the declaration the laſt paper day of this term Sir *Bartholomew Shower* for the defendant ſaid, that the action in this caſe would not lie. And *Holt* ſeemed to incline to the ſaid opinion. And upon motion of the plaintiff's counſel, that it might ſtay till the next term, *Holt* chief juſtice ſaid, that it ſhould ſtay till dooms-day with all his heart. But *Rokeby* ſeemed to be of opinion, that the action would lie. *Et adjournatur.* Note, a day or two after I met the lord chief juſtice *Treby* viſiting the lord chief juſtice *Holt* at his houſe. And *Holt* repeated the ſaid caſe to him, as a new attempt to extend the *indebitatus aſſumpſit*, which had been too much encouraged already. And *Treby* chief juſtice ſeemed alſo to be of the ſame opinion with *Holt*.

Memorandum, Charles Montague *eſquire reſigned his office of chancellor of the exchequer, and* John Smith *eſquire ſucceeded him.*

Mich.

Mich. Term

11 Will. 3. C. B. 1699.

Sir John Holt *Chief Juſtice.*
Sir Thomas Rokeby *died 26 Nov. in this Term after a long illneſs* } *Juſtices.*
Sir John Turton
Sir Henry Gould

Robbins *verſ.* Robbins.

S. C. Salk. 15. 12 Mod. 273. Pleadings poſt. vol. 3. p. 298.

A declaration for cauſing a man to be held to ſpecial bail without cauſe ought to ſhew for what ſum he was held to bail. And *how* the defendant *cauſed* him to be held to bail.

A declaration ſtating generally that the defendant, by colour of certain proceſs, cauſed the plaintiff to be arreſted and held to ſpecial bail without cauſe, is inſufficient even after verdict.

A man who is arreſted upon proceſs may move the court to compel the ſheriff to return it.

IN an action upon the caſe the plaintiff declared, that the defendant *praetextu et colore cujuſdam medii proceſſus in lege arreſtari* the plaintiff *cauſavit*, and to be held to ſpecial bail, without cauſe. Upon not guilty pleaded, verdict for the plaintiff, and now Mr. *Eyre* moved in arreſt of judgment, that the writ is not ſhewn upon which the arreſt was: nor is it averred, by whom it was proſecuted; and that the whole matter ought to be ſhewn at large; and not in this uncertain manner, *colore cujuſdam proceſſus in lege*, &c. Againſt which Mr. *Carthew* for the plaintiff argued, that the cauſe of this action was not the ſuing without cauſe, but the holding to ſpecial bail without cauſe. And the plaintiff could not ſhew it ſpecially, becauſe the writ remained with the officer; and therefore he could not ſhew it, nor what ſum was contained in it. And that is the reaſon that has introduced this ſuccinct way of pleading. But *per curiam*, the declaration is ill; for if the cauſe of action is the holding to ſpecial bail without cauſe, the plaintiff *(a)* ought to have ſhewn the whole ſpecially, *viz.* that he owed the defendant but ſo much, &c. and that the defendant intending to oppreſs him, had cauſed him to be arreſted for ſo much, &c. and held to ſpecial bail, &c. But now it does not appear to the court, that the ſum, for which the plaintiff was arreſted, required

(a) Vide 2 Will. 376. poſt. vol. 3. 299.

ſpecial

ROBBINS v. ROBBINS.

ſpecial bail; but that being the *giſt* of the action, ought to have been ſhewn at large. And as to the objection, that the plaintiff could not obtain a ſight of the writ, he might have moved the court, that the ſheriff ſhould return his writ, and then he might have ſeen all. Beſides, that the warrant under the hand of the ſheriff to the bailiff is good evidence, *&c.* 2. It is not ſhewn that (*a*) the plaintiff was proſecuted or arreſted at the ſuit of the defendant; and perhaps the defendant was only the bailiff, and then the action will not lie againſt him. And *per curiam*, this way of declaring is not introduced yet, for this is the firſt that they have ever ſeen of this ſort of pleading in this manner. And therefore judgment was ordered to ſtay, until, *&c.*

Warrant to the bailiff evidence againſt the ſheriff, &c.

(*a*) Vide ante, 389.

Blake *verſ.* Weſt and Trench.

Every material allegation upon pleadings, which is not anſwered, is admitted. R. Salk. 90. pl. 2. D. arg. Str. 298. & Vide ante, 296.

REPLEVIN of two cows. The captain was laid to be in a place called *Downfield*. The defendant avows, for that, that the place where, *&c.* contains two acres called *Marſh-acre* in *Downfield*, and two acres called *Stretfield* in *Downfield*, and that he was ſeiſed of them in fee, and took the cows, *viz.* one in *Marſh-acre*, and the other in *Stretfield*, damage feaſant, *&c.* The plaintiff pleads in bar, that the defendant took the two cows in *Downfield*, and traverſes the taking in *Marſh-acre* and *Stretfield* in *Downfield*, And iſſue thereupon, and verdict for the avowant. And now Mr. *Carthew* moved in arreſt of judgment, that the iſſue was immaterial, becauſe the plaintiff has traverſed the taking in the two places, which he underſtood to be a plea of *priſel in auter lieu*, but has not taken any notice of the damage feaſant; ſo that though a verdict is for the avowant, yet he has no title to have return, becauſe the damage feaſant is not found, *&c.* *Sed non allocatur.* For that is admitted by the iſſue of the taking, *viz.* if they were taken there, that they were taken there damage feaſant.

Stedman *verſ.* Lye.

A modus for the tithes of hops, that if the parſon ſend a ſervant to pull ſome of them he ſhall have the tithe of them, is bad. Vide 2 Bl. Com. 30.

MR. *Stephens* moved for a prohibition to be directed to the conſiſtory court of the biſhop of *Worceſter*, to ſtay proceedings in a ſuit there for tithes of hops, upon ſuggeſtion of a *modus* time whereof, *&c.* there uſed, that if the parſon ſend a ſervant, *&c.* to pull *aliquam partem lupularum* he ſhall have the tithes of them, *&c.* Upon which a rule was made, to ſhew cauſe why a prohibition ſhould not be granted. And now Mr. *Banniſter* ſhewed for cauſe againſt the prohibition. 1. The cuſtom is void of uncertainty, for it does not appear how much hops ought to be pulled, *&c.* 2. That it is an ill cuſtom, becauſe (*a*) it is no benefit at all to the parſon, but drives him to more pains than the law requires, to intitle him to that, which by law he ought to

(*a*) Vide Com. Diſtincs. F. 15. 2. Ed. vol. 3. p. 89.

to have in the ſame manner without ſuch pains. Of which opinion was the whole court. And therefore the rule was diſcharged.

STEDMAN v. LYE.

Helliard *verſ.* Jennings.

S. C. Com. 90. 94. 12 Mod. 276. Frem. 509.

UPON an iſſue directed by the court of chancery to be tried in a feigned action, to try whether *Thomas Jennings junr* deviſed the manor of *Earnſey* in *Somerſetſhire* to *William Helliard* the plaintiff, a ſpecial verdict was found; *viz.* That *Thomas Jennings*, the defendant's huſband, was ſeiſed of the ſaid manor in fee, and being ſo ſeiſed had iſſue by the defendant, *Thomas Jennings junior* his only ſon, and two daughters, *Mary* and *Elizabeth*, now living: That *Thomas Jennings*, the father, made his will the twenty-ſeventh of *December* 1679, in theſe words: I deviſe to my ſon *Thomas Jennings*, and his heirs for ever, all that my manor of *Earnſey* which I purchaſed of *H. Wall*; but if it ſhall ſo happen that my ſaid ſon ſhall die without iſſue of his body, or before he ſhall attain the age of twenty-one years, then I deviſe the ſaid manor to be equally divided between my two daughters, *Mary* and *Elizabeth*, and their heirs for ever: That *Thomas Jennings*, the father, died the twenty-ſeventh of *December* 1679, ſeiſed as aforeſaid; that *Thomas Jennings junior* entered into the ſaid manor, and was ſeiſed *prout lex poſtulat*; and being above the age of twenty-one years, he made his will, dated the ſeventh of *April* 1695, by which he deviſed the ſaid manor to the plaintiff *William Helliard* and his heirs; that he ſigned, ſealed and publiſhed that will, in the preſence of *A. B.* and *William Helliard* the plaintiff, and that they ſubſcribed their hands in preſence of the teſtator, *&c.* that *Thomas Jennings junior* was alſo heir to his father; and that he, the eighteenth of *May* 1695, died ſeiſed of the ſaid manor in fee, *&c. et ſi, &c.* And Mr. *Carthew* for the plaintiff argued, that *Thomas Jennings* had all the fee in him, and therefore might well deviſe to the plaintiff. For the word [or] ſhall be conſtrued [and] ſo that the remainder could not veſt before *Thomas Jennings* died without iſſue, and under the age of twenty-one years; and to make other conſtruction, would be to defeat the intent of the deviſor; for he intended, that the iſſue of his ſon ſhould inherit before his own daughters; but if [or] ſhould not be conſtrued [and] then if the ſon ſhould have ſons, *&c.* before he attained to the age of twenty-one years, and then ſhould die before twenty-one years of age, thoſe ſons could not inherit, which would be expreſsly contrary to the deviſor's intent; then the remain-

Under a deviſe to one and his heirs, and if he die without iſſue of his body, remainder over, an eſtate tail only paſſes. R. acc. Cro. El. 525. Cro. Jac. 290. pl. 7. 427. pl. 2. Raym. 452. 3 Lev. 70. Vide Hob. 29. D. acc. poſt. 568. 570. 623.

Under a deviſe to one and his heirs, and if he die without iſſue of his body, or under 21, remainder over; an eſtate tail determinable on the event of his dying under 21. R. cont. Cro. El. 525. Moor, 422. pl. 590.

A perſon benefited by a deviſe is not under the 29 Car. 2. c. 3. ſ. 5. a competent witneſs to atteſt the execution of the will containing ſuch deviſe *(a)*.

(a) In a report of this caſe in Carth. 514. (which is conſidered as the beſt in Bl. 101.) the court is repreſented to have held merely that the incompetency of ſuch perſon affected that benefit only which he was to derive under ſuch deviſe; and ſo lord R. Raymond himſelf ſtates the determination to have been in 1 P. Wms. 557. and in Burr. 424. Lord Mansfield lays it down, that no determination had carried the incapacity beyond this extent. Sed vide Str. 1253. but ſee alſo Bl. 8. 96. Burr. 414. 25 G. 2. c. 6. ſ. 1.

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der limited over will be void. And he cited the case of *Soulle v. Gerrard, Cro. El.* 525. *Moore* 422. *pl.* 590. as a case in point. He cited also many cases, where [or] shall be construed [and], and where [and] shall be construed [or]. 1 *Vent.* 62. *Hall v. Phillips.* 1 *Leon.* 74. *Baldwin v. Cox. Plowd.* 286. *Cro. El.* 362. *Pain v. Mallory.* But against this it was argued by Mr. *Pratt* for the defendant, that *Thomas Jennings junior* had an estate tail determinable upon the contingency of his dying before the age of twenty-one years; for the subsequent clause explains the precedent clause, (*viz.* and if he die without issue of his body) and moulds the precedent general words, which would pass a fee into an estate tail. *Littlet. Rep.* 345. Objection. That [or] shall be expounded [and]. Answer. That cannot be done here, for [or] in its genuine signification is a disjunctive, and shall not be expounded otherwise, unless the plain intent of the testator appears to be so, which does not appear here. 5 *Co.* 111. *A.* makes a feoffment to *B.* or his heirs; *B.* has but an estate for life, because there are no words to convey a greater estate. Besides, that it is probable here, that the devisor intended that [or] should be a disjunctive, to the end that in all events the estate should go over to his daughters, if he died before the age of twenty-one years, intending to prevent the marriage of his son before the said age, which is a good caution for many reasons. But if Mr. *Carthew's* construction be admitted, the whole estate will *not* be disposed, and the devise to the daughters will be void, because it will be an executory devise to commence upon too (*a*) remote a possibility, *viz.* the dying without issue, *&c.* And as to the case of *Soulle v. Gerrard, Cro. El.* 525. *Moore*, 422. *pl.* 590. he said that it would be no authority against him; for there the judges agreed, that the son had an estate tail; and though they held that the devise over, upon the dying within the age of twenty-one years, *&c.* would be void, because the fee was disposed before, (by him) that is not law. And *per Holt* chief justice, there is no necessity to construe [or] as [and] in this case. And the case of *Soulle v. Gerrard, Cro. El.* 525. *Moore*, 422. *pl.* 590. was adjudged to be an estate tail. And it may be it was the father's design to restrain the marriage of his son before the age of twenty-one years. But to that point the court gave no positive opinion. Then Mr. *Carthew* argued, that this will of *Thomas Jennings* was good, notwithstanding the statute of frauds and perjuries, 29 *Car.* 2. *c.* 3. *s.* 5. which requires that such will, by which lands are devised, should be subscribed by three credible witnesses. For (by him) the plaintiff is a man of an indisputable credit. 2. Though he cannot be sworn upon a trial, yet one cannot say but that there were three witnesses to the will; and the will has been well proved by the other two witnesses. 3. There is a difference between a matter which goes to the credit of his testimony,

(*a*) Vide post. 526.

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teſtimony, and a matter which goes in bar of it; the firſt ſort are excluded from being witneſſes by that ſtatute, as a man attainted of treaſon, &c. but where there is only a thing which bars him from being a witneſs, but does not touch his credit, it is otherwiſe. 4. The intent of the act was, to prevent perjuries; but this cannot be within the miſchief of the ſtatute, becauſe the deviſee being a witneſs, could not be ſworn and examined upon it, and therefore out of the miſchief of the ſtatute. 5. That this ſtatute has been taken with a liberal conſtruction; as where the ſtatute requires that the witneſſes ſhall ſubſcribe their names in the preſence of the teſtator, it was held in Sir *George Sheers*'s caſe, *Salk.* 688. *Carth.* 81. 1 *Bro. C. C.* 99. that where Sir *George Sheers* being ſick in bed, ſigned, publiſhed and declared his will, by which he deviſed lands and tenements, in his bed in his bed-chamber, to which an entry was adjoining, and a dining-room or long gallery adjoining to the entry, and a man in the bed, if he was raiſed up, might ſee perſons in the dining-room, and what they did there, the witneſſes ſubſcribed their names in this dining-room; and upon the queſtion, whether this could be called a ſubſcription of the witneſſes in preſence of the teſtator, according to 29 *Car.* 2. *c.* 3. *ſ.* 5. and becauſe there was a poſſibility, that if Sir *George Sheers* had been raiſed up in his bed, he might have ſeen through glaſs doors the witneſſes ſubſcribing their names, it was held a good will to convey the lands therein deviſed. But againſt this it was argued by Mr. *Pratt*, and held by the whole court, that this will was not well executed according to the ſtatute of frauds. For a man who cannot be a witneſs, which is the plaintiff's caſe, cannot be a credible witneſs. And the intent of the act was to prevent frauds as well as perjuries; which intent would be evaded, if the deviſee ſhould be admitted to be a witneſs, who being a party intereſted, might probably be induced to uſe fraud. And Mr. *Pratt* ſaid, that the ſtatute appointed three witneſſes, &c. to the end that it might be done in ſuch ſolemn and notorious manner, that they might ſee that the deviſor did not ſuffer any impoſition, being infirm as well in underſtanding as in body, as all men generally in *extremis* are. And for this reaſon the (*a*) common law would not permit one to deviſe his lands, without a cuſtom. But if perſons who cannot give evidence of their ſubſcriptions, &c. ſhall be admitted to be credible witneſſes, it is to admit ſo many dead letters to be witneſſes, which intirely evades the intention of the act. And for this point the whole court were of opinion, to give judgment for the defendant. But upon the importunity of the plaintiff's counſel to have another argument, *adjournatur* (*b*).

The atteſtation of a will which the teſtator might have ſeen at the time, is an atteſtation in his preſence. R. acc. 1 Bro. C. C. 99.

(*a*) D. acc. 6 Co. 16. b. 2 Bl. Com. 374.

(*b*) But judgment was afterwards given for the defendant. Vide 12 Mod. 277.

Yates

Yates *verſ.* Fettiplace.

In Chancery.

S. C. Chanc. Prec. 140. 2 Vern. 416. 2 Freem. 243. 12 Mod. 276. 2 Eq Abr. Portions. C. pl. 3. 1ſt. Ed. p. 653.

If a portion charged upon real property cannot veſt before the time limited for its payment. R. acc. 2 P. Wms. 276. 2 Vent. 366. 1 Vern. 204. D. acc. 3 P. Wms. 138. 1 Bro. Cha. Caſ. 123. quod vide D. arg. 2 P. Wms 610. A portion charged upon perſonalty may. R. acc. 2 P. Wms. 276. 1 Vern. 204. D. acc. 3 P. Wms. 138.

A Seiſed of lands in fee has iſſue a daughter, and by his will he charges his lands with 5000*l.* for his daughter's portion, to be paid at her age of twenty one years, or day of marriage; and dies; the daughter dies at the age of ſix years; the ſecond huſband of the mother of the daughter takes letters of adminiſtration to the daughter, and to the mother his wife. And the queſtion was, whether he ſhould have the 5000*l.* or whether the 5000*l.* ſhould be ſunk for the benefit of the heir? And my lord chancellor *Somers* decreed, for the benefit of the heir; and it was held by him, that in all caſes where a man charges a ſum certain, to be paid, as here, out of his real eſtate, if the daughter, *&c.* dies before the age of twenty-one years, the money ſhall be ſunk for the benefit of the heir. But if a man deviſes a perſonal legacy, or ſuch a ſum to be paid out of a term for years, as here, and the legatee dies before the age of twenty-one, there the executors or adminiſtrators of the legatee ſhall have the money, *&c.* becauſe it was *debitum in præſenti*, though *ſolvendum in futuro*. *Ex relatione m'ri Peere Williams*

Smith *verſ.* Plaſs. B. R.

A woman may ſue in the ſpiritual court for defamation charging her with whoredom. Vide Com. Prohibition. G. 14. 2d Ed. vol. 4. p. 507. poſt. 637. Theſe words "She was never married, and what is her hopeful ſon," amount to a charge of whoredom.

MR. *Northey* moved for a prohibition to be directed to the conſiſtory court of the biſhop of *London*, to ſtay proceedings upon a libel exhibited there againſt the plaintiff, for having ſpoken theſe words of the defendant. *She was never married, nor never had a huſband, and what is her hopeful ſon?* Mr. *Northey* urged, that theſe words did not amount to the calling the defendant whore; for it is not poſitively alleged that ſhe had a ſon. Upon which a rule was made, that the other ſide ſhould ſhew cauſe, why a prohibition ſhould not be granted, and that all proceedings ſhould ſtay in the mean time. Upon which at the day given, Mr. *Cheſhyre* ſhewed for cauſe, that all perſons who hear theſe words cannot but underſtand, that the defendant had a baſtard, and was a whore. And the court being of the ſame opinion, *Turton* and *Gould* juſtices being only preſent in court, the former rule was diſcharged.

Cremer

Cremer *verſ.* Wicket.

Intr. Paſch. 11 Will. 3. B. R. Rot. 456.

Miſnomer cannot properly be pleaded by attorney. Vide ante, 117.

If it be, the plaintiff may refuſe the plea, or inſiſt upon the warrant of attorney by way of eſtoppel; but he cannot object to it for this cauſe upon demurrer.

IN an action for falſe impriſonment, *&c.* the defendant pleaded *miſnomer* in abatement by attorney. The plaintiff demurred. And Mr. *Northey* took one exception to the plea, that *miſnomer* cannot be pleaded by attorney. *Bro. miſnomer*, 5. 66. *F. N. B.* 27. *a.* 8 *Ed.* 4. 9. *Theloal. dig.* 365. *b.* For having put in a warrant of attorney by the name by which we declare againſt him, he ſhall be eſtopped by his warrant, to plead that he is known by another name. And *Gould* juſtice ſeemed at the beginning to be of that opinion, and cited the caſe of *Briton* and *Graydon* as adjudged accordingly. [See before, 117]. But *Holt* chief juſtice was of opinion, that this was a good cauſe to refuſe the plea, but not to demur. And as to the eſtoppel, he ſaid, that the entry upon the roll was not the warrant of attorney, but only a *memorandum* of it, which entry was introduced in the time of king *James* II. when *Wright* was chief juſtice. Heretofore they were upon a roll by themſelves, and ſo they ought to be now. But the judges ſaid, that they would conſult with their brothers, to the end that this point might be ſettled. And afterwards at another day by the whole court judgment was given, *quod billa caſſetur*. And *Gould* juſtice ſaid, that if the plaintiff would have taken advantage of the eſtoppel by the warrant of attorney, he ought to have replied it, and relied upon it.

Rex *verſ.* Fuller.

Under an authority to hear and determine an offence a man cannot be convicted except an information has been laid againſt him for ſuch offence. D. acc. Burn's Juſtice. Conviction. 14th Ed. vol. I. p. 400.

Such information muſt be ſet forth in the conviction.

An information cannot be ſupported but by evidence of fact prior to the information. S. C. 12 Mod. 303.

I. S. came before the juſtices of peace, *viz.* two, according to the method directed by 12 *Car.* 2. *c.* 23. *ſ.* 31. and gave them information, that the defendant kept two concealed waſh backs, contrary to 8 & 9 *W.* 3. *c.* 19. This information was given the thirtieth of *March* 1699. Upon which the two juſtices iſſued their ſummons to ſummon the defendant to appear before them the third of *April* following. At which day, upon his appearance, and oath being made by a credible witneſs, that the defendant *modo habet et cuſtodit eadem duo privata ſeu concelata vaſa, Anglice* waſh-backs, they adjudged, that he ſhould forfeit 20*l.* for each waſh-back. This conviction having been contrived fraudulently, to avoid conviction by a later act, by which the penalty was increaſed to 100*l.* Mr. attorney general *Trevor* cauſed the conviction to be removed by *certiorari* into the king's bench, and now moved to quaſh it; becauſe the information was given the thirtieth of *March*, and the oath of the witneſs upon the third of *April*, upon which the conviction is grounded, is *quod modo habet, &c.* which muſt be underſtood of the time of the conviction, which is a different

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a different offence from that of which the information was given to the justices; because though he had concealed vessels the third of *April*, it may be that he had not any the thirtieth of *March*, when the information was given; and therefore the evidence on which the conviction was made not being conformable to the information, there is here a conviction without an information. Serjeant *Levinz*, 1. The words of the oath are, *quod modo habet eadem duo, &c.* which proves that he had them at the time of the information. 2. The justices may proceed without complaint or information. 3. If complaint be requisite, they may proceed upon it *instanter*. *Holt* chief justice, 1. The evidence is of a fact subsequent to the information; and though the *eadem* may be evidence that he had them at the time of the information, yet convictions ought to be certain, and not taken upon collection. 2. There ought to be information or complaint. 3. Though a conviction upon an information *instanter* may be good, yet it ought then to be declared to be made so, and not be grounded as here upon an information which is not proved, the evidence being of a fact subsequent to it; but if it had been of a precedent fact, it had been good. The conviction was quashed. *Ex relatione m'ri Jacob.*

Convictions ought to be certain, and not taken up on inference. Vide post. 1272.

Harper *verf.* Davy.

S. C. 12 Mod. 274. Carth. 498.

Upon a new trial the record of nisi prius must enter the pleadings exactly as they were entered on the former record.

THE plea was entered of *Easter* term. The *memorandum* was, that the bill was exhibited in *Hilary* term, and an imparlance to *Easter* term, and then a plea of *Easter* term, and issue joined, and verdict for the plaintiff. And a new trial granted, and the record of *nisi prius* was of an appearance and plea of this present *Michaelmas* term, and verdict for the plaintiff. And Mr. *Northey* moved to set aside the verdict, because it was another issue than that which was tried, being of a different term, and upon a plea of another term. And he relied upon the case of *Dobertin v. Chancellor*, *ante* 329. And *per Holt* chief justice, the verdict here is upon a plea and issue of *Michaelmas* term, which is intirely different from the record upon which the first verdict was obtained, and so not the same issue that was directed to be tried again, and therefore ought to be set aside. For though a new trial was granted, yet it ought to be upon the old plea. And the verdict was set aside. *Ex relatione m'ri Jacob.*

Sir

Sir William Lacon Child *verſ.* Harvey.

S. C. Salk. 48. 12 Mod. 274. Garth. 506.

THE plaintiff ſued a *ſcire facias* upon a recognizance, with a condition to pay money at a day certain; and iſſue was joined, *ſolvit ad diem vel non*; and a verdict at *niſi prius* was for the plaintiff. Upon which Mr. *Northey* moved to ſet aſide the trial, becauſe the *diſtringas* and *jurata* were made returnable *a die ſanctae Trinitatis in tres ſeptimanas niſi Johannes Holt miles capitalis, juſticiarius, &c. viceſimo ſeptimo die Junii prius venerit, &c.* which twenty-ſeventh of *June* was the morrow after *tres Trinitatis*; but the award upon the plea roll, *tres Michaelis*. Upon which Mr. *Montague* moved for leave to amend this miſtake of the clerk; becauſe that in all caſes where there is a record, by which one may amend, and the amendment does not alter the point in iſſue, and there was ſufficient authority for the trial of the iſſue, and the matter of the amendment is but the miſtake of the clerk, the court will give the party grieved leave to amend. Now in this caſe the award upon the roll is right, and the iſſue is the ſame, and the judge of *niſi prius* had ſufficient authority to try the iſſue by *Weſtm.* 2. 13 *Ed.* 1. *ſt.* 1. *c.* 30. which requires only, that a day and place certain be appointed in the country. And alſo it is a plain miſpriſion of the clerk in writing, *tres Trinitatis* for *tres Michaelis*; and therefore within all the rules of amendments. See *Cro. Car.* 595. *Sloper v. Child. Cro. Jac.* 253. *Dyer*, 260. *Hutton*, 81. and *Tite v.* Sir *Robert Bernard*, *Mich.* 8 *Will.* 3. *B. R. ante*, 94. where in ejectment againſt ſeven defendants they all pleaded not guilty, and iſſue was joined; but in tranſcribing the *niſi prius* roll two of the defendants were omitted, and ſo the plea and iſſue which was brought to the aſſiſes was between the plaintiff and five defendants only; and yet it was amended. Sir *Bartholomew Shower* argued to the ſame purpoſe; and that the court would not ſearch in the almanack, but take it as granted that the twenty-ſeventh of *June* preceded the *tres Trinitatis*; or they would permit the plaintiff to enter his verdict, *quod poſtea die et loco infra contentis, &c.* Mr. *Northey* argued *e contra*. That the record of *niſi prius* had been frequently amended by the plea roll, but always with this caution, *viz.* if the judge of *niſi prius* had ſufficient authority to try the ſame cauſe, 8 *Co.* 161. *b. Blackamoor's* caſe. Therefore the roll of *niſi prius* may be amended where the *diſtringas* is right. In this caſe by the words of the *diſtringas* the judge of *niſi prius* had no authority to try the cauſe, unleſs the twenty ſeventh of *June* preceded the *tres Trinitatis*; for at the *tres Trinitatis* the ſheriff ought to have the jury in bank. Alſo there is no day upon which the judge ought to make return of his *poſtea*, the

If the day of niſi prius be after the day mentioned as the day in bank in the diſtringas and jurata, though before the day awarded as the day in bank upon the plea roll, a trial at niſi prius inde will be void. Vide 2 Wilſ. 144. And the court will not after ſuch trial ſuffer an amendment of the diſtringas or jurata.

4 Mod. 364.

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the day of return being paſt before the trial. In the caſe of *Tite v.* Sir *Robert Brnard*, the biſhop of *Worceſter* and others, the *diſtringas* was right. *Holt* chief juſtice. Though the day of the return was miſtaken, yet if the cauſe was tried upon a right day *in pais*, it will be good. But here the day of *niſi prius* being an impoſſible day, and the judges authority confined to that, a trial upon another day will be without authority, and therefore can never be amended. I remember the caſe of one *Pooley*, a long time ago, where in trover and converſion the day of *niſi prius* was *die lunae in menſem Paſchae*, where in truth the *dies lunae* was one day after *menſem Prſchae*, being *Sunday*; and for that reaſon, after a trial had, and verdict, it was ſet aſide. If the *diſtringas* or *jurata* was right, the *niſi prius* roll might be amended, as in the caſe of *Tite* and the biſhop of *Worceſter*; there the *diſtringas* and the *jurata* were between the plaintiff and all ſeven defendants. As to the entry of it, we cannot make it agreeable to the return; for the entry upon the roll, as to the tranſactions of the trial, ought to be a warrant for the *niſi prius* roll. The trial was ſet aſide.

Pooley's caſe.

The Churchwardens of St. Ann's Weſtminſter.

The ſpiritual court may compel the payment of a tax for the repairs of a church. Vide Com. Prohibition. G. 2. 2d Ed. vol. 4. p. 501.

UPON a motion for a prohibition to ſtay a ſuit againſt *J. S.* for not paying a tax impoſed by the churchwardens and other pariſhioners, for building the church of *St. Ann's* in *Weſtminſter*; *per Holt* chief juſtice, a ſuit may be in the ſpiritual court for non-payment of a tax aſſeſſed for repairs of a church, but not for building a church.

But not the payment of a tax for building one.

Hil.

Hilary Term,

11 Will. 3. B. R. 1699.

Sir John Holt, *Chief Juſtice.*
Sir John Turton, *Sir* Henry Gould } *Juſtices.*

The Inhabitants of the Pariſh of Kingſton Bowſey *againſt* thoſe of Beddingham in Suſſex.

S. C. Carth. 516. Sett. & Rem. 277. pl. 315. 12 Mod. 323. but rather incorrect. Salk. 486.

A. A poor man was ſent by order of two juſtices of peace from the pariſh of *St. Morris* to *Kingſton*. *Kingſton* appealed from the ſaid order to the quarter ſeſſions, and it was quaſhed, whereby *A.* was ſent back to *St. Morris*. Afterwards *A.* came into the pariſh of *Beddingham*, which obtained an order to ſend him to *Kingſton*. And a motion was made to quaſh this order, foraſmuch as *Kingſton* had appealed from the order of *St. Morris*, and thereupon it was adjudged, that *A.* was not ſettled at *Kingſton*; and no pariſh can ſend *A.* to *Kingſton*, being upon the ſaid appeal totally diſcharged. *Curia contra.* The pariſh of *Beddingham* was not party to the ſaid appeal, and therefore ſhall not be concluded by it. *Contra*, of the pariſh of *St. Morris*. Another exception was taken, that it is not adjudged, that *A.* was likely to become chargeable to the pariſh; but it is only ſaid, that the juſtices were informed ſo by the overſeers. *Sed non allocatur*: Becauſe there is no need of any ſuch adjudication. And the order was confirmed.

The reverſal of an order of removal upon the merits precludes the pariſh who obtained ſuch order from inſiſting at any future period that the pauper was ſettled in the pariſh to which he was removed. Vide Burn's Juſtice, Poor. Removal. iii. 14th Ed. vol. 3. p. 530. 531. But not any other pariſh. R. acc. Salk. 492. pl. 58.

Vide Burn's Juſtice, Poor. Removal iii. 14th Ed. vol. 3. p. 532, 533. An order of removal need not contain an adjudication of the Juſtices, that the pauper is chargeable, or likely to become ſo. R. cont. Salk. 491. pl. 55. Set. & Rem. 27. pl. 38. 1 Sel. Caſ. 92. pl. 93. The courts cannot take notice what trades are within the 5th Eliz. c. 4. vide Com. Trade. D. 3, 6, 7. 2d Ed. vol. 5. p. 571, 572, 573.

Rex. *verſ.* Paris Slaughter.

S. C. Salk. 611. 12 Mod. 311. Holt, 68.

MR. *Broderick* made a motion to quaſh an indictment found againſt the defendant upon 5 *El. c.* 4. for exerciſing the trade of a felt-maker, not having ſerved his apprenticeſhip for ſeven years, according to the ſtatute: And

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his exception was, that this trade was not a trade within the intent of the act, becauſe it was not a trade uſed at the time of the making of the act. And he cited many caſes, where judgment had been arreſted or reverſed, becauſe the trade mentioned was not within the act: which proves, that the court will take notice which trades are within, and which not. As *Cro. Car.* 499. adjudged, that the trade of a hemp-dreſſer was not within the act, becauſe it did not require ſkill. *Paſch.* 4. *Jac.* 2. adjudged, that a wool-comber was not within the act. 2 *Bulſt.* 188. that an upholſterer is not within the act. And ſince the Revolution, it was adjudged in a caſe, that a pippin-monger is not a trade within the act. But *per Holt*, chief juſtice, the averment in the indictment, that this was a trade at the time of the ſtatute, is ſufficient to ſupport the indictment; ſo that the king's bench will not quaſh it: For whether it was a trade then or not, is matter of fact, and proper to be tried by a jury. And the king's bench cannot take notice, whether it was a trade within the ſtatute or not; for there are ſeveral trades within the general words of the ſtatute, beſides thoſe there mentioned. And as to the caſe of the pippin-monger, that was never determined finally. And he ſaid, that he diſapproved the caſe in 2 *Bulſt.* 186. of the upholſterer. See 1 *Sid.* 367. that an upholſterer is within the ſaid ſtatute. And the motion was denied.

Argent *verſ.* Sir Marmaduke Darrell.

A new trial cannot be granted after a trial at bar, though the verdict was againſt evidence. S. C. Salk. 648. Carth. 507. Holt 702. R. acc. 1 Sid. 58. T. Jon 224. 7. Mod. 37. vide 2 P. Wms. 563. 52 Mod. 93. 128. R. cont. Sty. 462. 466.

THE plaintiff obtained a verdict in ejectment upon a long trial at bar. And now a motion was made on behalf of the defendant, to have a new trial granted, becauſe the verdict was expreſs againſt evidence. And of that opinion was the whole court. But nevertheleſs, after long debate, the court denied to grant a new trial, becauſe the verdict was given upon a trial at bar, which is looked upon as very ſolemn. Then Mr. *Northey* moved, that the entry of the judgment ſhould be ſtayed until the defendant might bring a new ejectment, by reaſon of the ſtock which was upon and in the land. But that was denied alſo.

1 P. Wms. 207. poſt. 1358. Str. 1105. In ejectment, though the jury find for the plaintiff againſt evidence, yet if the court refuſe to grant a new trial, it will not ſtay the entry of the judgment until the defendant can bring a new ejectment.

Cage

Cage *verſ.* Acton.

Intr. Hill. 9 Will. 3. B. R. Rot. 203.

S. C. Salk. 325. Carth. 511. Com. 67. Holt 309. with the arguments of counſel. 12 Mod. 288. pleadings Lill. Ent. 214.

THE plaintiff brought an action of debt for rent againſt the defendant as adminiſtratrix to her huſband, and he declared upon a demiſe *(a)* made to the inteſtate rendering rent, and for rent arrear in the life of the inteſtate this action was brought, &c. The defendant pleads that, the inteſtate in his life-time, in conſideration of a marriage to be ſolemnized between the ſaid inteſtate and the defendant, became bound to the defendant in a bond of 2000*l.* *ſolvendis* to the defendant *cum ad inde requiſitus eſſet*, upon condition, that if the defendant ſhould ſurvive the inteſtate, if then the inteſtate ſhould leave to the defendant 1000*l.* or if his heirs, executors, or adminiſtrators ſhould pay to the defendant 1000*l.* within, *&c.* after the death of the inteſtate, that then the bond ſhould be void; and then the defendant avers, that the marriage afterwards took effect; ſhe avers alſo the death of the inteſtate, and that he had not left her 1000*l.* nor had his heirs paid it to her; and then ſhe ſhews, that ſhe herſelf took out letters of adminiſtration of the goods, *&c.* of the inteſtate, and that *aſſets* to the value of 250*l.* came to her hands; which ſhe retains in part of ſatisfaction of the money due by this bond; and that ſhe hath not *aſſets ultra*, *&c.* The plaintiff demurs. This caſe was argued ſeveral times at the bar by Mr. *Conyers* and Mr. ſerjeant *Levinz* for the plaintiff, and by Mr. *Carthew* and Mr. *Northey* for the defendant. And now the judges pronounced their opinions in ſolemn arguments. And two queſtions were made in this caſe: 1. If debt for rent was not of a higher nature than debt due upon bond; for if it were, then this plea could not be good; becauſe the adminiſtratrix cannot retain the *aſſets* for the debt due by the bond, when there is a debt of a higher nature, *viz.* a debt for rent owing by the inteſtate. 2. Admitting that this retainer is well pleadable in bar in reſpect of the nature of the debts; yet whether there is here any debt due to the defendant upon this bond, in regard that there was an extinguiſhment of it upon the intermarriage or not? And as to the firſt point, the whole court was of opinion, that a debt due by bond, and a debt due for rent, were of an equal nature, and conſequently that this plea in that reſpect was well enough. But *Turton* and *Gould* juſtices did not give their reaſons, why they were of that opinion, becauſe they thought it a clear point; ſave that *Gould* juſtice ſaid, that he knew it twice adjudged ſo in the common pleas. But *Holt* chief juſtice anſwered to the objection made by the counſel at the bar, (*viz.* that debt for

A debt for rent upon a demiſe by deed, and a debt upon a bond are equal in degree. Vide Com. 145. Wentw. Ed. 1763. p. 146. Lovel. 5th Ed. 53. Marriage will not deſtroy any prior contract between the parties, upon which a right of action cannot accrue during the coverture. The marriage of obligor and obligee will not extinguiſh a bond, the condition of which cannot be broken during the coverture. S. C. cit. 1 Bac. Abr. Vide Prec. Chan. 237. 2 Vern. 480.

(*a*) By deed. Salk. 325. Carth. 511. Lill. Ent. 214.

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rent ſounds in the realty, and therefore is of a higher nature than debt due upon bond, and for ſupport of this aſſertion, *Newport v. Godfrey*, 2 *Vent.* 184. 3 *Lev.* 267. 4 *Mod.* 44. was cited) that rent due upon a *parol* demiſe is a debt equal to a debt due upon bond, and that an executor or adminiſtrator may plead a retainer for ſuch rent in bar of an action upon a bond, *&c. et* (*a*) *ſic vice verſa*; and that the caſe in 2 *Vent.* 184. does not impugn this opinion, for there the defendant executor pleaded ſeveral bonds due from the teſtator, in bar of an action for rent upon a *parol* demiſe (for it muſt be intended to be by *parol*, it not being expreſſed to be by deed) and that he retained towards ſatisfaction, *&c.* and the plea was over-ruled. But that proves only, that they are in equal degree; for in the ſaid caſe, it could not be pleaded by the executor, unleſs he had paid them before the action brought, or that judgment was obtained againſt him upon them; and therefore for that reaſon the plea was ill. But he might have pleaded a judgment againſt himſelf upon them, or payment, in bar of the ſaid action; but that does not prove any ſuperiority, but only that a ſpecialty is equal to a debt in the realty. And though in this caſe the debt ariſes, as well in the realty, as by his ſpecialty; yet that will not make any alteration, being a difference only in number, and not in quality. And therefore he was of opinion, notwithſtanding this objection, that the plea was well enough. But as to the ſecond point the court was divided, *viz. Turton* and *Gould* juſtices were of opinion, that this debt was not diſtinguiſhed by the intermarriage, and therefore that the plea was good, and judgment ought to be for the defendant. But *Holt* chief juſtice held, that this debt was extinguiſhed, and therefore that judgment ought to be given for the plaintiff. And *Gould* juſtice argued for the defendant in this manner following. 1. He ſaid, he agreed, that the wife before the marriage might have releaſed this bond by a releaſe of all actions, becauſe ſhe had the right of action in her. 2. That by the intermarriage all contracts for debts due *in praeſenti*, or in *futuro*, or upon contingency, which may become due during the coverture, are extinct. 1. Becauſe the huſband and wife make but one perſon in law. 2. Becauſe the action is ſuſpended. 11 *Hen.* 7. 4. *b. Co. Lit.* 164. *b.* 8 *Co.* 136. *a. Dyer* 140. *Cro. Car.* 373. 3. That if there was an expreſs agreement, that they ſhould not be releaſed by the intermarriage; it would be void, becauſe it would be inconſiſtent with the ſtate of matrimony, the huſband and wife being but one perſon in law, and ſo there is not debtor and debtee, and therefore the debt is extinct in ſuch caſe, notwithſtanding ſuch covenant. 4. He ſaid, that he was at the beginning, when the caſe was firſt argued at the bar, of opinion, that this bond was extinct by the intermarriage. But now after mature conſideration he was of opinion, that it might ſubſiſt by the rules of law; for the law does not love, that rights ſhould

(*a*) R. acc. Com. 145.

An executor in an action againſt heirs may plead payment of a debt of equal degree before the action brought, or judgment obtained againſt him thereon.

By an intermarriage all former contracts between the parties, upon which a right of action might otherwiſe have accrued, during coverture, are extinct, and a covenant that they ſhould not be ſo is void.

ſhould be deſtroyed, but on the contrary for the ſupporting of them invents notions and fictions, as abeyance, &c. *Litt. ſect.* 646. *Co. Litt.* 342. Now in this caſe the expreſs agreement of the parties created a right, and ſuch a right as is not inconſiſtent with the rules of marriage, ſince the bond here ought not to have any effect till after the death of the huſband; and therefore the law will not work a releaſe, eſpecially ſince there are two rules of law, which would be broken by the deſtruction of this agreement. 1. *Modus et conventio vincunt legem.* 2. That the law will not work a wrong. But ſince a ſuſpenſion of rights in perſonal duties does not always work an extinguiſhment, as appears by the caſes hereafter put, he was of opinion that this bond was ſuſpended only during the coverture. As 8 *Co.* 136. *a. Co. Lit.* 264. *b.* the wife executrix of the debtee takes the debtor in marriage; the (*a*) debt is not releaſed, but the right is ſuſpended *pro tempore.* And ſo here, the law preſerves it from extinguiſhment, by interpoſing, and taking it into its cuſtody, for the making of the agreement of the parties effectual. If the obligee make the obligor executor, becauſe it is his own act, it (*b*) is a releaſe of the debt; but (*c*) otherwiſe if adminiſtration was committed. 8 *Co.* 136. *Needham's* caſe. *Cro. Car.* 373. *Dorcheſter v. Webb.* Beſides, that 26 *Hen.* 8. 7. *b.* proves that the law does not abſolutely work an extinguiſhment; for it is held there, that if there be a divorce, the wife ſhall have her goods again; and *Fitzherbert* and *Norwich* put the caſe of a bond by the huſband to the wife before the coverture, and ſaid, that though it was in ſuſpenſe during the coverture, and ſaid, that though it was in ſuſpenſe during the coverture; yet (*d*) after the divorce the wife might ſue him upon it. So here he agreed, that this debt was qualified and remedileſs during the coverture. And (by him) there is no ſolid difference between the caſes of *Clark v. Thompſon*, *Cro. Jac.* 571. and *Smith v. Stafford*, *Hob.* 216. *Hutt.* 17. *Noy* 26. *Hetl.* 12. *Litt. Rep.* 32. of a promiſe made by the huſband to the wife before the coverture, to leave her 100*l.* at his death, and this caſe of a bond, for as *Hobart* there obſerves, it is a promiſe preſently though futurely to be performed, and has a preſent *lien.* And therefore as the promiſe was held to be in ſuſpence, ſo here the debt is ſuſpended during the coverture, for preſerving an honeſt agreement, which otherwiſe would be deſtroyed. For the difference taken in *Noy*, and there ſaid to be agreed by the court, *viz.* that it would be otherwiſe in caſe of a bond, no ſuch matter is reported in *Hobart* or *Hutton*; and therefore he could not ſay, how far the ſaid point of the bond was under their conſideration. It is ſaid in *Hutton*, that the law will not work a releaſe contrary to the intent of the parties; becauſe the marriage, which is the cauſe, will not deſtroy that which itſelf creates; which is the ſame in the caſe of the bond. And in *Lit. Rep.* 32. the ſame with *Hetl.* 12. the promiſe is ſaid to be ſuſpended by the marriage; which he

(*a*) Vide poſt. 520.

(*b*) Agr. Salk. 300. ſed vide Salk. 303.

(*c*) D. acc. Salk. 306.

(*d*) Poſt. 521.

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ne ſaid is done here in the caſe of the bond. And *Hobart* does not ſeem to make any difference between a promiſe and a bond; and he could not believe, that there is any; and therefore he was of opinion, that the plea was good, and that judgment ought to be given for the defendant.

Turton juſtice argued much to the ſame purpoſe. And he agreed, that if this bond had been given for a precedent debt, it had been deſtroyed by the marriage, which had been a releaſe in law. But a releaſe in law will never deſtroy the proviſion that was intended for the wife by the expreſs agreement of the parties. But ſuch releaſes ſhall be taken ſtrictly. And *Hutt* 17, 18. *Plowd.* 184. *Hutt.* 94. *Hob.* 10. *Moor* 853. were cited by him to prove it. And he ſaid, that this deed being in contingency during the coverture, could not be releaſed; for the bond and condition make but one deed; and upon *oyer* of the condition it appears, that if the wife did not ſurvive the huſband, nothing would be due to her; and therefore being a contingency, and only a bare poſſibility, could not be releaſed. As *Hoe*'s caſe, 5 *Co.* 70. *b.* *Cro. Jac.* 171. A man (*a*) cannot releaſe to the bail in the king's bench before judgment againſt the principal. And therefore if it could not be releaſed by a releaſe in fact, no more could it be releaſed by a releaſe in law. And a bond cannot be ſued until the condition is broken, which in this caſe could not be during the coverture; and therefore this debt is qualified. Then he cited the aforeſaid caſes cited by *Gould* juſtice concerning the promiſes, and alſo 2 *Sid.* 58. the roll of which he had ſeen, and which is entered *Mich.* 1657. *Rot.* 629. *ſup. banc. Hoblin v. Lupart*, where the caſe was thus; debt was brought upon a bond by *Hoblin* a ſtranger againſt *Lupart*, of which the condition was, that *Lupart* ſhould perform covenants in certain marriage articles, in which *Lupart* covenanted with his wife before marriage, to leave to her, &c. if ſhe ſhould ſurvive him; and if he ſhould ſurvive her, that he ſhould pay to the executors of his wife 400*l.* *Lupart* pleaded there, covenants performed; *Hoblin* replied, and aſſigned a breach, that he had not paid the 400*l.* &c. and judgment was entered for the plaintiff, as appears upon the record. And this caſe he urged as ſtrong in point, together with the arguments and reaſons therein uſed in 2 *Sid.* 58. And as to the objection, that this was *debitum in praeſenti*, &c. He anſwered, that that was rather ſound than ſubſtance. And he cited *Litt. Rep.* 87. that by a releaſe of all demands a bond with condition to perform covenants ſhall not be releaſed, before the covenants are broken; and yet it is *debitum in praeſenti* as much there as in this caſe. But a releaſe of the covenants would diſcharge the bond. *Dyer* 57. And he cited the words of *Henden* in *Littleton*'s *Reports*, that is not *choſe in action*, but the poſſibility, of a *choſe in action*. And he relied upon the caſe of *Han-*

A contingent debt cannot be releaſed. Vide ante 65, and the caſes there cited, poſt. 519.

A releaſe of all demands does not diſcharge a bond conditioned to perform covenants before the condition is broken. A releaſe of the covenants does.

(a) Note in Hoe's caſe the releaſe was merely of all actions, duties, and demands.

cock v. Field there cited as a caſe in point. [But ſee *Cro. Jac.* 170. 2 *Roll. Abr.* 407. that the ſaid caſe was an action of covenant, and not debt upon a bond with condition to perform covenants, as it is there cited.] And therefore he agreed with *Gould* juſtice, that judgment ought to be given for the defendant.

Holt chief juſtice argued *e contra* for the plaintiff, *viz.* that the bond was extinguiſhed by the intermarriage. And the foundation of his opinion was, becauſe it is an immediate debt due from the ſealing of this bond. *Litt. ſect.* 512. and the reaſon which *Coke* in his comment upon *Littleton* 292. *b.* gives, why a releaſe of all actions before the day of payment will diſcharge it, though no action can be maintained upon it until after the day of payment, is, becauſe it is a *choſe in action*. And then if it is a preſent debt, the queſtion will be, whether the condition will make any alteration. The nature of the condition therefore ought to be conſidered: and the condition here is a ſubſequent condition, and therefore cannot diminiſh, alter, or qualify the debt; but the debt will have the ſame exiſtence that it had before. And in its nature it cannot be a ſubſequent condition, unleſs there be a precedent debt, to which it was annexed. And the difference is put in 5 *Co.* 70. *b. Hoe's* caſe, as to the matter of the releaſe, between a duty certain with a condition ſubſequent, and a duty uncertain to be reduced to a certainty upon a condition precedent; the firſt is releaſeable before the day, the ſecond not. And to ſay here, that this is not a preſent debt, is expreſsly contrary to the words of the bond, *viz.* that the obligor binds himſelf in 200*l.* to be paid when he ſhould be required. The condition goes in defeaſance, but does not ſuſpend the debt, for that would make the condition repugnant. And if the breach of the condition were to raiſe the debt, it ought always to be ſhewn in the declaration, which is againſt conſtant experience; and yet it ought neceſſarily to have been ſhewn, if it raiſed the debt, as they always do in caſe of a condition precedent. And as to the objection, that the defendant might have *oyer* of the condition, and then it becomes part of the declaration. He anſwered, that that did not compel the plaintiff, to ſhew a breach of the condition; which nevertheleſs ought to be done, if the breach of the condition was neceſſary to raiſe the debt. But the reaſon why there is *oyer* of the condition is, becauſe it is part of the ſame deed; but that does not drive the plaintiff to alter his declaration. If the defendant ſays nothing, nor demurs; the court muſt give judgment upon the bond, without having any regard to the condition: but if it appears upon the whole matter, that the condition is not broken, the court cannot give judgment for the plaintiff. Then ſince it is an immediate debt, by the intermarriage it is diſcharged. 1. Becauſe the huſband can-

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not be indebted to his wife, for they are but one perſon in law. 2. The huſband might pay the money due upon the bond without having reſpect to the condition, and that would diſcharge the bond. 11 *Hen.* 4. 43. which ſince he cannot do to his wife, ſuch payment being impertinent, as if the right-hand ſhould pay to the left; for this reaſon it is releaſed. 3. The intermarriage is an actual payment, becauſe the huſband is intituled to receive the money. And when the perſon who ought to pay the money, is the ſame with the perſon who ought to receive it; it is in law a payment. Suppoſe a ſtranger, who was bound to the wife *dum ſola*, would pay the money; he ought to pay it to the huſband: then if the huſband be debtor to the wife *dum ſola*, and would pay, *&c.* after marriage he muſt pay himſelf. If a ſtranger had been bound to the wife in a bond with the ſame condition as here, a releaſe by the huſband would have diſcharged the bond. *Co. Lit.* 264. *b. Prowd.* 184. *Woodward v. Darcy.* The law books do not make any diſtinction between bonds, in which there is a precedent duty, and others; *et ubi lex non diſtinguit, nec judices diſtinguere debent.* And therefore he held, that the bond was diſcharged. If this had been a ſingle bill, ſtatute, or recognizance, with a defeaſance of the ſame purport as the condition of this bond (he ſaid) that without doubt the intermarriage would have releaſed them: yet the ſtatute, *&c.* would have been as much qualified by the defeaſance, as the bond here by the condition; and the agreement of the parties had been the ſame in both. The only difference is, that in the caſe of the bond the defeaſance is contained in the ſame deed, and therefore the deed being in court one may have *oyer* of the condition; in the other caſe the defeaſance is in the hands of the defendant, being in another deed, and therefore there cannot be *oyer* of it; but yet in both caſes the defendant ought to plead the condition or defeaſance; and therefore in both caſes the law is the ſame.

Marriage does not extinguiſh debts due in auter droit from the one party to the other. D. acc. Salk. 306.

Objection. If the executor of the obligee marries the obligor, the debt is not extinguiſhed.

Anſwer. That depends upon different reaſons. For 1. The difference of the rights there preſerves the debt from extinguiſhment. As where a man has a term as executor, and purchaſes the inheritance, the term is not extinguiſhed. *Co. Litt.* 264. *b.* 338. *b.* 2. If that ſhould be an extinguiſhment, it would be a wrong to creditors, and amount to a *devaſtavit*, which an act in law will not do. 8 *Co.* 136. *a.* And things ſhall be extinguiſhed between the parties, which yet ſhall remain, and have exiſtence, as to ſtrangers. As if a tenant for life grants a rent-charge, and then ſurrenders to the reverſioner; or if a man, who has a rent in fee, acknow-

acknowledges a ſtatute, and then releaſes to the terre-tenant; the eſtate for life in the one caſe will continue as to the grantee of the rent, and the rent in the other caſe as to the conuſee. But if the huſband pays debts of the teſtator with his own money, amounting to the ſum in which he was bound to the teſtator; that will amount to a releaſe of the debt, becauſe it is an honeſt payment, and prevention of a wrong.

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If a debtor of a man deceaſed marries his perſonal repreſentative, and pays a debt of the deceaſed out of his own money, ſuch payments ſhall go towards the diſcharge of his own debt. Semb. acc. Salk. 306.

Objection. The intermarriage will not deſtroy that which itſelf ſupports.

Anſwer. That the bond is not ſupported by the marriage, but by its own efficacy. The bond was made in conſideration of an intended marriage, but it had its full force and effect inſtantly upon the ſealing and delivery.

Objection. That the law will not do wrong.

Anſwer. That this was the act of the wife herſelf, and therefore ſhe is not injured. And this is no more, than that ſhe did not well underſtand what ſhe was going to do, and there is no third perſon in the caſe.

Objection. 26 *H.* 8. 7. *b.* That a wife after a divorce ſhall have her goods again, and the bond would revive.

On a divorce a vinculo the feme ſhall have again all her property, and all her rights extinguiſhed by the marriage ſhall revive as againſt her huſband, but not as againſt a ſtranger.

Anſwer. He agreed the ſaid caſe; becauſe the divorce, being *a vinculo matrimonii* by reaſon of ſome prior impediment, as pre-contract, &c. makes them never huſband and wife *ab initio*: But if the huſband had made a feoffment in fee of the lands of his wife, and then the divorce had been, that would have been a diſcontinuance as well as if the huſband had died; becauſe there the intereſt of a third perſon would have been concerned; but between the parties themſelves it will have relation to deſtroy the huſband's title to the goods. And it proves no more than the common rule, *viz.* that relation will make a nullity between the parties themſelves, but not among ſtrangers.

And as to the objection made by Mr. juſtice *Turton*, that there is nothing here to be releaſed, becauſe it is but a contingency, and a bare poſſibility; he anſwered, that that avails nothing, becauſe a releaſe of the condition will not releaſe the bond, but they muſt releaſe the bond itſelf.

A releaſe of the condition of a bond will not releaſe the bond.

He agreed alſo the caſes of *Smith v. Stafford*, and *Clark v. Thompſon*, *ante* 517. that the intermarriage would not extinguiſh ſuch a promiſe, though *Hobart* is of a contrary opinion. But there is a difference between the ſaid caſes and this preſent caſe, becauſe the promiſe muſt raiſe a future

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duty upon a contingency; ſo that there is nothing due there, nor ever was, and it is a queſtion whether there ever will be. In an action upon the promiſe all the ſpecial matter muſt be ſhewn in the declaration, but otherwiſe in the caſe of a bond. Pleading, though it does not make the law, yet is good evidence of the law, becauſe it is made conformable to it. If therefore in the one caſe there is no need to ſhew a breach, and in the other one muſt ſhew it; that proves, that in the caſe of the bond the duty ariſes immediately, and is defeaſanced by the condition; but in the other caſe, it ariſes upon the performance of the condition, which ought to precede it; and conſequently the caſes are as different as a condition precedent and ſubſequent.

He ſaid alſo, that there is no difference between the caſe of *Lupart v. Hoblin*, which is covenant, 2 *Sid.* 58. and the caſe of a promiſe. For in covenant one muſt ſhew the ſpecial matter, and aſſign a breach, as one ought in that of a promiſe. And a releaſe of all demands will not diſcharge the covenant before it be broken; as it will not diſcharge the promiſe before the time of performance; but it will diſcharge a bond before the condition broken: but the lien of the bond, if it was upon condition precedent, would be of the ſame nature. If a ſtranger promiſed to a woman, that in conſideration that ſhe would marry ſuch a man, he would pay her ſo much if ſhe ſurvive her huſband; the huſband could not have releaſed this promiſe, becauſe nothing could become due during the coverture; but when the wife has a duty, which may become due during the coverture, the huſband may diſcharge that, according to *Lampet's* caſe, 10 *Co.* 46.

The reaſon given in *Cro. Jac.* 571. *Clark v. Thompſon*, why the marriage of the promiſſor with the promiſſee is no diſcharge of the promiſe, *viz.* becauſe the huſband could not releaſe it, ought to be underſtood of a promiſe made by a ſtranger; and thoſe words ought to be added, as appears by the reaſon of it; but in caſe of ſuch a bond the huſband might releaſe it. In *Yelv.* 156. *Belcher v. Hudſon*, it is inſinuated, as if the huſband might have releaſed ſuch a promiſe made by a third perſon; but the book there is nonſenſe; and in the ſame caſe, *Cro. Jac.* 222. the only queſtion is there, whether it be releaſed by a releaſe of all demands, and no conſideration had of the caſe upon the point of the marriage.

Noy, 26. in his report of the caſe of *Smith and Stafford*, reports that it was ſaid by *Warburton*, that it would be otherwiſe in the caſe of a bond, and that the whole court agreed it; and nevertheleſs they reſolved otherwiſe in the caſe of a promiſe; which proves, that it muſt neceſſarily be, that they grounded themſelves upon the difference between a bond and a promiſe, or otherwiſe their reſolution will be contradictory. And one muſt conſider the whole caſe, and not diſallow the diſtinction, and agree the reſolution; for

that

that would be to agree the concluſion, and deny the premiſſes.

CAGE v. ACTON.

Objection. The intent and agreement of the parties.

Anſwer. That the intent of the parties cannot alter the rules of the law, and make an immediate preſent *lien* not to have any efficacy.

Beſides that, he ſaid, in ſuch a caſe as here the chancery will not give relief, as appears in 1 *Cha. Caſ.* 21, *Lady Darcy* and *Chute*. Much leſs ought the king's bench upon equitable conſiderations to give judgment againſt the rules of law. And therefore for theſe reaſons he was of opinion, that judgment ought to be given for the plaintiff. But judgment was given for the defendant by the other two judges. Afterwards error was brought upon this judgment *(a)*

(*a*) But the plaintiff in error perceiving the court above inclined to affirm the judgment, did not proceed. Carth. 513.

Badger *verſ.* Lloyd.

S. C. Com. 62.

Intr. Trin. 9 Will. 3. B. R. Rot. 374. Salop.

EJECTMENT. Upon a ſpecial verdict the caſe was thus. *John Lloyd ſenior*, ſeiſed of the lands in queſtion in fee, conveyed them by leaſe and releaſe, to the uſe of himſelf for ninety-nine years, if he ſhould ſo long live, remainder to *John* his ſon for ninety-nine years, if he ſhould ſo long live, remainder to *Elizabeth* wife of *John* the ſon for her life, remainder to truſtees and their heirs during the lives of the two *Johns*, for preſerving the contingent remainders, remainder to the firſt, *&c.* ſons of *John* the younger in tail male (*a*), remainder to *John* the elder in tail male, remainder to *John* the elder in fee. *John* the elder had iſſue *John* the younger, *Thomas*, *Paul*, and *Peter*. *John* the elder made his will, and reciting the ſettlement aforeſaid, deviſed the ſaid lands in queſtion, after the death of *John* the younger without iſſue male, to *Thomas*, and after the death of *Thomas* without iſſue male, to *Paul*; and if *Paul* ſhould die without iſſue male, and none of his brothers living, then to *Peter* and his heirs for ever. And in the will there are theſe words, *viz.* "Laſtly, my will and meaning "is, that all my eſtates in lands whatſoever ſhall come and "deſcend unto my name and poſterity, as is before ſpecified "and not to ſtrangers; and whichſoever of my ſons ſhall "ſurvive, and live longer than all the reſt of his brothers,

A remainder limited to take effect *if and when* former limitations ceaſe is veſted, not contingent. S. C. Salk. 232. R. acc. Moor. 486. 2d. Reſ. Cro. Jac. 415. 3d. Reſ. Vide 3 Co. 19. a. Raym. 427. Gilb. Eq. Rep. 36. Burr. 228. Fearne; 3d. Ed. 167 to 172.

As a remainder if a remainder-man in tail ſhall die without iſſue, and none of ſeveral prior remainder-men in tail be living. S. C. Salk. 232.

A deviſe by the reverſioner to take effect on the determination of outſtanding eſtates is an immediate veſted deviſe of the reverſion. S. C. Salk. 232. R. acc. Cro. El. 323. pl. 14. 10 Co. 107. a. Acc. Fearne, 3d Ed. 324. 327. agr. 6 Co. 36. b. D. acc. 1 Saund. 151. As a deviſe after the death of tenant in tail without iſſue. S. C. Salk. 232. cit. Fearne, 3d. Ed. 327. A limitation by the reverſioner to a remainder-man of an eſtate merely co-extenſive with his remainder is good. S. C. Salk. 232. Acc. 5 Co. 51, a. A ſimilar limitation by a remainder-man not. S. C. Salk. 232. R. acc. 5 Co. 51. a. 1 Saund. 149. A recovery ſuffered to the uſe of a will ſhall enure to thoſe uſes, if they appear good upon the will, though on account of foreign circumſtances they may be void.

(*a*) In Com. 62. the ſettlement is repreſented to have contained a remainder to John the younger in tail male after the limitation in ſtrict ſettlement; and Holt C. J. in ſtating the caſe, poſt. 524. takes notice of ſuch a remainder.

"then

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" then he to poſſeſs and enjoy all my eſtate to him and his " heirs for ever; yet if it ſhall ſo happen (as I truſt in God " it will not) that none of my ſons ſhall have iſſue male, but " daughters, then I will that their daughters ſhall inherit " my eſtate among them." *John* the elder died. *John* the younger ſuffered a common recovery, to the uſe of himſelf for life, remainder to his wife for life, remainder to the heirs males of their two bodies, remainder to the uſe of the will of *John* the elder, &c. And after ſeveral arguments at bar, *Holt* chief juſtice delivered the opinion of the other two judges, and his own, (*Rokeby* juſtice dying laſt term). The queſtion is, whether the remainder limited to *Peter* be a remainder contingent or veſted. If it be contingent, then the leſſor of the plaintiff has no title; if it be veſted, then he has a title. And we are all of opinion for the plaintiff. The caſe is no more than this: *John* the elder ſettles the lands in queſtion to the uſe of himſelf for life, remainder to *John* the younger for his life, remainder to the firſt, &c. ſons of *John* the younger in tail male, *remainder to* John *the younger in tail male*, remainder to *John* the elder in tail male, remainder to *John* the elder in fee; then the elder *John* by his will deviſes the lands, after the death of *John* the younger without iſſue, to *Thomas* in tail male, remainder to *Paul* in tail male; and if *Paul* dies without iſſue male, none of his other brothers living, then to *Peter* and his heirs. It is urged, that theſe words [and none of his other brothers living] put the remainder in contingency. But we are of the contrary opinion, *viz.* that it is veſted. For if theſe words had been omitted, it had reſembled all other limitations of remainders, and the words [none of his other brothers living] do not by any means qualify the remainder, but amount to no more than what was ſaid before; for remainders being limited to *Thomas* and *Paul* before, precedent to this limitation to *Peter*, it could never take effect ſo long as *Thomas* or *Paul* lived; and therefore theſe words make no addition to the will, and therefore cannot make a contingency; for ſo long as *John*, *Thomas*, or *Paul* lived, the remainder to *Peter* could not take effect; and if theſe words ſhould be taken ſo ſtrong, as to make a contingent remainder, they would deſtroy the eſtate tail to *Thomas*, which is expreſsly given by the will; for if *Thomas* had iſſue a ſon and died, and then *John* died without iſſue, and then *Paul* died without iſſue, this contingent remainder would veſt in *Peter*, and defeat the iſſue of *Thomas*, though an eſtate tail was expreſsly given to *Thomas* by the will; which is the expreſs caſe of *Spalding v. Spalding*, *Mich.* 5 *Car.* 1. *Rot.* 609. *Cro. Car.* 185. where lands were deviſed to *B.* in tail, after the death of *A.* and if *B.* died in the life of *A.* then *C.* ſhould be his heir; *B.* had iſſue a ſon and died, living *A.* and it was adjudged, that this ſhould be expounded, if *B.* died without iſſue living *A.* and not by way of contingent

contingent remainder, becauſe then it would abridge the former expreſs limitation; but that it was a remainder veſted to take effect upon the death of *B.* without iſſue. And *Webb. v. Herring*, *H.* 13 *Jac.* 1. *Rot.* 600. *vel* 544. *Cro. Jac.* 415. *pl.* 5. deviſe to his ſon after the death of his wife; and if his three daughters, or any of them, ſhould ſurvive their mother, and brother and his heirs, that then they ſhould have it for their lives; two of the daughters died in the life of their brother: adjudged, that this was not a contingent limitation, but only a direction of the time when it ſhould commence. So here, theſe words are explanatory, when the remainder to *Peter ſhall* take effect in poſſeſſion; and not reſtrictive, that it ſhall not take effect, unleſs that happens. Then if one conſiders the other words of the will [Laſtly, *&c.*] which are in effect, that his deſire was, that his eſtate ſhould deſcend to his name and poſterity, and not to ſtrangers, and that the ſurvivor of his ſons ſhould have all; and that if his ſons left only daughters, that then they ſhould take equally: Now if this ſhould be conſtrued a contingent remainder, it would defeat the teſtator's deſign, and let in the daughters before the ſons; for if *Paul* died without iſſue before *Thomas*, and *Peter* died leaving iſſue a ſon and a daughter, and *Thomas* died without iſſue, the daughter would take this eſtate before the ſon, and defeat the will of the teſtator, that it ſhould deſcend to his name; and ſo of collateral kindred. ["*Quaere* of this laſt, if it be not miſtaken by "the reporter?"]

Objection by ſerjeant *Wright*, in his argument, that theſe eſtates deviſed by the will are executory deviſes and void; for *John* has an eſtate tail by the limitations in the ſettlement, and theſe deviſes ought not to take effect but upon his death without iſſue, and ſo the deviſes are executory and void. Anſwer: That indeed theſe deviſes would be void, if there was no more in the caſe. It is *Pell* and *Brown*'s caſe, *Cro. Jac.* 590. But as the caſe is here, a man ſeiſed of a reverſion, expectant upon an eſtate tail, deviſes it, after the death of the tenant in tail without iſſue, to another in tail; this is not an executory, but an immediate deviſe; and the words [from and after] are only a declaration when it ſhall take effect in poſſeſſion. And it reſembles the caſe of *Paſmere v. Prowſe*, 10 *Co.* 107. *a.* where a man makes a leaſe for years, if the leſſee ſhall ſo long live, and afterwards grants the reverſion to another, *habendum* to the grantee for life, *cum per mortem aut forisfacturam* of the leſſee, *aut aliter acciderit*; and it was reſolved, that the reverſion paſſed immediately; and the *cum per mortem*, *&c.* is as much as to ſay, to take effect in poſſeſſion *cum per mortem*, *&c.* The ſame point adjudged *Cro. Eliz.* 323. *pl.* 14. which is confirmed, 1 *Saund.* 151, 152. So here, though the eſtates deviſed are after the death of *John* without iſſue, yet the reverſions paſs immediately, only they will not take effect in poſſeſſion till then;

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An executory deviſe cannot be limited to take effect upon the death of a perſon without iſſue. R. acc. 1 Vez. 89. caſe 53. acc. 1 Eq. Abr. Deviſe. E. pl. 1 Ed. 1756. p. 186. Fearne 3d. Ed. 314. D. acc. Cro. Jac. 416. 1. Roll. R. 399 Forr. 1. 2. ante 506. poſt. 569 vide Dougl. 470

but nevertheleſs preſent eſtates in reverſion do paſs. In fact, if *John* had not had any eſtate tail in the land, but the deviſes had been after the death of a ſtranger without iſſue, theſe had been executory deviſes, and void by reaſon of the remoteneſs of the poſſibility; but here they are limited after the determination of the particular eſtate.

Objection. That the eſtate tail in *John* the elder will deſtroy this deviſe. As if *A.* was tenant for life, remainder to *B.* his ſon in tail male, remainder to *A.* and the heirs male of his body, remainder to *A.* in fee, *A.* has iſſue another ſon *C.* and deviſes his remainder, after the death of *B.* without iſſue, to *C.* his ſecond ſon in tail male. It was objected, that this deviſe could never take effect, and therefore that it was ill, becauſe the eſtate tail in the father will deſcend in the ſame order, and interpoſe between the eſtate deviſed by the will, and the deviſees reſpectively will take the old intail be deſcent, which will exclude the new eſtates limited by the will; and the deviſe of a remainder, which can never take effect in poſſeſſion, is void. So here, becauſe the tail deviſed by the will cannot by any poſſibility take effect in any of the ſons, becauſe they ought to take by the old intail as heirs males to *John* the father, and the deviſe gives no more, nor otherwiſe, than they take by the intail, and therefore it is void. The which is apparent by the compariſon of the deſcents; for the eſtate tail deviſed by the will expires *aequis paſſibus* with the eſtate tail in *John* the elder; and therefore if the fee in *John* the elder, out of which this deviſe takes effect, was a remainder, it would be void. But here in this caſe it is a reverſion; and though ſuch a bequeſt of a remainder would be ill, yet it will be good of a reverſion, though it could never by any poſſibility take effect in poſſeſſion. And this is the expreſs difference in *Cholmley's* caſe, 2 *Co.* 51. *a.* And the reaſon is, becauſe tenant in tail holds of him in the reverſion, and he of the chief lord. If a man makes a feoffment in fee, to the uſe of himſelf for life, remainder to his firſt ſon, *&c.* in tail, remainder to himſelf and the heirs males of his body, remainder to himſelf and his heirs, he has but a reverſion; and though the tail deviſed out of it can never take effect in poſſeſſion, yet it is a good deviſe of ſuch eſtate in reverſion; for *John* the brother will hold of *Thomas*, and *Thomas* of the chief lord, and the lord ſhall avow upon *Thomas modo et forma praedictis*; ſo that it creates a ſeignory and tenancy, though it can never take effect in poſſeſſion, and this is a ſound diverſity. But then ſuppoſing that this fee in *John* the father had been a remainder, and ſo the deviſes in the will void, yet the leſſor of the plaintiff will have a good title; for the words of the will ſufficiently explain the intent of the teſtator, and the limitations will be good; but by matter *dehors*, *viz.* that the deviſor was tenant in tail, and has not given any larger eſtate, ſo that when the common recovery comes and docks the eſtate tail of *John* the

the elder, and ſo removes the impediment, the eſtates limited in the will being good in point of limitation, the *remotio impedimenti* revives the will, and the title of the leſſor of the plaintiff. And therefore judgment was given for the plaintiff. *Ex relatione m'ri Jacob.* Afterwards, upon error brought in the exchequer-chamber, this judgment was affirmed. *Ex relatione m'ri Willelmi Tully.* And afterwards a writ of error was brought upon theſe two judgments in parliament; and *Eaſter* vacation, 13 *Will.* 3. the judgment was affirmed there. *Ex relatione m'ri baronis Bury.*

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Rex *verſ.* Knight and Burton.

S. C. Salk. 375.

It is a crime in a receiver of taxes to pay the crown what he has received in ſpecie by bills iſſued by the crown to ſupply a deficiency of caſh, and made current with ſuch receiver. On an information for ſuch crime it ought to appear that the party was receiver at the time the ſpecie was paid him. S. C. 3 Salk. 186. If the perſon paying ſuch a bill to the receiver is to write his name thereon, it is criminal in the receiver to forge on any ſuch bill the name of any perſon from whom he has received ſpecie for the purpoſe of paying it to the crown inſtead of ſuch ſpecie. An information for ſuch forgery muſt ſtate unequivocally that the name of

HOLT chief juſtice delivered the opinion of the court in this manner, after motions had been ſeveral times made in arreſt of judgment, after verdict for the king. The informations are very like the one to the other, and therefore I ſhall join them together. This againſt Mr. *Knight* is an information by the attorney-general, ſhewing, *quod cum quinto Junii octavo Will.* 3. three or more of the commiſſioners of the treaſury cauſed divers bills to be iſſued at the receipt of the exchequer, according to the form of the ſtatute in the ſaid caſe made and provided; Mr. *Knight nuper receptor generalis cuſtumarum exiſtens*, and not ignorant of the premiſſes, fraudulently and with deſign to make great gains to himſelf, falſely indorſed, or (*a*) cauſed to be indorſed twenty of the ſaid bills, *quaſi receptae eſſent pro cuſtumis* and the ſame day and year paid them into the receipt of the exchequer, as if they had been truly indorſed. There is a difference in that againſt *Burton*, *viz.* that he is ſhewn to be *nnper receptor exciſae*, and the falſe indorſement to be as received for cuſtoms. Upon not guilty pleaded by the two defendants to theſe two informations, Mr. *Burton* was found guilty of the whole, and Mr. *Knight* was found guilty as to the falſe indorſement, and not guilty as to the payment of them in. And we are of opinion, that judgment ought to be arreſted. I will ſpeak to them both together, ſince the one very much reſembles the other. But the ſubject being unuſual, I fear that I ſhall not make myſelf intelligible: but I will do my endeavour, that the reaſons of our judgment may be apprehended. And before I proceed to the particular objections, I will conſider what particular facts with relation to theſe exchequer-bills, are criminal. 1. It is a crime in a receiver, who has the king's money in his hands, to pay the king in (*b*) exchequer-bills inſtead of money. 2. If he writes the name of any perſon upon the back of the bill, intimating (*c*) that it was paid into his hands, where

ſuch perſon was written on ſuch bill. An information ſtating merely that the receiver indorſed the bill as if it had been received by him for the tax is inſufficient, even after verdict. S. C. 3 Salk. 186. Forgery is criminal if any perſon beſides the forger can be prejudiced thereby, otherwiſe it is not. Vide 1 Hawk. c. 70. S. 4. poſt. 1464. 1466. 7 Mod. 151.

(*a*) Vide Salk. 371. pl. 8. 5 Mod 137. Dougl 174. (*b*) Vide 8 & 9 W. 3. c. 6. & c. 20. ſ. 63. (*c*) Vide 8 & 9 W. 3, c. 20. ſ. 65.

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it was not, it is a great crime. 3. If by agreement between the receiver, &c. and the teller, the receiver pay the king in bills, where he ought to pay him in money, it is alſo a great crime. As to the firſt, though they are payable as money in many caſes, yet (a) they are not ſo in all: as they are not payable as money by collectors, unleſs that they were received by them for the aids of which they are collectors; ſo if they are paid to a receiver for one aid, they are not money to diſcharge the receiver of another aid. As if bills be paid to the receiver of the cuſtoms, they ſhall not be money to diſcharge the receiver of exciſe, but only to diſcharge the cuſtoms for which they were paid. This appears by the firſt act, 8 & 9 *W.* 3. c. 6. and by the ſecond act, 8 & 9 *W.* 3. *c.* 120. But it is objected, upon one clauſe in the ſecond act, *c.* 63. *fol.* 384, 385. that a receiver may buy bills, and pay them to the king inſtead of ready money of the king's in the hands of the receiver, which he may detain; and they inſiſt upon the general words at the end of the ſaid clauſe. But that can never be the intent of the ſaid act; but the words ought to be underſtood reſpectively, otherwiſe it would make a confuſion in the king's revenues. For according to ſuch ſtrict conſtruction, if a man ſhould owe money to the exciſe-office, he might pay it in exchequer-bills to the receiver of the cuſtoms. And alſo it is againſt the authority of the act of parliament to keep the king's money, and pay him in bills: for if a receiver retains the king's money, and pays him in exchequer-bills, he fruſtrates the deſign of theſe bills, making the want of money greater, inſtead of promoting the circulation of it; and that is an embezzlement of the king's money.

(a) Vide 8 & 9 W. 3. c. 20. ſ. 63.

As to the ſecond, that (b) it is a falſity, and though no advantage be made of it, yet it is an evil thing, becauſe advantage may be made of it. As if a man forge a (c) falſe deed, in which the eſtate of *J. S.* is mentioned to be conveyed to *J. N.* though *J. S.* be not damnified by it, yet it is *crimen falſi*, and puniſhable by reaſon of the tendency that it had to have defrauded him.

(b) Vide 1 Hawk. c. 70. ſ. 11.

(c) Vide 1 Hawk. c. 70. S. 1. 10. 11.

As to the third, it is a fraud in the receiver, to pay in bills, when he ought to pay in money; and in the teller, to receive it, when he ought to receive money; and therefore they cannot be received, without the mark appointed by the act of parliament firſt impreſſed upon them.

But here there is none of theſe facts charged upon either of theſe defendants in theſe informations. The one is not ſaid to be caſhier, nor the other receiver, at the time when theſe bills were paid into the exchequer; but only *nuper* caſhier, and *nuper receptor*; nor is it ſaid, that the name of any one was put upon theſe bills, nor any combination laid between theſe defendants and the tellers.

2. But

2. But to be more particular. Theſe informations are, that the one being late receiver of the cuſtoms, and the other of the exciſe, falſely indorſed divers exchequer bills, as if they had been received for cuſtoms: and ſecondly, that they paid them into the exchequer, as if they had been truly indorſed. *Burton* is found guilty of both; *Knight* only of the falſe indorſement.

1. To conſider the falſe indorſement. I ſuppoſe that the intent was, to charge them with a fraud. But it does not appear that it could be any fraud. If it be it muſt ſignify the ſetting the mark appointed by the act of parliament, 8 & 9 *W.* 3. *c.* 20. *ſ.* 65. but a falſe indorſement does not ſignify that. The mark appointed is, the writing of the name of the party who paid it in; but a falſe indorſement does not import that: and then if it be ſo, there is no fraud in making a falſe indorſement, becauſe it is not the mark appointed by the act. An indorſement is only the writing upon the back of any thing which was complete before; but does not imply a ſigning. As in caſe of a bond, as the old practice was to make them in parchment, and to write the condition upon the back; when the party came and prayed *oyer* of it, *petit auditum ſcripti obligatorii praedicti, petit etiam auditum indorſamenti*; and yet the name of the party is not ſet to the condition: and therefore the word indorſement may be true, though no perſon put any name upon the bill: and then it might be falſely indorſed, and yet not have the ſign required by law. In fact, if the name of any body had been ſet to the bill, that had been material.

Objection: Since it is laid as if received for cuſtoms, that makes it apparent what the indorſement was. Anſwer: That the [as if], no body can underſtand what it means.

Objection: It is a falſity, and therefore puniſhable. Anſwer: If it does not tend to the deceipt of any one, it is no crime. And it could not deceive any one here, becauſe it is not the ſign. I cannot imagine why this word indorſement was uſed, ſince there is not any ſuch word in the act of parliament. One cannot make it good, but by argument or inference; and argumentative informations are ill, for that very reaſon, becauſe all charges ought to be ſhewn preciſely in pleading. It ought to have been laid, that the defendants ſet the name of ſuch a one to the bill; *ubi revera* no ſuch perſon ſet his name to the bill; or *ubi revera* there (*a*) was not any ſuch perſon. If it had been ſo, the information had been good, and, had charged the defendants with a manifeſt cheat.

Argumentative informations are ill. Acc. 6 Mod. 289. 4 Co. 42. b. Cro. Jac. 19. Vide ante, 2.

(*a*) Vide Leach. 83. 183. 216.

Suppoſe that the indorſement had been, as if they had been received for cuſtoms, yet that would not have been

Rex v. Knight.

good, to lay it with an *ac ſi*. As in caſe of an information or indictment for forgery, it would not be good to ſay, that the defendant forged a falſe deed, *quaſi* a conveyance of ſuch lands. So in perjury, that which was ſworn ought to be ſhewn, and not with a *quaſi*. So here, it ought to have been laid, that the defendant made a falſe indorſement *continens*, &c. according to the matter of fact, with which he was to be charged.

But now if we ſhould be indulgent, and contrary to all the the rules of law, intend that this falſe indorſement was the ſetting the name of ſome body to the bill; let us conſider whether this would make it good. If the defendants had been receivers, or had had money of the king's in their hands when they falſely indorſed theſe bills, how far that would have made them criminal; but that is not laid here. So that the caſe is no more, than that a private perſon, no officer, nor having any money of the king's in his hands, makes a falſe indorſement upon theſe bills. Whatſoever it would be in the caſe of an officer, or a man who had the king's money in his hands, yet it cannot be a crime in him, to make ſuch indorſement. For firſt the bills are payable into the exchequer, without any indorſement. But then ſuppoſe they are falſely indorſed, that will not tend to the damage of the king, but of the party. For ſuppoſe bills ſhould iſſue the firſt of *January*, and they are falſely indorſed, paid into the cuſtoms the firſt of *April*, that will make appear, that they were there all the time of *April* until the time that he comes to pay them, and for all the ſaid time he ſhould loſe his intereſt, for they cannot carry intereſt again, until they are indorſed, paid out. And if this falſe indorſement does not tend to the damage of the king, it cannot be a crime. As the caſe in *Noy*, 99. where the obligee diminiſhed the ſum, it had been forgery in a ſtranger, or in the obligee if he had enlarged it; but in regard that the obligee by diminiſhing the ſum did no damage but to himſelf, it was held not to be forgery. So here, the falſe indorſement in this caſe is not criminal, becauſe it is no damage to the king, but only to the party in the loſs of his intereſt.

Objection. It is a damage to the contractors, by making this bill a ſpecie bill. Anſwer. 1. It does not appear, that there were any contractors. We ought to take notice, that there might be ſuch, becauſe the act of Parliament ſays ſo, but not that there were ſuch in fact; and therefore if they had relied upon that, it ought to have been ſhewn; becauſe we cannot take notice judicially, that there were any contractors. And if no perſon appears to be damnified by this falſe indorſement, we cannot judge it to be a crime. But

ſecondly,

secondly, the contractors are not obliged to change these bills, until they are paid out of the exchequer again, which is not shewn in this case to have been done, nor is there any sign shewn of their having been issued again; for upon their payment out again, the name of the payer out ought to be set to them with the day of the month: and if that had been shewn, then perhaps it might have been a crime, but yet not till then. This is sufficient for the first part of the information.

As to the second part, which relates to *Burton* singly, *viz.* payment of these bills into the exchequer, *ac si* they had been truly indorsed; I do not well understand the meaning of the expression. For if they had been truly indorsed, and truly paid for customs, they could not have been paid into the exchequer by *Burton*, who was cashier of the excise. They might have been paid by *Knight*, as received by him for customs; but *Burton* could not pay a bill paid for customs, in discharge of money received by him for excise; and the officers of the exchequer ought not to have received them, and therefore it is no fraud, but a mere impertinent falsity. And it is no more a fraud, than (*a*) if a man should sell a horse which has but one eye, instead of a horse which has both his eyes. And since the teller ought not to have received it, if he did receive it, it is a plain mistake. 2. It is not said, that he paid these into the exchequer, instead of money of the king's which he had received for excise. We cannot intend, that he was an officer, because he is laid to be *nuper* cashier of the excise; nor can we intend, that he had any money of the king's in his hands, because it is not said so; so that he paid it merely as a private man; and the bill, notwithstanding the false indorsement, is as good as it was before. And if it was falsely indorsed, and paid as a private man, he has not aggrieved any body but himself; so that I cannot see in what the offence consists, or what it is. Possibly we might intend some fact, which might be a sufficient foundation for an information; but in this information there is not one word that looks like any such fact. And therefore judgment ought to be arrested. And it was arrested accordingly. *Ex relatione m'ri Jacob.*

(*a*) Vide Salk 211. pl. 4.

Davy's Case.

SIR *Bartholomew Shower* moved for a prohibition to be directed to the court of chancery, in a cause in which the earl of *Stamford* was plaintiff, and *Gibbons* defendant; and it was on behalf of *Davy*, who was purchaser under

A prohibition is not to be granted to the court of chancery to stay a sequestration of land by the application of a person claiming as purchaser of the lands before the sequestration issued from the person on whose default it issued. Vide Com. Chancery. D. 7. 2d. Ed. vol. 2. p. 44. 4. 2d. Ed. vol. 2. p. 106. Prohibition. A. 1. 2d. Ed. vol. 4. p. 488. Sho. Parl. Cas. 63.

Davy's Case.

Gibbons, whoſe lands were ſeized upon a ſequeſtration, for levying ſo much money decreed againſt *Gibbons* upon account there. And he founded his motion upon this, that the court of chancery has not any juriſdiction but in perſonal matters; and therefore this ſequeſtration affecting land, and binding the intereſt of it, is againſt *magna charta*. But the only proceſs which they can iſſue there is againſt the perſon. And though, where by reaſon of ſome truſt the title of land comes in queſtion, and therefore the chancery, to compel an execution of the truſt in performance of their decrees, have uſed to ſequeſter the lands, which was the firſt original of this proceſs; yet there is no colour for it, when the original cauſe of ſuit is a mere perſonal duty.

Holt chief juſtice. It is *Davy* for whom you make this motion, and therefore you are not proper to have a prohibition for him; but if he be turned out of poſſeſſion, he ought to bring his action at common law. For the lands are ſequeſtered as the lands of *Gibbons*, and it is but his ſuggeſtion that they belong to him; and he would have a prohibition, becauſe he has made application to the court, and they will not relieve him. If you make a motion for *Gibbons*, it will be another queſtion; but as to *Davy*, he cannot have a prohibition. *Ex relatione m'ri Jacob.*

Bringar *verſ.* Allanſon.

A ſcire facias on the recogniſance againſt bail may be in hac parte. R. acc. 7 Mod. 4. D. cont. ante 393.

IN *ſcire facias* againſt the defendant as bail, *&c.* the defendant demurs. And Mr. *Carthew* took exceptions to the *ſcire facias*. 1. That it was *in hac parte*, where it ought to be in *ea parte*. But *per Holt* chief juſtice, in caſe of a *ſcire facias* againſt bail, *hac parte* is the moſt proper. 2. Exc. That it does not appear in the *ſcire facias* where the court was at the time of the judgment; which ought to be ſhewn, becauſe it is an ambulatory court; and if it be not ſhewn, one cannot know to what place one ought to ſend a *certiorari*. 27 *H.* 6. 10. *b.* *Cro. El.* 504. *Yelv.* 227. But *Holt* chief juſtice ſaid, that he always thought that exception very ſlight, *viz.* to ſay that one does not know where the court is, but it has been held cauſe of demurrer in both old and new books. But yet it is but form, and therefore ſhould have been ſhewn as cauſe of demurrer. Judgment for the plaintiff. *Ex relatione m'ri Jacob.*

The omiſſion of ſhewing where the court of king's bench was at the time it gave a particular judgment can only be taken advantage of by a ſpecial demurrer.

Newton

Newton *verſ.* Rowland.

S. C. Salk. 2. 12 Mod. 316.

9 Jenkins 263.

IN an action upon ſeveral promiſes againſt the defendant as executor to *J. S.* he being an attorney, the defendant pleaded his privilege in abatement. The plaintiff demurred. Sir *Bartholomew Shower* for the defendant ſaid, that an executor attorney being plaintiff has no reaſon to have his privilege; but it ſeems otherways where he is defendant; for there it ſeems to be as reaſonable as when he is ſued in his own right. *Broderick* for the plaintiff: *Gage*'s caſe, *Hob.* 177. is expreſs in point to the contrary. *Holt* chief juſtice. His privilege extends only to actions in his own right. All the authorities are ſo, and it has been often held ſo. *Reſpondeas ouſter niſi, &c. Ex relatione m'ri Jacob.*

An attorny is not intitled to privilege when ſued en auter droit. R. acc. Salk. 7. pl. 18. Vide Com. Attorney, B. 17. 2d. Ed. vol. 1. p. 45.

Deſborough *verſ.* Kelby.

ERROR upon a judgment in *aſſumpſit*, where the plaintiff declared upon ſeveral promiſes; and in the count upon the *inſimul computaſſet*, no time was laid when, nor place where, the account was made between them. *Holt* chief juſtice. It is the ſame thing as if a man ſhould declare, that at *Cambridge* the defendant was indebted to him for goods ſold, and not to ſay where they were ſold; it ought to be, *adtunc et ibidem venditis*. The judgment ought to be reverſed. *Ex relatione m'ri Jacob.*

An action upon an inſimul computaſſet muſt ſhew the time when, and the place where, the account was ſtated. Vide ante. 181. 1 Saund. 228. 16 and 17 Car. 2. c. 8. ſ. 1. 4 Ann. c. 16. ſ. 1, 2.

Doyley *verſ.* Burton.

DEBT upon bond conditioned to perform an award. The defendant pleaded, no award made. The plaintiff replied, and ſhewed the award, and aſſigned a breach, *&c.* The defendant demurred. And Mr. *Eyre* took exceptions to the award. 1. That the award did not purſue the ſubmiſſion; for the ſubmiſſion was, that it ſhould be ready to be delivered at *London*; and the pleading was, that the arbitrators made the award at *Weſtminſter* ready to be delivered at *London*, like the caſe in *Cro. Jac.* 577. *pl.* 6. *Holt* chief juſtice. If it be made (*a*), it is ready to be delivered; and therefore if [ready to be delivered] had been omitted, it (*a*) had been well enough. The alleging the award to be *de et ſuper praemiſſis*, ſupplies all averments. 2. Exception. That the arbitrators had awarded the bonds of ſubmiſſion to be ſurrendered, which exceeded their authority. *Holt* chief juſtice. As to that, it is void; for they could not award any thing concerning them; and if

Where an award is to be ready to be delivered by a particular day at a particular place an averment that it was made elſewhere ready to be delivered there, is good. Arbitrators cannot direct the ſurrender of the arbitration bonds. An award directing the payment of money by one party without awarding any thing in his favour is void for want of mutuality. Vide ante, 246. and the caſes there cited. Com. Arbitrament, E. 14. 2d. Ed. vol. 1. p. 387. Upon an award for the payment of money at a particular time and place, the party who is to make the payment is bound to attend, though the other does not. Under a particular ſubmiſſion an award of mutual general releaſes according to the extent of the ſubmiſſion is good.

(*a*) Vide ante, 114. and the caſes there cited.

DOYLEY v. BURTON.

as this caſe is, they had awarded general releaſes to have been given after the delivery of the bonds of ſubmiſſion, the award had been bad, becauſe it would not have been mutual; in regard that the releaſes would have been given after the performance of an act, which they had not had power to award that the defendant ſhould do; and conſequently it is void, and ſo it ſhould never be done; and ſo nothing to be done on the part of plaintiff to the defendant, but only the defendant ſhould pay money to the plaintiff. 3. Exception. That the plaintiff does not aver, that he was ready at the place to receive the money. *Holt.* There is no need, becauſe the defendant ought to do the firſt act, and therefore if he does not come and tender the money, though the plaintiff be not there to receive it, the bond will be forfeited. 4. Exception. That the award as to the general releaſes is uncertain, *viz.* that they ſhould execute mutual general releaſes according to the extent of the ſubmiſſion. *Holt* chief juſtice. The ſubmiſſion is ſpecial, of all controverſies between the plaintiff and defendant as adminiſtrator, *&c.* ſo that that explains the generality of the award. Judgment for the plaintiff. *Ex relatione m'ri Jacob.*

Machin *verſ.* Moulton. Ante 452.

A ſuit for ſubtraction of tithes cannot be brought in any ſpiritual court out of the dioceſe in which the tithes are payable. Vide ante 452. and the caſes there cited.

A man may be cited out of the dioceſe in which he lives in cauſes which could not have been maintained againſt him in that dioceſe. Vide ante, 452. and the caſes there cited.

THE plaintiff declared in attachment upon the prohibition, *&c.* And Mr. *Broderick* argued for the defendant, that the words of the 23 *H.* 8. *c.* 9. are general, *viz.* that a man ſhall not be cited out of the dioceſe or peculiar, where he ſhall be dwelling; but that reſtraint ought to be limited to ſuch caſes only, where the juriſdiction, within which the party dwells, hath conuſance of the cauſe for which the party is cited out of the dioceſe: for if it were otherwiſe, the ſubtraction of tithes in this caſe would be diſpuniſhable. A dioceſe is a juriſdiction, and not the deſcription of a place as terminated by metes and bounds. And therefore in this caſe the party cannot be ſaid to be cited out of his dioceſe, becauſe no remedy could be had againſt him there; and therefore as to that he is not within the dioceſe. This notion appears by the caſes in 1 *Roll. Rep.* 328. 13 *Co.* 5. So if a peculiar is in two dioceſes, and a man who dwells in one of the dioceſes in the peculiar is cited to the court of the peculiar held in the other dioceſe, that is not a citing out of the dioceſe, becauſe it is within the peculiar, 1 *Roll. Rep.* 329. Therefore ſince in this caſe the tithes aroſe within the dioceſe of *York*, he is not cited out of the juriſdiction, nor conſequently out of the dioceſe. For by the ſtatute of 32 *H.* 8. *c.* 7. *ſ.* 7. the ſubtraction of tithes is made local; for by the words of the act the party offending ſhall and may be cited before the eccleſiaſtical judge of the place where ſuch wrong ſhall be done. In

Winch.

Winch. Entr. 570. there is a ſuggeſtion for a prohibition, for proceeding before the archbiſhop, where the cauſe was tranſmitted by letters of requeſt; becauſe by the ſtatute 5 & 6 *Ed.* 6 *c.* 4. *ſ.* 1. proceeding againſt brawlers in churches and church-yards is limited to be before the ordinary of the place where the offence ſhall be done. The caſe in 1 *Keb.* 481. 501. is a caſe in point. And in the caſe of 2 *Roll. Rep.* 448. the tithes are laid to have ariſen within the peculiar. There is a caſe in *Salk.* 164. where it is held, that a taxation in another dioceſe is local, and will ſubject a man to be cited there, (it is ſaid by inference) much more will tithes ſubject a man, for they will make a man an inhabitant to many purpoſes. *Jenner* ſerjeant *e contra* for the plaintiff. The words of the act are expreſs for the prohibition, and ſuit for tithes is mentioned in the preamble. And there is an opinion in point, 2 *Brownl.* 28. confirming the generality of the words of the act; and there is no authority againſt it. There is alſo a caſe of a legacy in 2 *Brownl.* 12 and for words, *Godb.* 190. [But of perſonal things there is no doubt.] It is a rule in the canon law, that *forum ſequitur reum.* And the caſe in 1 *Roll. Rep.* 328. is a ſtrong caſe for the plaintiff.

The court awarded a conſultation; becauſe by the ſtatute of 32 *H.* 8. *c.* 7. *ſ.* 2. the ſuit for with-holding of tithes in expreſs words is appointed to be before the ordinary of the place where the wrong was done. But if it had been in another caſe, it had been within the 23 *H.* 8. *c.* 9. *ſ.* 2. and the prohibition ſhould have continued.

Epiſcopus Saliſbury *verſ.* Philips.

Writ of Error and Pleadings, poſt. vol. 3. p. 301.

ERROR upon a judgment in *quare impedit* after verdict for the plaintiff.

In quare impedit the declaration may deſcribe the church with an alias though the writ did not.

A covenant between joint-tenants of an advowſon in groſs to preſent by turns, amounts to a partition, and will enable each of them individually in his turn to maintain a quare impedit even againſt a ſtranger. S. C. Salk. 43. Carth. 505. 12 Mod. 321. Holt, 52. A biſhop defendant in a quare impedit cannot after inſiſting on a right by lapſe, and confeſſing and avoiding a preſentation ſtated by the plaintiff, object to the ſufficiency of the right ſet out in the declaration to preſent.

The plaintiff declares, that *A.* and *B.* were joint-tenants of the advowſon of the church in groſs; and being jointly ſeiſed, by indenture between them agreed, that they ſhould ſtand ſeiſed of that advowſon in common, and preſent ſeverally by turns; and lays ſeveral preſentations by each of them; and the plaintiff claims as executor to his father, the aſſignee of one of the ſaid parties, for a diſturbance in the time of the father. The biſhop pleaded, that it came to him by lapſe. The plaintiff replies, and ſhews that he preſented *Sims* within ſix months, and the biſhop refuſed him. The biſhop rejoins, and confeſſes the preſentation, and that the clerk came to him, and that he gave him time to prepare for his examination for three days, and that the clerk went away, and never returned. And iſſue upon the rejoinder, and verdict and judgment for the plaintiff in the

Bishop of Salisbury v. Phillips.

common pleas. Mr. *Carthew* for the plaintiff in error, assigned a variance between the original and the declaration. The original was, *praesentare ad ecclesiam de Staunton*, and the declaration was, *Staunton alias Staunton-Fitzherbert*. But *per Holt*, one name is enough, and therefore *non allocatur*. 2. Exception. It appears, that the plaintiff has not any title. For, 1. This indenture *nil operatur*, but is only good by way of covenant; for if it was in case of lands, it would not amount to a partition; for nothing can do that, but what divides the title, and makes several rights to several parts, which cannot be in this case of one intire thing. And if it be admitted, that this agreement would make them tenants in common, it would nevertheless be ill, for they could not present singly; and if they do, the clerk may be refused: Nor could the one of them grant the whole, which each of them ought to have, if this should amount to a division, for they cannot have part of an intire thing; and so two advowsons should be made of one. And there is no case in all the books of the law which warrants it. *Holt* chief justice, doubtless they may make partition, to present by turns, and that (*a*) will divide the inheritance *aliquatenus*, and (*a*) create separate rights, so that the one shall present in the one turn, and the other in the other, which is a sufficient partition; for partition of the profits is a partition of the thing, where the thing and the profits are the same. Indeed it cannot make two advowsons out of one, but it can create distinct rights to present in the several turns. But if this should not make a good partition, the question is, if one of them presents, and the bishop does not refuse his clerk for that reason, but refuses him obstinately without any cause, and a *quare impedit* is brought, and admitted to be good; whether the grantee shall not recover his presentation. The chief justice thought this to be a very plain case. But at another day, because Mr. *Carthew* was so positive in the matter, that there were no authorities in the books which warrant this case; he said, that by *Westm.* 2. 13 *Ed.* 1. *st.* 1. *c.* 5. *f.* 2. if divers persons, claiming an advowson, make composition upon record, to present by turns, and this composition is executed by presentation by one of the parties, the other may have a *scire facias* upon this agreement, being upon record, and he is not put to his *quare impedit*; and that not only in a case of a disturbance by one who was party to the agreement, but by a stranger. And that statute does not extend only to privies in blood, but also as 2 *Inst.* 362. says, to strangers also, which must be of tenants in common. In 28 *H.* 8. *Dyer*, 29. *a. pl.* 194 if tenants in common of an advowson make composition to present by turns, and that is executed of all parties, in a *quare impedit* brought by any of them they have no need to make mention of the composition; which shews, that by the com-

(*a*) Vide 7 Ann. c. 18.

compoſition the inheritance and right is ſevered, and a ſeparate intereſt veſts in each of them, to preſent alternately. The only difference is, that in caſe of coparceners, they being privies in blood, the (a) partition may be by parol; but between tenants in common it muſt (b) be by deed. *Fitzh. Nat. Br.* 63. *d. f.* 11 *Hen.* 4. 3. *b.* And in *Co. Entr.* 496. *b.* grantee of a next avoidance, by a man who was ſo to preſent by turns, declares in *quare impedit* poſitively upon his grant, that he was *poſſeſſionatus de advocatione eccleſiae praedictae pro prima et proxima vacatione ejuſdem.* And in *Fitzh. Nat. Br.* 62. *a.* there is a ſtronger caſe, where a manor with an advowſon appendant deſcended to two coparceners, and they made partition of the demeſnes, and to preſent ſeverally by turns to the church; this was a good partition, and the (c) advowſon was appendant at one turn to one part of the demeſnes, and at the other to the other.

Mr. *Carthew* cited a caſe in 2 *Mod.* 97. to the contrary. To which *Holt* chief juſtice *in ira* ſaid, that no books ought to be cited at the bar, but thoſe which were licenſed by the judges. Judgment was affirmed. *Ex relatione m'ri Jacob.*

Biſhop of SALISBURY v. PHILIPS.

(a) D. acc. Dy. 29. a.pl. 194. ante 197. Bro. Qua. Imp. pl. 118. Wats. c. 8. 8vo. Ed. p. 116.

(c) Vide ante 198. and the caſes there cited 3 Salk. 25.

(b) Acc. Watſ. c. 8. 8vo. Ed. p. 117.

Rex *verſ.* Higginſon.

S. C. 12 Mod. 322.

AN information was preferred againſt the defendant for maintenance *contra formam ſtatuti.* The maintenance was laid in *Cheſter.* And upon not guilty pleaded, the record was ſent to be tried in *Cheſter* by *mittimus*; and the *mittimus* was, in information for maintenance *contra formam ſtatuti fact. contra manutenentes et embraceatores necnon illegitimas emptiones titulorum.* And the defendant upon the trial was found guilty. Mr. *Northey* moved in arreſt of judgment, that the judge who tried the cauſe, had not any authority; for the information is general, *contra formam ſtatuti*, and the *mittimus* is confined to an information upon 32 *H.* 8. *c.* 9. theſe words in the *mittimus* being the very words in the title of the act of *Henry* VIII. and ſo he had not authority to try any information upon all the laws againſt maintenance in general. And for this exception the verdict was ſet aſide. For *per Holt* chief juſtice, though an action will lie upon this ſtatute, as appears 3 *Cro.* 735. *Raſt. Entr.* 430. yet the queſtion is, if where there are ſeveral ſtatutes, which inflict ſeveral diſtinct penalties upon maintainers of ſuits, *&c.* and an information for maintenance concludes generally, as in the preſent caſe, it is not a good deſcription of ſuch information, that it is an information againſt one of the ſaid ſtatutes in particular. For this information is not only againſt the ſtatute of 32 *H.* 8. *c.* 9. but alſo againſt *Artic. ſuper chart.* 28 *Ed.* 1. *ſt.* 3. *c.* 11. and 1 *R.* 2. *c.* 4. and all the other ſtatutes.

A mittimus whereby a cauſe is ſent for trial into a county palatine muſt deſcribe the record correctly. Deſcribing a general information for an offence made puniſhable by ſeveral ſtatutes as an information upon one of thoſe ſtatutes only, is incorrect.

And

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(a) And therefore the information being general upon any other ſtatute, the *mittimus* is not good, which reſtrains it to the ſtatute of *Henry* VIII. only, but it is a variance from the record, with which it ought to agree. And therefore it ought to be tried again. *Ex relatione m'ri Jacob.*

(a) Vide 1 Hawk. c. 83. 1ſt. Ed. p. 249. Burn's Juſtice Maintenance, 14th. Ed. vol. 3 p. 17.

Starke *verſ.* Cheeſeman.

S. C. Salk. 128. Carth. 509.

The act of drawing a bill implies a promiſe from the drawer to pay it, if the drawer does not. Vide Bailey 11. In a count againſt the drawer, it is ſufficient to ſtate that the defendant made the bill, and the drawer refuſed to pay it. It need not add, that the drawer afterwards promiſed to pay it. Such count is notwithſtanding a count in aſſumpſit.

IN an action upon the caſe upon a bill of exchange, the plaintiff in his declaration declared upon a bill of exchange, and that he offered it to the perſon upon whom it was drawn, and he refuſed to pay it, *per quod* the firſt drawer *devenit onerabilis per conſuetudinem, &c.* and there was an *indebitatus aſſumpſit*, and a *quantum meruit*, in the declaration. Judgment by default, and a writ of inquiry of damages, and intire damages given. And now it was moved in arreſt of judgment, that as the matter ſtood upon the firſt count, this action was founded upon a deceipt, the bill not being paid according to the warranty, every one who draws a bill, warranting the payment of it; and therefore being in the nature of an action for a deceipt, which is a *tort*, it cannot be joined with an *aſſumpſit*, which is founded upon a contract; and therefore for want of laying an expreſs promiſe, it was ill, intire damages being given. *Northey* ſaid, that the action was founded upon the cuſtom, and that the obligation aroſe by that, and therefore the action is maintainable, without ſhewing a promiſe. *Cro. Car.* 302. A declaration upon a bill of exchange, without ſhewing any promiſe, and the roll is ſo. 2. This founds all in contract, for the cuſtom raiſes a promiſe in law, that the drawer will pay the money, if the perſon upon whom it was drawn refuſes to pay it. And 2 *Cro.* 307. ſays, that if a merchant accepts a bill, it has by the cuſtom the force of a promiſe, to compel him to pay the money. *Holt* chief juſtice, at the beginning, ſeemed to agree with the objection, and ſaid, that he who draws the bill warrants the payment of it, and if he does not, it is a deceipt, and one may have an action upon it; but then they ought not to join it with an action upon a promiſe. That is the reaſon of the caſe of *Sir John Dalſton* and *Janſon*, *Mich.* 7 *Will.* 3. *B. R. ante* 58. In the time of 2 *Cro.* they were not arrived at this way of declaring upon bills of exchange. *Gould* juſtice cited 1 *Sid.* 306. that if a man brings *aſſumpſit* for the arrears of an account, where the action formed is debt; he ought to lay an expreſs promiſe to maintain the action. *Holt* ſaid, that the notion of promiſes in law was a metaphyſical notion, for the law makes no promiſe, but where there is a promiſe of the party. Afterwards, in this term, judgment was given for the plaintiff, becauſe

becauſe the drawing of the bill was an actual promiſe. *Ex relatione m'ri Jacob.* STARKE v. CHEESEMAN.

Epiſcopus St. David *verſ.* Lucy. Ante 447.

PENDING the ſuit againſt the biſhop of St. *David's* before the archbiſhop, he appealed to the delegates; and pending his appeal, he moved in *B. R. Paſch.* eleventh of this king, for a prohibition to be directed to the delegates upon divers ſuggeſtions, which prohibition was denied. [See before 451.] After which the commiſſioners delegates over-ruled his appeal, and the archbiſhop pronounced ſentence of deprivation againſt him; from which ſentence he appealed to the commiſſioners delegates; and ſeeing that they were of opinion to affirm the ſentence, he moved by his counſel for a prohibition now to be granted by this court to the commiſſioners delegates, to ſtay their proceedings in the appeal from the ſentence of the archbiſhop; upon a ſuggeſtion, 1. That by the canon law the archbiſhop alone could not deprive a biſhop; and 2. That the delegates refuſed to admit his allegations; and the counſel for the prohibition argued, that the archbiſhop had not any authority over his ſuffragan biſhops; that the biſhops are lords of parliament, and ſo peers to the archbiſhop, and therefore he could not have authority over them, *quia par in parem non agit*; that there are no inſtances of ſuch proceedings, nor hath this point been determined in our books; and therefore being a matter of great conſequence, it ought to be ſettled by mature deliberation. That the deprivations of biſhops, which have been heretofore, have been by the eccleſiaſtical commiſſion, or in convocation, or by act of parliament; and therefore by *Littleton's* rule, *ſ.* 108. *Co. Litt.* 81. *a. b.* if ſuch a thing might have been done, it ſhould be intended, that it would have been put in practice before this time. That though the archbiſhop may viſit and cenſure the biſhops, yet it does not follow that he can deprive; becauſe deprivation does not follow the viſitatorial power, as a neceſſary conſequence. That the law has provided for the temporalties, as 14 *Ed.* 3. *ſt.* 4. *c.* 3. that their temporalties ſhall not be ſeized into the king's hands, but upon lawful cauſe, and judgment thereupon given according to the law of the land; and 25 *Ed.* 3. *ſt.* 3. *c.* 6. that their temporalties ſhall not be ſeized for a contempt; and that in the caſe of the archbiſhop of *York* and the biſhop of *Durham*, in *Riley's Placita Parliamentaria* 135. there is a diſtinction made between their temporal ſtate and their eccleſiaſtical; and the archbiſhops have no authority over them as to their temporal ſtate; and therefore ſince this ſentence of deprivation takes away their temporalties from them, over which they have no juriſdiction, the king's bench will grant a prohibition, to examine into the

A prohibition does not lie to the ſpiritual court, for proceeding contrary to the canon law. The right of deputation is incident to the right of viſitation. S. C. Salk. 134. D. acc. ante 9.

An archbiſhop may by the common law deprive any of his ſuffragan biſhops. S. C. Salk. 134. Vide ante 447. and the caſes there cited.

The ſame perſons may be appointed commiſſioners delegates upon an appeal from a definitive ſentence in the ſpiritual court as were appointed on an appeal from an interlocutory decree.

A prohibition cannot in ſtrictneſs be moved for until after the ſuggeſtion is entered on the roll. Semb. acc. 5. Mod. 435.

A mandamus does not lie to the ſpiritual court to admit allegations. Vide ante 363.

Error does not lie upon the refuſal of a prohibition. S. C. Salk. 136.

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the juriſdiction of the archbiſhop, to the end that if he has not ſuch juriſdiction, the biſhop may not be deprived of his temporalties. Another objection was made, that the ſame commiſſioners, who were in the commiſſion of delegates upon the appeal *propter gravamen*, were commiſſioners in the commiſſion upon the appeal to the merits, where the whole matter, as well the *gravamen* as the reſt of the cauſe, might be urged; and ſo they would be judges in the ſame cauſe which they had determined againſt the biſhop upon the former appeal, which was unreaſonable. *E contra*, it was argued, by the attorney general and the other counſel for the promoter againſt the prohibition, that the ſuggeſtion for the prohibition was founded only upon the canon law, and not upon the common law or any act of parliament; and therefore very proper before the delegates upon the appeal, but not any ground for a prohibition. And as to the objection that the biſhop is a lord of parliament, that is only in reſpect that he holds his temporalties by barony, which temporalties are annexed to his biſhoprick, and therefore being deprived of the biſhoprick, he will in conſequence be deprived of the temporalties, and of his ſeat in parliament. There is not any other juriſdiction for ſuch purpoſe, for the convocation is more properly a legiſlative than an executive authority. If the archbiſhop has no ſuch authority, what is the meaning of the exception in 23 *Hen.* 8. *c.* 9. *ſ.* 3. that biſhops may be cited out of their dioceſe? The act as to clergymen in general was reaſonable, becauſe there is a juriſdiction within the dioceſe, to which they are ſubject; but the exception was of neceſſity in caſe of biſhops, becauſe they were not ſubject to any other juriſdiction than that of the archbiſhop. Before the ſtatute of 16 *Car.* 1. *c.* 11. which took away the high commiſſion court, which ſtatute is ſince confirmed by 13 *Car.* 2. *ſt.* 1. *c.* 12. they proceeded before the commiſſioners appointed by virtue of the power given to the queen, by 1 *El. c.* 1. and the biſhops were deprived by them, becauſe it was a more expeditious way of proceeding; but now by the ſaid acts the old juriſdiction is reſtored, as it was upon 26 *H.* 8. *c.* 1. And alſo upon 29. *Car.* 2. *c.* 9. which takes away the writ *de haeretico comburendo*, there is a ſaving for the juriſdiction of archbiſhops and biſhops, *&c.*

The reaſon why a biſhop is a lord of parliament is becauſe he holds his temporalties by barony. Vide Co Litt. 97. a. 70. b. 13th Ed. n. 2. 1 Bl. Com. 155, 156.

Wright king's ſerjeant of the ſame ſide argued, that a power of deprivation was incident to the viſitatorial power; and the caſe in *Ryley* 186. admitting the power of the archbiſhop in ſpiritual caſes, it muſt follow of conſequence, that he has a power of deprivation; becauſe deprivation is the puniſhment proper for ſome caſes.

This

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This matter was moved several times at the bar. And the whole court was of opinion, that the prohibition should not be granted. And as to the authority of the archbishop, *Holt* chief justice said, that there are archbishops, who have authority over their suffragan bishops; and there are primates, who are superior to them. The archbishop of *Spalata* says in his book, that an archbishop has the same authority over his suffragan bishops, that the bishop has over his inferior clergy; and though there may be a co-ordination *jure divino*, yet there is a subordination *jure ecclesiastico qua humana*; not of necessity from the nature of their offices, but for convenience. And for what other purpose have archbishops been instituted by ecclesiastical constitutions? The power of an archbishop was very great here in *England* anciently: the same jurisdiction of supremacy as the patriarchs of *Constantinople*, &c. The pope used to call him, *alterius orbis papam*, and he exercised the same jurisdiction with him. *Theodore*, who was archbishop soon after the first constitution, not more than the fourth, fifth, or sixth, of St. *Austin*, deprived *Winifred* bishop of *York*, for the said see was not then metropolitical, but subject to the archbishop of *Canterbury*; and yet at the same time there was a council held; and *Beda* commends *Theodore* for it. But afterwards in the time of *Henry* I. and king *Stephen*, the pope usurped the authority of the archbishops; in exchange for which they became *legati nati* of the pope. See for this *Roger Twisden de schismate*; and that is the reason why this practice cannot be found to have been put in use for so long time; for when the archbishop had divested himself of his supremacy, and the pope had gained all his jurisdiction, the bishops being created by the pope, and consequently having better interest at *Rome*, at least as good as the archbishop, it was in vain to intermeddle. And if there are any instances found, of bishops who were deprived in the said time, it was where the archbishop had more interest with his holiness, and so the bishop perceiving it acquiesced. But at this day, by the act of 24 *H.* 8. *c.* 12. this jurisdiction is restored. It was always admitted, that the archbishop had metropolitical jurisdiction, and the bishops swear canonical obedience to him; and where there is a visitatorial power, there is no reason to question the power of deprivation; for the same superiority, which gives him power to pass ecclesiastical censures upon the bishops, will give him power to deprive, it being only a different degree of punishment for a different degree of offence. This appears upon the statutes 26 *H.* 8. *c.* 1. and 1 *El. c.* 1. where, notwithstanding that there is not one word of deprivation, but only to visit, repress, redress, reform, correct, and amend; yet they have been construed to give a power of deprivation. And by virtue of the 26 *H.* 8. *c.* 1. *Bonner* was deprived. Dr. *Burnett* the bishop of *Salisbury* in his book of the reformation

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(a) Vide Co. Litt. 16. b. 13th Ed. a. 2.

mation believes that *Bonner* was deprived because he had accepted letters patent of *Henry* 8. to the bishop; but that cannot be a legal reason, for he being bishop before for his life, acceptance (a) of a patent *durante beneplacito* could not determine it. So the high commissioners, by virtue of the act of 1 *El. c.* 1. deprived; and yet there is not one word of deprivation in the said act, but only visit, &c. as in the said act of 26 *H.* 8. *c.* 1. And the reason, that it is an inherent prerogative in the king, is but an additional reason; for it is plain, that before the statute of *Elizabeth* the king could not have granted a commission for redressing and reforming ecclesiastical matters, and therefore the power that they had proceeded from the said act; for the king exercises his ecclesiastical supremacy by his ecclesiastical judges, as he exercises his temporal by his temporal judges. And he said, that he did not know any subordinate visitatorial power in any case but that of an archdeacon, which is a subordinate jurisdiction, and for informing the bishop, and he is called *oculus episcopi*. But where there is an unlimited power of visitation, there must be of consequence a power of deprivation. This jurisdiction of the archbishop has notice taken of it in acts of parliament. Because that the act of 16 *Car.* 1. *c.* 11. which took away the high commission court, was thought to have lessened the jurisdiction of archbishops and bishops; therefore it was repealed *quoad*, by 13 *Car.* 2. *st.* 1. *c.* 12. And the act of 29 *Car.* 2. *c.* 9. which takes away the writ *de haeretico comburendo*, have a saving of the jurisdiction of the protestant archbishops and bishops. If the issue was joined (as his brother *Gould* justice well observed) in a real action upon the deprivation of a bishop, to whom could the court write, unless to the archbishop? In case of deprivation of a parson, the court writes to the bishop to certify. Then if the archbishop had such authority, as it is plain he had, by what law is he restrained? Mention is made of an old canon of *Antioch*, but that was never received in *England*. And if the non-usage should be an argument against it, which proceeded from a particular reason as appears before, it would also be a reason why bishops should never be deprived at all, because no bishop was ever deprived from the time of *Henry* II. until *Henry* VIII. and no other jurisdiction can be shewn, to which they are subject; for all the same objections may be made to the power of the convocation; for a convocation has no power over a peer *qua* peer; but the objection will not prevail for their peerage is but accessory, and they have their temporalties as they are bishops. And in ancient times there were abbots, who were lords of parliament, and yet their visitors had power to deprive them. So that if any ecclesiastical jurisdiction is allowed to be over them, this objection will fail. And in fact it signifies nothing, because their peerage is but grafted upon their being bishops.

And

And the notion of the deprivation of bishops by the convocation is new, and started by Sir *Bartholomew Shower*, and (by him) the convocation has not any such power: and if there was such power in the convocation, it is presumable that care would have been taken in the act of *Henry* 8. that there should be an appeal from them. Farther, it seems by the writ *de haeretico comburendo*, *F. N. B.* 269. that what is done in convocation, is the act of the archbishop, and only the consent of the rest of the clergy in convocation. He agreed, that (*a*) the spiritual court has not any jurisdiction in case of freehold; but in this case the freehold follows the person being under such capacity. He agreed also, that the spiritual court cannot (*b*) examine institution after the induction, because that makes a plenarty; and therefore the declaring of institution to be void, would be avoiding a temporal act. But these instances are not like the present case. The reason of the case in *Ryley* was plainly because the archbishop punished him for matter in which the bishop of *Durham* acted in his temporal capacity as count palatine of *Durham*; which appears by the question asked, whether the gaol was the gaol of the county palatine? and whether it had not always been delivered by lay people? And (by him) to question this authority of the archbishop, is to question the very foundations of the government. And *Gou'd* justice said, that in 2 *H.* 4. 10. *a.* where the ecclesiastical jurisdictions are enumerated, the accounts begins with archbishops. And it appears by our books, that bishops may be deprived for dilapidations, 11 *Co.* 49. *b.* 3 *Inst.* 204. 29 *Ed.* 3. 16. *a.* 2 *H.* 4. 3. *b.* And such deprivation seems to be by the archbishop; for otherwise to whom should the court write? For which reason it must be pleaded by whom it was done, as *Bro. Deposition*, 5. The court cannot write to the convocation; and it is strange, if the bishops are deprivable, that the law should place it at such a distance, as to refer it to the convocation. And in 1 *Roll. Abr.* 882. 10 *Vin.* 509. *G. pl.* 2. *Anselmus* archbishop of *Canterbury* is said to have deprived several prelates. And there is no case, where a person hath power of visitation, but he hath also power of deprivation, *F. N. B. tit. Prohibition*. But when there was such a summary way of proceeding before the high commission, it is no wonder if such a tedious proceeding before the archbishop was not used. But *Holt* chief justice said, that though he was fully satisfied in his opinion that the archbishop had such jurisdiction, yet he would not make that the ground of denying a prohibition in this case. The matter of the suggestion is, that the archbishop is restrained by the canon law from proceeding, *&c.* without assistance, *&c.* Now it must be, that the court take notice that the archbishop by the common law hath metropolitical jurisdiction, and for that purpose he was constituted; that there

(*a*) R. acc. ante 212. Str. 1013. Vide Com. Prohibition. F. 2. 2d. Ed. vol. 4. p. 492.

(*b*) R. Hob. 15.

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there are two in *England*, who are primates in their respective provinces; and then they have sufficient jurisdiction, and being the judges, though perhaps by the canon law they ought to take other persons to their assistance, yet their proceeding without such assistance cannot be a ground for a prohibition. If in fact the archbishop extended his jurisdiction farther than he could by the rules of the common law, that might be a ground for a prohibition; but where all the authority that he makes use of is no more than what the common law allows him; but there are some ecclesiastical canons which restrain him from exercising the jurisdiction which he hath by the common law; that is matter proper for the conusance of the delegates upon the appeal, but no ground to prohibit them from proceeding. And it is without precedent, to grant a prohibition to the ecclesiastical court, because they proceed there contrary to the canons. And *Gould* justice said, that (*a*) if a tortious judgment be given, that is proper matter for appeal, and not for prohibition. And of that opinion lord *Hobart* is expressly. And as to the objection concerning the commissioners of the commission of delegates, *Holt* chief justice said, that they upon a second appeal could not determine the *gravamen* at another time. And if the said objection should be allowed, where their course is, upon allowing the *gravamen* to retain the cause, there the archbishop might make the same objection, that they were not proper persons to be judges for the bishop, because they had determined the *gravamen* against the archbishop, and so they should not proceed at all, it being but the reverse of the said objection. And he was of opinion, that being appointed judges by a new commission, it was well enough. And the prohibition was denied by the whole court. And *Holt* chief justice ordered the counsel for the bishop to enter their suggestion upon record, and they would enter the reasons of the denial of the prohibition. And *Holt* said, that if the other party had insisted upon it, they could not have moved for a prohibition before their suggestion was entered upon the roll. Then Mr. *Montague* on behalf of the bishop moved the court, that they would grant a *mandamus* to the commissioners delegates, to admit the bishop's allegations. And he compared it to the cases where they grant *mandamuses*, to compel the granting of probates of wills and letters of administration. But *per Holt* chief justice, the king's bench cannot grant a *mandamus* to them, to compel them to proceed according to their law. Indeed *mandamuses* are (*b*) grantable to compel probates of wills, because it concerns temporal right; and (*c*) to compel the grant of letters of administration, because the statute directs to whom they shall be granted. But in the present case a *mandamus* was denied. *Ex relatione m'ri Jacob.*

(*a*) Vide ante 449. and the cases there cited

(*b*) Vide ante 361. and the cases there cited.

(*c*) Vide ante, 262.

Note;

Note; that after this denial of the prohibition, the biſhop of St. *David's* petitioned the lord chancellor *Somers*, to have a writ of error upon this denial of the prohibition, who having ſome doubt, whether it would lie or not, referred it to the attorney general; who certified his opinion to be, that a writ of error would lie in this caſe. Upon which the ſuggeſtion was entered upon record, and the denial of the prohibition; and the writ of error was granted, and the whole record brought by the chief juſtice into parliament. And afterwards upon hearing of his opinion, the lords of parliament were of opinion, that a writ of error would not lie in this caſe. Note, that *Holt* chief juſtice told me, that if the lords had been of opinion, that the prohibition ought to have been granted, he never would have granted it.

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Rex *verſ.* Chandler.

If a ſtatute directs that a perſon convicted by a juſtice of an offence ſhall for want of a ſufficient diſtreſs for a penalty he incurs on the conviction ſuffer imprisonment, the juſtice muſt before he can iſſue a warrant for his commitment, ſtate on the conviction that he has not ſuch diſtreſs, and enter an adjudication that he be impriſoned. S. C. 12 Mod. 314. Carth. 508. Holt 214. pl. 1, 2. D. acc. poſt. 1196. Vide 8 Co. 120. a. Sed vide Str. 263. A conſtable cannot execute out of his own diſtrict a warrant directed generally to all conſtables. S. C. Carth. 538. D. acc. Salk. 176. But he may execute any where within the limits of the juſtice's juriſdiction a warrant directed particularly to him. D. acc Salk. 176. 5 Mod. 81.

Chandler was brought into the court upon a *habeas corpus*, to which the warrant of his commitment was returned. And upon two exceptions taken to his commitment, he was diſcharged. The firſt was, that it did not appear ſufficiently, that the defendant had not ſufficient diſtreſs (he being committed upon a conviction upon the new act of deer-ſtealing, 3 *W. & M. c.* 10. *ſ.* 2.) and therefore it was ill; for if he had ſufficient diſtreſs, the juſtices of peace had not any power to commit him to priſon; but the warrant of commitment only recited, that *Chandler*, of the pariſh of *Hadley*, in the county of *Middleſex*, was convict, *&c.* and becauſe that he did not pay the forfeiture, the juſtice iſſued his warrant, directed to all conſtables, *&c.* to require them to levy the forfeiture, by diſtreſs, *&c.* and that the conſtable of *South Mims* in the ſaid county had made return, that the defendant had no goods in *Hadley*, theſe are therefore, *&c.* And *per Holt* and *Gould* juſtices, the act of parliament is not purſued, for the return of the conſtable is nothing to the purpoſe. Indeed a warrant is appointed by the ſtatute to be iſſued and returned; but the ſtatute does not ſay, that upon the return to the warrant, that he has not ſufficient diſtreſs, he ſhall ſuffer impriſonment, *&c.* but that for want of diſtreſs, he ſhall ſuffer impriſonment, *&c.* And therefore if there is no diſtreſs, nor the pecuniary penalty paid, the remedy for that ceaſes, and the offender ought to ſuffer another puniſhment, and judgment ought to be given for that, and there ought to be more than a bare commitment. If the party was preſent, as in this caſe, upon the conviction, the juſtice ought to adjudge that he ſhould pay the money as the act appoints, and then *(a)* he ought to detain him for two days, to diſco-

(a) Vide 3. W. and M. c. 10. ſ. 4.

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ver if he hath ſufficient diſtreſs; and if it appears that he hath not, then he ought to record it, and give judgment that he ſhall ſuffer impriſonment, and commit him preſently. But if the party was not preſent, then he ought to proceed in this manner: Firſt he ought to iſſue his warrant for levying the money by diſtreſs, and if it appear to him by the return of the warrant, that there is not ſufficient diſtreſs, then he ought to record that he hath no diſtreſs, and therefore award that he ſhall be committed, &c. and upon that iſſue his warrant. But a man ought not to continue in priſon, upon a bare recital in a warrant without any adjudication. There ought to be a judicial determination where ſuch infamous puniſhment is to be inflicted. It is ſaid in 8 *Co.* 120. *a.* Dr. *Bonham*'s caſe, that there ought to be a record made of it. But *Turton*-juſtice was of opinion, that the iſſuing of the warrant in this caſe was well enough, and ſo the commitment good upon the return of no diſtreſs. 2. The ſecond exception was, that the conſtable of *South Mims* could not return a matter of fact done in *Hadley*, becauſe it was out of his juriſdiction. And the whole court was of that opinion. For *per Holt* chief juſtice, If a ſtatute directs a thing to be done by a conſtable, that will give them juriſdiction over the limits of their pariſhes. So if a juſtice of peace directs his warrant to a particular conſtable, he may execute it out of his pariſh. But where a warrant is directed generally to all conſtables, &c it ſhall be taken reſpectively, to each of them within their ſeveral diſtricts; and not to the conſtable of one pariſh, to take a diſtreſs in another pariſh. For where a precept or warrant is directed to men by the name of their office, it is confined to the diſtricts in which they are officers. And therefore the conſtable of *South Mims* could not return this fact in *Hadley*. To all which *Gould* juſtice agreed; and he ſaid, that the return of the warrant by the conſtable of the pariſh where he lived might have been ſufficient ſatisfaction to the juſtice of peace, to ground his adjudication upon it. Mr. *Northey* ſtarted an objection, that the conviction ought to be quaſhed, before the defendant could be diſcharged; for though in a writ of execution the judgment is ſhewn (which has no need to be ſhewn there) and errors appear in it, yet the execution is good, until the judgment be reverſed. So though errors appear in this conviction, &c. And alſo the court will not take notice of the conviction, becauſe it need not be ſhewn. But *Holt* chief juſtice ſaid, he doubted of that: for in *Buſhell*'s caſe in *Vaughan*, the jury were fined, becauſe they gave a verdict againſt evidence, and were committed in execution for it in court, which was a judgment; and yet they were diſcharged in the common pleas, though the record of the conviction was not before them. He ſaid, he always believed it a ſtrong objection. But they agreed clearly in *Buſhell*'s caſe, that if it had been a conviction upon a verdict; they could not

Execution upon an erroneous judgment is good, until the judgment be reverſed.

not have discharged *Bushell* out of execution, until the judgment had been reversed by error. But this point was not afterwards moved. *Ex relatione mri Jacob.*

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Villers *verſ.* Parry and Moor. Error. C. B.

Intr. Hil. 10 & 11 Will. 3. B.R. Rot. 179.

S. C. but no judgment. Comb. 397.

THE plaintiff ſued a *ſcire facias* againſt *Parry* and *Moor*, bail of Sir *Talbot Clerk*, upon a recognizance in which they bound themſelves in a ſum ſeverally of 2000*l.* and the writ was to ſhew cauſe, why the ſum of 2000*l.* ſhould not be levied upon each of them. The defendants plead, that no *capias* iſſued againſt the principal. To which the plaintiff replied, and ſhewed a *capias*. And upon demurrer judgment in the common pleas was given for the plaintiff. The demurrer was, that the plaintiff ought not to have execution of the two ſeveral ſums of 2000*l.* and 2000*l.* againſt the defendants. The joinder in demurrer was, that he ought to have execution of the ſeveral ſums of 2000*l.* and 2000*l.* And the judgment was entered, that the plaintiff ſhould have execution againſt both defendants of the ſeveral ſums of 2000*l.* and 2000*l.* Upon which judgment error was brought, and aſſigned, that the court hath given an erroneous judgment in this, that they have given a joint judgment of 4000*l.* againſt each of the defendants, where it ought to have been but for 2000*l.* againſt each of them. Againſt which it was argued by Mr. *Broderick* for the defendant in error, that the whole depended upon the interpretation of the *ſeparalibus ſummis* contained in the bar. And (by him) there are ſeveral words, which do not import any determinate ſenſe, but ought to be interpreted according to the company in which they are. Of this ſort is the word *ſeparalia*, and it ſignifies reſpective. And if the judgment had been, that he ſhould recover the reſpective ſums of 2000*l.* and 2000*l.* it had been good. It appears that each acknowledged but 2000*l.* and that they ſhould be levied againſt them ſeverally. And therefore though the judgment be joint in the words, yet the ſubject matter requiring it, ſeveral interpretations ſhall be made; and the prayer is confined to the *ſecundum formam recognitionis*. *Palm.* 435. *Latch.* 137. 2 *Hen.* 4. 13. Where in a *ſcire facias* againſt ſeveral terre-tenants the ſheriff returned, that he warned them *ſecundum formam brevis*; and it was adjudged, that it ſhould be taken reſpectively, becauſe the return was *ſecundum formam brevis*. So here the prayer is *ſecundum formam recognitionis*. He cited alſo 1 *Sid.* 339. *Gee v. Fane & ux.* *Yelv.* 53. 1 *Saund.* 65. *Paſch.*

On a recognizance whereby two perſons are ſeverally bound in the ſum of 2000*l.* an award of execution againſt both jointly for 4000*l.* is error. S. C. ante. 182. But amendable. R. cont. ante 182.

An award of execution againſt both of the ſeveral ſums of 2000*l.* and 2000*l.* in an award of execution againſt both jointly for 4000*l.*

VILLERS v. PARRY.

34 *Car.* 2. *B. R. Rot.* 386. *Mich.* 3. *Will. & Mar. B. R. Rot.* 357 or 257. *Rofy v. Hunt.* And (by him) where there is error in the bare entry of the judgment, the court will reverſe the judgment of the common pleas, and give ſuch judgment as they ought to have given.

But the whole court were of opinion, that this was error. But *Holt* chief juſtice ſaid, that it was a queſtion, if it might not be amended in the common pleas. To which it was anſwered by Mr. *Northey* counſel for the plaintiff in error, that ſuch a motion had been made in the common pleas, and denied. [See it before 182.] But *Holt* ſeemed to be of opinion, that it might well be amended, the writ being good, and therefore this fault in the judgment but *vitium clerici*. But if the writ had been ill, it could not have been amended, becauſe the party might have had a new writ. Upon which it was adjourned, to the intent that application might be made to the common pleas for an amendment. And it being moved there, the court was divided, two judges againſt two. And ſo the caſe was not moved afterwards in the king's bench.

Rex *verſ.* Pheaſant.

The caption of an indictment need not ſtate that the jury were ſworn at the time when, and the place where they preſented it.

ERROR brought to reverſe a judgment of attainder upon an indictment for a rape. Several errors were aſſigned by Mr. *Peere Williams*, and over-ruled. Among others one was, that it is not ſaid in the caption, *adtunc et ibidem jurat*, and it may be, that they were ſworn at an alehouſe, and not for the ſaid purpoſe, *&c.* And for this he cited 1 *Ventr.* 16. 2 *Keb.* 610. 1 *Mod.* 26. 2 *Keb.* 583. But the court inclined to diſallow the exception, becauſe it would reverſe an infinite number of attainders and judgments upon indictments. And *Holt* chief juſtice ſaid, that in *Coventry*, *Lincoln*, *&c.* the grand jury were ſworn at the ſeſſions, from whence they came to the aſſizes; and they inſiſted, that they were not accuſtomed to be ſworn there again; but he held it to be an ill practice, and always for his part cauſed them to be ſworn again at the aſſizes. And this exception being moved, the court refuſed to allow it.

The

The Inhabitants of the Pariſh of Clerkenwell *verſ.* Bridewell.

S. C. Carth. 515. Salk. 486.

A. Who had been educated in *Bridewell* as apprentice of one of the maſters of the ſaid hoſpital in the trade of hemp-dreſſing, came to the pariſh of *Clerkenwell*, and there being likely to become chargeable, &c. was removed by two juſtices to *Bridewell*, which is an extra-parochial place. But *per Holt* chief juſtice, the juſtices of peace have no authority to ſettle any perſon in an extra-parochial place; for the ſtatute which gives them authority, extends only to the poor within pariſhes. Pariſhes (*b*) in reputation are within the act, but places extra-parochial are out of the act. And the order of the juſtices was quaſhed.

Juſtices of the peace cannot remove a pauper to an extra parochial place (*a*). R. acc. fol. 97. D. acc. Salk. 487. pl. 48. Sed vide Sett. and Rem. 43. pl. 68. Salk. 486 in margine. fol 98.

(*a*) According to the caſe of Polting v. Stokeland, Foley 98. a pauper cannot be removed to an extra-parochial place, unleſs there are overſeers in ſuch place; and that before a removal can be made to an extra-parochial place which has no overſeers, application muſt be made to the juſtices to make an appointment, and if they refuſe, the court of king's bench will grant a mandamus to compel them. (*b*) D. acc. Salk. 487. pl. 48.

Eaſte

Eaſter Term,

12 Will. 3. B. R. 1700.

Sir John Holt, *Chief Juſtice.*

Sir John Turton, *Sir* Henry Gould } *Juſtices.*

Cremer *verſ.* Wicket. Ante 509.

S. C. but incompletely reported. 12 Mod. 350.

IN an action for aſſault, battery, and wounding, the defendant pleaded another action depending in this court, in abatement. The plaintiff replied, *nul tiel record.* And entry was made, *quia curia domini regis hic ſe adviſare vult ſuper inſpectione et examinatione recordi, &c. dies datus eſt, &c.* And the defendant put a demurrer into the office, and refuſed to pay for the entry of his plea; for which reaſon the plaintiff ſigned final judgment. So that the queſtion in court was, whether the demurrer was regular. For if it was regular, then he ought not to pay for it till the paper book was complete: but if otherwiſe, then he ought to pay for it before; and for want of that the plea was no plea, and ſo judgment ought to be by default, which is final judgment. And *per Holt* chief juſtice, where it is a record in the ſame court, it is the moſt proper and ſure method; if it was a record in another court, then there ought to be a rejoinder, *quod habetur tale recordum, &c.* And if in this caſe upon ſearch it appears to the court that there is ſuch record, then the entry ought to be, *quia inſpectis recordis, &c. apparet*, that there is ſuch record, *ideo, &c.* But if no ſuch record be found, then, *quia inſpectis, &c. non invenitur aliquod tale recordum, &c.* then judgment *quod reſpondeat ulterius* ought to be given, for failure of the record; and there is no need to join iſſue, where it is a record of the ſame court. The other method has been uſed, *viz.* to rejoin *quod habetur tale recordum*; but that is contrary to the reaſon of the law; for where it is a record of the ſame court, the entry ought to be made as here. *Dier*, 228. *a.* Or otherwiſe the plaintiff might

A plea of nul tiel record to a record of the court in which the plea is pleaded is a concluſion to the record. S. C. Carth. 517. Vide 2 Wilſ. 113. Barnes, 4to. Ed. 335.

On a plea in abatement, tho' the replication denies the ſubſtance of the plea, a judgment by default ſhall only be quod defendens reſpondeat ulterius. Vide ante, 338. 2 Wilſ. 367. Com. Abatement. l. 14, 15. 2d Ed. vol. 1. p. 68, 69.

might have prayed (a) *oyer* of the record. Then this entry being regular, the demurrer was irregular. But then final judgment ought not to be ſigned, but only *quod reſpondeat ulterius*; for failure of record is not peremptory But Mr. *Northey* for the plaintiff urged, that they might ſign final judgment by *nil dicit* for want of paying for the plea. But *per Holt* chief juſtice, that is too hard, where there was a probable queſtion, as there was in this caſe. And therefore the judgment was ſet aſide, and the plea ſtood as of the laſt term, and day was given to inſpect the record as of this term. *Ex relatione m'ri Jacob.*

CREMER v. WICKETT.

(a) Vide ante, 347.

Intr. Trin. 11 Will. 3. B. R. Rot. 754. Comyns has it, Rot. 752.

Aſhmead *verſ.* Ranger.

In treſpaſs for entering a cloſe, without naming it, if the defendant in his plea ſtates it to be a cloſe containing eight acres, called A. the plaintiff may in his replication ſtate it to be parcel of a meſſuage and twenty acres of land, without adding that it is other than the place mentioned in the bar.

A plaintiff cannot after replying take advantage of a neglect in the defendant to give colour in his plea. Semb. acc. Cro. Jac. 229. ſ. c. Vide Com. Pleader. 3. M 41. 2d. Ed. vol 5. p. 366. ante, 218.

A copyholder may maintain treſpaſs againſt his lord for cutting upon the copyhold trees to which the copyholder was intitled for re-

THE plaintiff brought an action of treſpaſs againſt the defendant for the breaking of his cloſe at *B.* and the cutting and carrying away of —— oaks and aſhes, *&c.* the defendant pleaded that the place where, *&c.* is a cloſe called *Horn Cloſe* containing eight acres; and that it is, and at the time of the treſpaſs was, the freehold of the defendant; and that the oaks and aſhes were timber trees there growing; and therefore he cut them down and carried them away, as well and lawfully he might, *&c.* The plaintiff replies, that the place where, *&c.* is parcel of a meſſuage and twenty acres of land, which are copyhold, and parcel of the manor of, *&c.* whereof the defendant is ſeiſed in fee; and that he granted them to *J. S.* for his life, to hold at the will of the defendant according to the cuſtom of the manor; and that there is a cuſtom within the manor, that (a) every copyholder for life, *&c.* hath uſed, to have all timber trees *ſuper eiſdem terris cuſtumariis ſuis creſcentes*, for the reparation of their houſes, *&c.* and that all the timber trees at the time of the treſpaſs aforeſaid, and until this time, growing upon the ſaid lands, were not ſufficient for the reparations, *&c.* The defendant demurred. And *Hilary* term laſt Mr. *Northey*, for the defendant took exception to the replication, becauſe it is not *alias quam in barra*, which ought to have been ſaid, ſince the plaintiff varies from the place in the defendant's plea. But *Holt* chief juſtice held, that it was well enough, it being very well conſiſtent, for the place where, *&c.* may be a cloſe called *Horn Cloſe* containing eight acres, and yet it may be parcel of a copyhold tenement and twenty acres. Then Mr. *Earle* took exception to the defendant's plea, becauſe he had not given colour to the plaintiff. But *per Holt* chief juſtice, if the plaintiff replies, the defect of colour is waived; but upon a general

pair. S. C. Salk. 638. 12 Mod. 378. Holt, 162. Fort. 152. Vide Com. Copyhold. K 7. 2d. Ed. vol. 2. p. 513. The lord cannot cut any trees upon a copyhold except under a cuſtom. S. C. Com. 71. 12 Mod 378. Holt, 162. Fort. 152. Vide 1 Leon. 272. pl. 365. Com. Biens. H. 2d. Ed. vol. 1. p. 600. Com. Copyhold. K. 7. 2d. Ed. vol. 2. p. 513.

(a) Vide 11 Mod. 68. Cro. El. 5. pl. 3. 294. pl. 3. 499. 13 Co. 68. Co. Cop. 188. Gilb. Tenn. 237. 1 Roll. Abr. 508. 6 Vin. 125. pl. 4.

demurrer

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demurrer advantage might have been taken of it. And now this term Mr. *Northey* argued for the defendant, 1. That the lord of the manor might take the trees growing upon the copyhold, if he leaves enough for reparations. *Godb.* 173. *per Coke* chief justice. And the constant practice is accordingly through all the west of *England*, where the lord may assign to the copyholder enough for repairs upon other land; and therefore it is not material, though he did not leave enough upon the copyhold land. 2. The plaintiff cannot have an action of trespass, but an action upon the case. As if a man has right to estovers in a wood, and the owner cuts all the wood, he shall have case and not trespass. *Moor*, 546. *pl.* 727. 3 *Cro.* 629. 1 *Roll. Rep.* 196. Mr. *Earle e contra* argued for the plaintiff, that the copyholder might have trespass against the lord himself. 2 *H.* 4. 12. 2 *Saund.* 422. *Noy*, 14 *Cross v. Abbot*. And as to the other point, that the lord could not cut the trees, without leaving enough, he relied upon 13 *Co.* 67. 2 *Brownl.* 328. in point, *Heydon v. Smith*.

And the whole court were clear of opinion, that judgment ought to be given for the plaintiff, because it appears that the plaintiff had not enough to repair without these trees. And therefore judgment could not be given for the defendant, without overthrowing the case of *Heydon v. Smith*. And *per Holt* chief justice, a copyholder holds the trees by copy of court-roll, as well as the land; and therefore it seemed to him, that the lord could not cut the trees growing upon the copyhold. And *Cro. El.* 361. says, that the copyholder may lop the trees without special custom, which shews that the copyholder has a special property in them. And there are some places, where the lord compounds with the copyholder for his special interest; and the copyholder shall have the acorns; and if birds build their nests, and breed there, he (*a*) shall have the young ones. And it is not like the case of a lease of the land, excepting the trees; for there the trees were never demised, and (*b*) the lord may enter and cut them. But where they are not excepted upon the demise, though after severance the property of them is in the lord, yet he cannot cut them; no more can the lord enter upon his copyholder, and cut the trees. But he said, he would not give an absolute opinion as to that point. In the principal case judgment was given for the plaintiff. Afterwards error was brought upon this judgment in the exchequer chamber, and the judgment was affirmed there. And afterwards error was brought in parliament, and both judgments were reversed *Monday* 28 *April* 1702, ten lords being for affirming, and eleven for reversing.

(*a*) D. acc. 11 Co. 48. a. b.

(*b*) R. 11 Co. 52. a. Lessor cannot enter and cut trees, unless they are excepted by the demise.

Atwood

Atwood *verſ.* Burr.

S. C. 3 Salk. 369.

A Writ of error brought upon an award of execution upon a *ſcire facias* againſt the bail was quaſhed, becauſe the writ was, *in adjudicatione executionis judicii praedicti, &c.* where it ought to have been, *in adjucatione executionis ſuper recognitionem. Ex relatione m'ri Jacob.*

Vide poſt. 821.

Intr. Trin. 11 Will. 3. B. R. Rot. 167.

Mois *verſ.* Bruerton.

IN *aſſumpſit* brought by the plaintiff and laid in *Norfolk*, the defendant pleaded the ſtatute of limitations. The plaintiff replied; and ſhewed a writ of *clauſum fregit* brought within the ſix years in *Suffolk*, and continued there until this time. The defendant demurred. And in the common pleas judgment was given for the plaintiff there, that the replication was good, and that this writ of *clauſum fregit* had avoided the ſtatute of limitations. And now upon error brought, and the general errors aſſigned, the judgment was reverſed. But in maintenance of the judgment 2 *Ventr.* 193, 258. were cited. But *per Holt* chief juſtice, though this writ of *clauſum fregit* might be a ſufficient proceſs, to bring in the party, and compel an appearance, yet it cannot be an original, to avoid the ſtatute of limitations. This way of proceeding is to eradicate all the principles of the law. If a plaint be levied in an inferior court within the ſix years, and then it is removed into the king's bench by *habeas corpus*, and the plaintiff declares here *de novo*, and the defendant pleads the ſtatute of limitations; the plaintiff may reply, and ſhew the plaint in the inferior court; and that will be ſufficient to avoid the ſtatute of limitations. *Ex relatione m'ri Jacob.*

A clauſum fregit ſued out for the purpoſe of bringing the defendant into court to enable the plaintiff to declare againſt him in an action of aſſumpſit will not prevent the ſtatute of limitations from attaching upon the aſſumpſit. Vide ante, 432. and the books there cited.

The commencement of an action in the inferior court will prevent the ſtatute of limitations from attaching upon the cauſe of action. R. acc. 1 Sid. 228. pl. 24. Salk. 424. pl. 13. poſt. 1427.

Tilney *verſ.* Norris.

S. C. Carth. 519. but no judgment. Salk. 309.

Intr. Trin. 9 Will. 3. Rot. 182.

AN action of covenant was brought againſt an adminiſtrator for a breach of covenant in his own time for not repairing the premiſes. The *quaere* aroſe upon the declaration, it being alleged generally, *quod ſtatus de et in praemiſſis legitime devenit* to the defendant; (*a*) whether the adminiſtrator of a leſſee for years is not chargeable in his own right in this caſe for a breach of covenant in his own

The perſonal repreſentative of a leſſee for years is his aſſignee. R. acc. Salk. 316. pl. 25 D. arg. Dougl. 176.

A covenant to repair binds an aſſignee.

R. acc. 5 Co. 16. b. 17. b. 24. a. Cro. El. 457. pl. 1. 552. pl. 2, 3. Cro. Car. 222. pl. 8. W. Jon. 245. pl. 3. Salk. 316. pl. 25. acc. 3 Wilſ. 29.

(*a*) And according to Carthew, 519. that the defendant entered, for if he had not entered he would not have been chargeable as aſſignee. Vide Salk. 316. pl. 25. Dougl. 438.

time.

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time. And Mr. *Peere Williams* argued for the plaintiff, that this was a covenant which ought to be performed upon the land, and runs with it, and binds the aſſignee. 5 *Co.* 16. *Spence*'s caſe. *Moor* 399. The dean and chapter of *Windſor*'s caſe, 5 *Co.* 24. the ſame caſe. And the aſſignee of part ſhall be chargeable with this covenant. *Congham v. King*, *Cro. Car.* 222. *pl.* 8. *W. Jon.* 245. *pl.* 3. And for the ſame reaſon an executor or adminiſtrator ſhall be chargeable as tenant of the land, as every other poſſeſſor is, for a breach of covenant in their own time. And if the law ſhould be otherwiſe, it would be a great hardſhip to the landlord, who (as is ſaid in the caſe of the dean and chapter of *Windſor* in 5 *Co.* 24. *a. Cro. El.* 457. *pl.* 1. 552. *pl.* 3.) leaſed his land at a leſs rent for this conſideration; for it may be, that the teſtator did not leave any *aſſets*; but that would be no hardſhip to the adminiſtrator, becauſe he might waive the term, or aſſign it over, and diſcharge himſelf, if the premiſes were in ſo bad a condition, as not to be worth being repaired. And there are many caſes which will warrant this, as 5 *Co.* 31. *Hargrave*'s caſe. Debt againſt the adminiſtrator in the *debet* and *detinet* for rent incurred in the adminiſtrator's time; which caſe is the ſtronger, becauſe it appeared, that the defendant was adminiſtrator, upon the declaration. 2 *Inſt.* 302. The executor or adminiſtrator of a tenant for years ſhall be puniſhed for waſte done in their own time. And 1 *Anderſ.* 52. that the judgment for the damages ſhall be againſt them *de bonis propriis*. And there is no difference between permiſſive and voluntary waſte, that will influence this caſe, becauſe this breach of covenant is in nature of permiſſive waſte; except that the caſe of waſte is ſtronger, becauſe treble damages are recoverable there, but ſingle damages only in covenant. And if the executor aſſigns over, waſte will lie againſt him in the *tenuit*; therefore it is not hard, to ſupport this action; and judgment ſhall be againſt him *de bonis propriis*. *Office of Exec.* 280. A man may be charged as executor barely, where he might be charged as aſſignee, as *Allen* 42. debt will lie againſt an executor in the *detinet* for rent incurred in his own time. And therefore he admitted all the caſes to be law, where in actions of covenant brought againſt executors for breaches in their own time, the judgments are *de bonis teſtatoris*; becauſe in the ſaid caſes they are named executors, and charged as ſuch; but in this caſe the defendant is charged as aſſignee, and as aſſignee he ought to be charged *de bonis propriis*. And for theſe reaſons he prayed judgment for the plaintiff, and judgment was given for the plaintiff, *niſi*, &c. becauſe no counſel attended for the defendant; though *Holt* chief juſtice ſaid, that he had a mind to hear counſel of the other ſide. *Ex relatione m'ri Jacob.* Afterwards this was argued twice at the chief juſtice's chamber, by Mr. *Peere Williams*, and by

by ſerjeant *Wright* for the defendant; and after mature deliberation the plaintiff had judgment.

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Rex *verſ.* Toler.

S. C. Salk. 176. 12 Mod. 372. Holt. 483.

MRS. *Stout* mother of Mrs. *Sarah Stout* ſued a writ of appeal out of chancery againſt *Spencer Cowper*, Eſq. counſellor at law, the youngeſt ſon of Sir *William Cowper* baronet, for the ſuppoſed murder of her daughter, in the name of an infant, who was a relation to the ſaid *Sarah Stout*, and her heir; and before the writ was returnable, procured herſelf to be admited guardian to the infant in the ſaid appeal by the lord chief juſtice *Holt*. After this the friends and mother of the infant, being influenced by the *Cowpers*, went to the defendant who was under-ſheriff of *Hertfordſhire*, with the infant, and demanded of him the writ of appeal, which the defendant delivered accordingly. And now this term, after the return of the writ was expired, Mr. ſerjeant *Levinz* and Mr. *Carthew*, being counſel with Mrs. *Stout* the guardian, made a motion in the king's bench to have a rule, that *Toler* ſhould return the writ. And upon a rule made accordingly, that *Toler* ſhould ſhew cauſe, why he ſhould not return the writ, the whole matter appearing upon the *affidavits*, and that the writ was burnt, and ſo loſt, the queſtion was, whether the re-delivery of the writ by the defendant to the infant was a contempt to the court. And it was ſtrongly argued for the defendant, that this was no contempt, becauſe it was the ſuit of the infant, and the infant upon compoſition made might come into court, and diſallow his guardians. 2 *Roll. Rep.* 59. *Onley*'s caſe. And therefore if the infant has his writ again, it is a ſufficient excuſe for the ſheriff. That after the writ returned into the court, the infant may come and diſavow the ſuit; and the court will diſcharge the guardians. 1 *Roll. Abr.* 288. 3 *Vin.* 283. *D.* And if the infant has ſuch power over the ſuit after it is begun; *a fortiori* before the writ is returned. And Mr. *Ward* cited ſome caſes, as *Dalt.* 77. that if the plaintiff ordered the ſheriff, to let a man, who is in execution at his ſuit, go at large, and he does ſo accordingly; it is a (*b*) good bar in debt for the eſcape. And 3 *Bulſtr.* 98. *Blamford v. Blamford*, that if in ſuch caſe the ſheriff refuſes to let him go at large, an action of falſe impriſonment lies againſt him: and there the lord *Coke* ſays, that the ſheriff is bound to take notice of the plaintiff. And *Cro. Jac.* 379. *Withers v. Henley* to the ſame purpoſe. It was urged alſo, that the guardian was not appointed, till after the writ was ſued; ſo that when the writ was delivered to the ſheriff, the guardian had nothing to do with it. And the practice of under-ſhe-

It is a contempt in a ſheriff to deliver to an infant a writ of appeal ſued out in the infant's name. S. C. Holt, 153. Though no guardian was appointed when the writ was ſued out. S. C. Holt, 153. A writ of appeal of murder cannot be ſued out (*a*) after a year and day from the deed done, though a former writ ſued out in time has been improperly deſtroyed. Vide H. 7. 10. pl. 5. Com. Appeal. D. 2d Ed. vol. 1. p. 366. Hawk. B. 2. c. 23. ſ. 33. 34. 1 Bac. 125. 2 Inſt. 319. 320.

(*b*) D. acc. 2 Inſt. 382.

(*a*) It is ſtated in Salk. 177. though not in this report "that the ſecond writ was refuſed becauſe the year and day had elapſed after the deed done:" and in 12 Mod. 375. "that the writ was *petitioned for* becauſe the year and day had elaſped, and that the lord keeper and judges thought the lord keeper had a diſcretionary power to grant or refuſe it."

riffs

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riff's delivering writs again to plaintiffs was well urged. But *per Holt* chief justice, there is great difference between the re-delivery of writs to men of full age plaintiffs, and to infants plaintiffs. For the law takes great care of the suits of infants, that they shall not sue, but by such persons as the court appoints, because they cannot manage their own suits. And therefore the law will never permit such persons to dispose of writs out of court, who cannot prosecute a writ when it is returned in court. But the sheriff has nothing to do, but to execute the writ. And therefore when the infant came to demand the writ of the defendant, the re-delivery to him, when he has no power to dispose of it, is no more than a delivery to a mere stranger, which is a contempt. And it is an insufferable contempt, when under-sheriffs by these practices hinder justice. Whether there was a guardian appointed or not, signified nothing to him. If no guardian had been appointed, then upon the return of the writ, if the plaintiff had been called, and no person had appeared, the plaintiff ought to have been nonsuit, and the defendant discharged. See *Latch.* 178. But such discharge had been by course of law, and not in such manner as this, by anticipation of the court. If the court, upon the coming in of the infant, and disavowing of the suit, could discharge the guardian; yet the under-sheriff out of court has no power to do it. And in the said case it is in the discretion of the court, that they may and ought to refuse to suffer it. And a *retraxit* entered is error. The case in 2 *Roll. Rep.* 59. is not law. Besides, that if the plaintiff had been nonsuit after appearance, the defendant ought to be arraigned at the suit of the king, though he had been acquitted upon the indictment, and ought to have been put to plead, *autrefois acquit.*

H. P. C. 199. If the plaintiff in appeal be nonsuit after appearance, the defendant shall be arraigned at the suit of the king, though he may have been acquitted before. Vide post. 671.

If the guardian had any thing to do with the writ, it is nothing to the purpose, for the writ is the king's writ, and ought to be returned in the court. And in the book of *Edward* III. an attachment was granted against a sheriff for not executing a replevin. There was also an objection, that the writ was not returned, and therefore the court could not take notice of it. To which *Holt* chief justice said, that the sheriff was the officer of the court, and they could examine him, what writs he had returnable here, and what was become of them. That it is the common practice. And where a writ of error is sued out of chancery, to remove a record out of an inferior court, returnable here; if they sue execution afterwards, and before the return, this court will punish them. And he cited the case of Mr. *Starkey* in the time of the lord chief justice *Kelynge*, who was steward of *Windsor* court, where a complaint was made against him, for being judge, plaintiff and bailiff; and Mr. *Starkey* at the bar said, it did not concern this court; but he was committed, for every such misdemeanor is iniquitable here. And therefore he was of opinion, that

that this was a contempt in the defendant, and that he ought to be committed.

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Turton juſtice was of opinion, that this was not a contempt. And he relied upon the common practice of re-delivering writs to plaintiffs; and ſaid much to induce a belief that the defendant did this ignorantly out of the ſimplicity of his heart.

Gould juſtice agreed in opinion with *Holt* chief juſtice, that this was a contempt; and took the ſame diſtinction between men of full age and infants, as to the withdrawing of writs; and ſaid that this ſuit by appeal was different from all other ſuits by infants, for they cannot proſecute an appeal by *prochein amy*, though they may all other ſuits, but only by guardian.

Infants cannot proſecute appeals but by guardian. Semb. 27 H. 8. 11. a. pl. 25.

Toler was committed the laſt day of the term upon the report upon the interrogatories, and he was bailed the next day by Mr. Juſtice *Turton* at his chamber. Afterwards in the vacation before *Trinity* term a petition was preferred to Sir *Nathan Wright*, lately made lord keeper of the great ſeal of *England*, to leave a new writ of appeal granted. But upon the hearing of counſel on both ſides for ſix hours and more by him, aſſiſted by the lord chief juſtice *Treby*, the lord chief baron *Ward*, and Mr. juſtice *Powel*, whom my lord chief juſtice *Holt* ſent in his place, and Sir *John Trevor* the maſter of the rolls, by the unanimous opinion of all of them the (*a*) petition was rejected. And afterwards in *Trinity* term next following *Toler* was fined 200 marks. Upon which occaſion *Holt* chief juſtice ſaid, he wondered that it ſhould be ſaid that an appeal is an odious proſecution. He ſaid, he eſteemed it a noble remedy, and a badge of the rights and liberties of an *Engliſhman*. The ſtatute of *Glouceſter*, 6 *Ed.* 1. c. 9. has provided, that it ſhall not be abated ſo lightly as before it had been; but if the appellant declares the fact, the year, the day, the hour, the time of the king, and with what weapon, the appeal ſhall be maintained. And 3 *H.* 7. c. 1. which gives power to proceed at the ſuit of the king within the year, does yet ſave the appeal to the party after acquittal. And therefore ſince this remedy hath been favoured by acts of parliament, and tends to the ſupport of families, and is of evident neceſſity in ſome caſes (to ſay nothing of this preſent caſe, but only that a very odd method has been taken, and that too publicly avowed, for withdrawing of this appeal) the judges ought to encourage appeals. The court of king's bench, to ſhew their reſentment, committed *Toler* to the priſon of the king's bench for his fine, though the clerk in court would have undertaken to pay it. And *Holt* chief juſtice ſaid to *Toler*, that he had not been in priſon long enough before; and that he might now, if he pleaſed, go to *Hertford*, and make his boaſt that he had got the better of the king's bench. *Ex relatione m'ri Jacob.*

(*a*) Vide ante, 555. and the note there.

Pitts

Pitts *verſ.* Gainee and Foreſight.

No corporation can preſcribe which has not exiſted immemorially. Vide 2 Bl. Com. 263. And where a corporation does preſcribe it muſt appear that it has ſo exiſted. Under a right to diſtrain for toll, a man cannot juſtify detaining the diſtreſs until payment of the toll *and charges*. The maſter of a ſhip may, though he is not owner, maintain treſpaſs againſt any one who ſeizes the ſhip. S. C. Salk. 10. Holt. 12. or if he ſuſtains any conſequential damage thereby, caſe. S. C. Salk. 10. Holt, 12. Vide Bl. 897. In caſe for ſeizing a ſhip, per quod the plaintiff was hindered from making a voyage on which he was bound, it is ſufficient for him to ſtate that he was bound upon the voyage, he need not add that he intended to have proſecuted it.

IN an action upon the caſe the plaintiff declared, that the firſt of *October* in the —— year of the king that now is, he was maſter of ſuch a ſhip, which ſhip lay then in *Ipſwich* haven, loaden with corn *in quodam viagio tunc obligata ad Dantzick per ipſum* the plaintiff *fiendo*, and that the defendants entered and ſeized the ſhip, and detained her ſo long, *per quod impeditus et obſtructus fuit in viagio praedicto*, to his damage, &c. The defendants juſtified the ſeizure as bailiffs to the corporation for toll, &c. But the plea for ſeveral defects in it was over-ruled; as, 1. That a preſcription was laid in the corporation to have toll, &c. and it was not ſhewn that this was a corporation, time whereof, &c. 2. They ſaid, that they detained the ſhip until they were paid the toll and charges; and title is made only to diſtrain for the toll. But Mr. *Ward* for the defendants did not pretend to maintain the plea; but he took exception to the action, that it will not lie, but that the plaintiff ought to have brought a general action of treſpaſs. 41 *Ed.* 3. 24. Action upon the caſe againſt a miller, for that he ought to grind his corn without payment of toll, he brought his corn to be ground, and the defendant took two buſhels of peas, &c. and it was held that the plaintiff ought to have brought a general action of treſpaſs. He cited alſo *Palm.* 47. 13 *H.* 7. 26. *Lane*, 65. and the caſes of *Thornton and Auſtin*, *Hil.* 4. *W.* & *M. Rot.* 1051. *C. B.* and *Paſch.* 9 *Will.* 3. *C. B. Hills v. Clerk.* (See the ſaid caſes before, *p.* 188.) Mr. *Hall e contra* for the plaintiff ſaid, that in the ſaid caſes the property was in the plaintiff: but here the ſhip did not belong to the plaintiff, and he had no damage but the loſs of his voyage. *Holt* chief juſtice. The plaintiff here might have had treſpaſs, and declared that he was poſſeſſed of a ſhip, and founded his action upon the poſſeſſion. But when he brings the action as maſter, he cannot have treſpaſs, but caſe. A baillee may maintain treſpaſs, but then he ought to declare upon his poſſeſſion. So the maſter might have done here, and the defendants could not ſay that the ſhip was not his. But when he ſues as maſter, he can recover only as officer, and therefore this action is more proper. Then Mr. *Weld* for the defendant took exception, that it is not ſaid he had an intent to proſecute his voyage; for it may be, if he had not been detained by the defendants, he would not have made his voyage. But *per Holt* chief juſtice, it is enough for the plaintiff to ſay that he had his cargo on board, and bound for ſuch a place; for he has no need to ſay, that the wind was fair. Judgment for the plaintiff. *Ex relatione m'ri Jacob.*

The

The King *againſt* the Mayor of Abingdon.

A *Mandamus* was granted, directed *Jacobo Courteen majori, ballivis, et omnibus principalibus burgenſibus, burgi de Abingdon, praeter Johannem Sellwood et Johannem Spinnage*, reciting the letters patent conſtituting them a corporation, and howby the letters patent the commonalty ought to elect two out of the capital burgeſſes, to be mayor for the enſuing year; and the mayor, bailiffs, and capital burgeſſes, ought to elect one of them; and they ſhew the fact, that *John Sellwood* and *John Spinnage* were capital burgeſſes, and elected by the commonalty; and therefore it commands them, to elect one of them to be mayor; and it commands the mayor to ſwear him, *&c.* To which writ of *mandamus* they return the act of 13 *Car.* 2. *ſ.* 2. *c.* 1. by which it is enacted, that if any perſon, after the expiration of the commiſſion there mentioned, ſhall be elected into any office in a corporation, who ſhall not have taken the ſacrament according to the rites of the church of *England* within one year before ſuch election, the election ſhall be void; then they ſay, that within twenty years after the twenty-fifth of *March* 1663, *John Sellwood* and *John Spinnage* were elected capital burgeſſes, and that within one year before their election they had not received the ſacrament according to the rites of the church of *England*, *per quod electio eorum vacua devenit, et quod non ſunt principales burgenſes burgi praedicti, &c.* Several exceptions were taken to this writ, and this return; but the principal of them, and thoſe which were adjudged, were theſe. 1. The exception to the return was, that the merits of the return, *viz.* that *Sellwood* and *Spinnage* were not capital burgeſſes, could not be proved by it: for though it was true, that within twenty years after the twenty-fifth of *March* 1663 they were elected capital burgeſſes, and were not qualified, yet they may have qualified themſelves, and may have been elected capital burgeſſes again ſince; and if that be true, they may be capital burgeſſes at this hour; and then though they were not qualified when they were elected firſt, that is no reaſon why one of them ſhould not be elected mayor; therefore they ſhould have added to the return, that they were never elected ſince. For anſwer to which it was ſaid, that the laſt words, *et non ſunt principales burgenſes burgi praedicti* was a poſitive direct affirmation of itſelf, that *Sellwood* and *Spinnage* were not capital burgeſſes, and a ſufficient anſwer to the writ without more ſaying; and a general poſitive return is good, 1 *Sid.* 209. But all the court held the exception good. And *Holt* chief juſtice ſaid, that if the words, *et non ſunt principales, &c.* had been omitted, the ſpecial matter in the return would not have been good and ſufficient. The writ ſuggeſts an election, which the court muſt intend to be true;

The return to a mandamus muſt have the utmoſt poſſible certainty. S. C. 12 Mod. 401. Holt, 441. Vide Com. Mandamus. D. 5. 2d. Ed. vol. 4. p. 215.

Where the mayor of a corporation is eligible out of two capital burgeſſes nominated by a part of the corporation, and a mandamus iſſues to inforce ſuch election, a return ſtating elections of the nominees to the offices of capital burgeſſes, and ſhewing thoſe elections to have been void muſt add that they were not elected afterwards. S. C. Carth. 499. Holt, 441.

An allegation by inference from ſuch ſtatement that they are not capital burgeſſes is not ſufficient. S. C. Holt, 441.

An allegation "that they are not capital burgeſſes" joined to ſuch ſtatement by a conjunction is an allegation by inference from ſuch ſtatement. S. C. Holt, 441.

A mandamus may be directed to ſome only of the integral parts of a corporation by their corporate names. S. C. Salk. 699.

Carth. 499. R. Salk. 701. pl. 6. Vide Com. Mandamus. C. 1. 2d. Ed. vol. 4. p. 211. With an exception of particular individuals. S. C. Salk. 699. Carth. 499. A mandamus to *ſwear in* as well as elect an officer is good, though it is uncertain who will be elected.

and

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and the defendants avoid it by inference, which is not concluſive. The defendants ſhew, that within twenty years after the twenty-fifth of *March* 1663 *Sellwood* and *Spinnage* were elected, &c. within the year before which election they had not received the ſacrament, which avoids the ſaid election, but does not exclude a ſubſequent election. Returns ought to have the moſt exact certainty that the law approves, becauſe they cannot be traverſed, nor hath the party the benefit of interpleading; and therefore the whole matter ought to be ſo certainly laid before us, to the end that we may judge whether the cauſe returned be ſufficient or not. Now if this matter had been pleaded in a bar (which is good if it be certain to a common intent) the plaintiff might have replied a ſubſequent election. And if it be ſo, that that is not excluded by the return, the return cannot be good, becauſe it does not anſwer the point of the writ, *viz.* that they are principal burgeſſes. The time of the election ought to have been ſhewn, *viz.* that ſuch a time *Sellwood* was elected, and that within one year before, &c. and that he was not elected ſince. We know in fact, that ſubſequent elections have been made. *Bethell* was elected ſheriff, and not being qualified, he received the ſacrament, and was elected another time. Then here the *et non ſunt principales*, &c. will not make it good; for that is only by inference, to warrant which there are not ſufficient premiſſes, it being coupled to the former part of the ſentence by the copulative *et*.

Two exceptions were taken to the writ. 1. That it is ill-directed: for it ought either to have been directed to the corporation by their corporate name, or otherwiſe to the members of it by their natural names; for the law makes no other diſtinction of perſons. But it is here directed to the mayor, bailiffs, and capital burgeſſes, who are but part of the corporation, for the corporation is the mayor, bailiffs, and burgeſſes, and there is no ſuch corporation as this. And for this exception in a *mandamus* to this town of *Abingdon* the writ was quaſhed. *T. Jon.* 52. *Holt*'s caſe [father to the chief juſtice.] But *per Holt* chief juſtice, though the caſe in *Jones* is in (*a*) point, yet it never was eſteemed to be law at any time ſince. And he ſaid, that he remembered that his brother *Pemberton* and Sir *William Jones*, who were at the bar then, wondered at the reſolution, and ſo alſo did the whole bar. If the writ is directed to the corporation, it (*b*) has been held good. But if it be directed to thoſe, who by the conſtitution of the corporation ought to do the act, without doubt it is good alſo. There have been a hundred writs directed to the mayor and

(*b*) 1 Roll. Rep. 409. pl. 50.

(*a*) The queſtion in Sir T. Jones was, whether a peremptory mandamus could be granted upon a writ improperly directed? which ſeems materially different from the queſtion in this caſe. Vide ante 337.

aldermen

aldermen of *London* in cases of acts to be done by them separately; and that is the course of all mandatory writs. And wherefore must it be directed to the whole corporation, when the rest of them do not obstruct the doing of the thing, nor have any power to execute the command of the court.

Rex
Mayor of Abingdon.

2. The second exception to the writ was to that part of the writ which commanded the mayor to swear *Sellwood* and *Spinnage*, that they sued this too soon; for a *mandamus* ought not to go, until the officer has refused to do the act, and his duty; or at least that there was some person, who had right to have the thing done to them; which was not in this case, because they were not yet elected. That this was to sue a *mandamus quia timet*, and like the case of an original bearing *teste* before the cause of action accrued. But *per Holt* chief justice, it will be well enough in this case, because they are acts depending the one upon the other; first they ought to elect him, and then the mayor ought to swear him. And the writ was held good, and the return disallowed, and a peremptory *mandamus* was granted. *Ex relatione m'ri Jacob.*

Slabourne *verf.* Bengo.

In ejectment for several tenements upon several demises a charge that the defendant entered into *the tenements aforesaid* is sufficient, and will not be made otherwise by the addition of an averment that the plaintiff's term aforesaid therein was not then expired.

IN ejectment the plaintiff declared upon two several demises, *habendum tenementa praedicta*, &c. by virtue whereof he entered and was possessed, *quousque* the defendant entered *in tenementa*, and the plaintiff *expulit et amovit a termino suo praedicto inde nondum finito*, &c. Mr. *Northey* moved in arrest of judgment that *tenementa praedicta* was uncertain, and therefore ill, for it did not appear which. The same of *termino suo praedicto inde nondum finito*, which makes the former objection the stronger, because it complains but of one. But the court held the first to be well enough, and that it would extend to both. And as to the other, if it had been omitted, the declaration had been well enough, and therefore it would not hurt it. Judgment for the plaintiff. *Ex relatione m'ri Jacob.*

Rex *verſ.* Newman.

A perſon can have but one Chriſtian name. Vide Co. Litt. 3. 1.

THE defendant was indicted by the name of *Elizabeth Newman alias Judith Hancock*, for keeping a bawdy-houſe. Mr. *King* moved to quaſh it, becauſe a woman cannot have two *Chriſtian* names; for which reaſon in a caſe in *Noy* the return of a *reſcous* was quaſhed. And for this reaſon the indictment was quaſhed. *Ex relatione m'ri Jacob.*

Anonymous.

In debt upon a bail-bond if the defendant in his plea ſtates an arreſt upon a different writ from that upon which the bond was given, and the plaintiff in his replication ſets out that writ, he ſhould not traverſe the arreſt by the other. D. cont. ante, 411, 412. But the traverſe will not make his replication bad.

IN debt upon a bail-bond the defendant pleaded the ſtatute of 23 *H.* 6. *c.* 10. and ſhewed an arreſt by a wrong writ. The plaintiff replied and ſhewed the right writ, and traverſed the wrong writ. The defendant demurred. And exception was taken, that the plaintiff ſhould not have traverſed the wrong writ, according to 1 *Saund.* 22. *Bennet v. Filkins.* *Holt* chief juſtice. The plaintiff has no need to traverſe the wrong writ, but only to reply the right writ, and rely upon that. For it may be, there were two writs, and the defendant might be arreſted by virtue of the writ returnable *die Martis*, &c. and then the other writ might come to the ſheriff returnable *die Mercurii*, which coming to his hands, when the defendant was in cuſtody, amounts to an arreſt in law, and he might give a bail-bond to appear upon it; therefore the traverſe is not ſo good. But the plaintiff had judgment. *Ex relatione m'ri Jacob.*

Hilliard *verſ.* Cox.

Pleadings poſt. vol. 3. p. 313. Salk. 747.

A ſimple contract debt owing to a man who dies inteſtate is bonum notabile in the place in which the debtor was reſident at the time of the death of the inteſtate and of the commiſſion of adminiſtration. R. acc. Comb. 392. Dy. 305. a. pl. 58. in marg. Vide Lovel. f. 3.

AN action upon ſeveral promiſes by an adminiſtrator. The defendant craves *oyer* of the letters of adminiſtration, by which adminiſtration appeared to have been committed to the plaintiff by the archdeacon of *Berks*, and he pleads, that (*a*) at the time of the death of the inteſtate, and committing of adminiſtration, he was inhabiting and reſident at *Oxford*. The plaintiff demurs. And Mr. *Northey* took exception to the plea; becauſe the defendant did not deny, nor traverſe, his reſidence in *Berks* within the peculiar. *Holt* chief juſtice. If the debtor has two houſes in ſeveral dioceſes, and at the time of the death of the debtee and commiſſion of adminiſtration is inhabitant and reſident at one of the houſes, that will exclude the juriſdiction of the ordinary of the dioceſe in which the other houſe ſtood. Judgment for the defendant. *Ex relatione m'ri Jacob.*

(*a*) In Salk. 37. the plea is repreſented to have been that *the inteſtate* at the time of his death was reſident, &c. but that ſtatement appears from the pleadings in Salk. 750. and poſt. vol. 316. incorrect, and ſo Lee C. J. conſidered it in Say. 83.

Rex

Rex *verſ.* Majorem Rippon.

S. C. Salk. 433.

A *Mandamus* was directed to the mayor, aldermen, and commonalty of *Rippon*, to reſtore Sir *Jonathan Jennings* to be alderman of *Rippon*. They in their return take advantage of the miſdirection, and ſhew, that they are incorporated by another name, *viz.* the mayor, burgeſſes, and commonalty, but precedent to the ſubſtance of their return; and they ſay, that Sir *Jonathan Jennings* on ſuch a day in open aſſembly in the town, *libere, perſonaliter, et debito modo*, ſurrendered his office of alderman of *Rippon*, and declared, that he would not continue, *et deſervire in officio praedicto* any longer, by which means the office became void, and they elected another in his room. Mr. *Mulſo* took exception to this return, that it not being ſhewn in the return, that he ſurrendered by deed, it muſt be intended, that he ſurrendered by parol, and then it will not be good; for he has a freehold in his office, ſince he ought to continue for his life, unleſs he be removed for good cauſe. And the freehold of a thing which lies in grant, cannot be granted or ſurrendered without deed. 2 *Roll. Abr. Grants.* 1 *Vent.* 296. *Co. Lit.* 338. 2 *Roll. Rep.* 20. *Cro. Car.* 198. 259. And as to the caſe of the king and *Tidderly*, 1 *Sid.* 14. he ſaid, that was only a burgeſs. Mr. *Northey e contra* ſaid, that ſince Sir *Jonathan Jennings* came in by election without any deed, he might ſurrender without deed. And he relied upon 1 *Sid.* 14. where *Hale* chief baron ſaid, that it is incident to a corporation, to take a reſignation of their members. But however the return poſitively affirms, that the ſurrender was *debito modo*; and if that is falſe, Sir *Jonathan Jennings* may bring his action. *Holt* chief Juſtice. If a man ſpeaks at large, that he will not be alderman, *&c.* that ſignifies nothing. But *e contra*, if he comes in an open aſſembly of the corporation, and there reſigns his office, and declares, that he will not continue in it longer, and deſires them to accept his reſignation, and they accept it, and elect another in his room, it is a good reſignation. Indeed if it was an office, which lay in grant by deed, there ought to be a deed to ſurrender it; but when they are made by election, the corporation may accept a ſurrender by parol before them. In *London* the aldermen ſend letters to acquaint the lord mayor and court of aldermen that they reſign; and if another be elected in their place, it is a good reſignation; indeed they may revoke it before their place is ſupplied. [Mr. *Criſpe* common ſerjeant of *London* ſaid, that Sir *Thomas Allen* ſent a letter, *&c.* that he reſigned his place: but before another was elected, he came and diſavowed it]. And if it be a good reſignation of the office of alderman of *London*, why not of *Rippon*? but if a deed were neceſſary, it is

An officer conſtituted by election may reſign by parol.

To a mandamus to reſtore an officer a return generally "that he had reſigned" ſhall be intended to mean that he had made a complete reſignation. Though it was eſſential that the reſignation ſhould have been by deed, the return need not ſhew the deed.

A mandamus directed to a corporation by a wrong name is bad.

But if the members make a return thereto, if it be falſe, an action will lie againſt them.

And if it be true, and contain a ſufficient anſwer to the writ, the court will not on account of the impropriety of the direction grant a ſecond writ.

Aldermen of London reſign by letter.

REX v. Mayor of RIPPON.

not excluded by this return; for if there was a deed, it has no need to be shewn to the court; and therefore *resignavit* generally does not imply a resignation by parol, but rather a resignation by deed; because if there was no deed, there was no resignation; and if there was no sufficient resignation (as it is positively shewn in the return that there was, which is enough for them to say) an action will lie for the false return. And therefore the return was allowed for the merits. But Mr. *Northey* took exception to the *misnomer* of the corporation in the writ. And *per Holt* chief justice, if a *mandamus* be directed to a corporation as a corporation, and there is no such corporation, the writ is ill. There may be aldermen in this corporation, and it may be they are not part of their corporation. But that was not adjudged. Mr. *Mulso* in *Trinity* term next following came and moved for a new writ of *mandamus*, because this was wrong directed, and therefore they could not have an action against the corporation for the false return of it; and they would be bound to take no exception to the return, but only to intitle Sir *Jonathan Jennings* to try the right. But *per Holt* chief justice, they may bring an action against the particular persons who caused this return to be made in the name of the corporation. And so it was resolved in the case of *Enfield v. Hills*, *T. Jon.* 116. in a *mandamus* directed to the city of *Canterbury*, and an action brought for a false return against the particular persons, and a bill of exceptions brought, and the exception taken, that it would not lie against the particular persons, and over-ruled. And therefore in regard that the return was allowed upon the merits, and that Sir *Jonathan Jennings* is not without remedy, it is vexatious to grant a new writ. And upon three several motions for a new writ made by Mr. *Mulso* it was denied. But *Turton* justice inclined to grant the writ. *Ex relatione m'ri Jacob.*

An action lies against particular persons, who cause a false return to be made to a mandamus in the name of a corporation. S. P. Com. 86.

Tomkin *verf.* Croker.

S. C. Salk. 49. Carth. 520. 12 Mod. 369.

A writ of error is not amendable. R. acc. ante, 71. sed vide the books there cited. Com. Amendment. 2. c. 4. 2d Ed. vol. 1. p. 344. Though the instructions for it to the curfitor were right. R. acc. ante, 71. Particularly if the writ appears good upon the face of it, and without the amendment would not have removed the record.

MR. *Northey* moved for leave to amend a writ of error by the instructions given to the curfitor, which were right, for removing a record of a judgment *in curia nostra et nuper reginae*, but the writ was *in curia nostra*; which mistake he prayed might be amended. For original writs are amendable, 8 *Co.* 156. *Blackmore's* case. And (by him) the difference is, where the clerk has nothing to guide him, but he makes a mistake for want of skill; there the court will not amend; but where his instructions guide him to avoid the mistake, but by negligence he makes it otherwise than his instructions warrant, it is otherwise. But

Mr.

Mr. *Gowper* and Mr. *Boult* oppoſed the amendment, becauſe this was a writ of error. For by the common law no original writ was amendable; and the 8 *H.* 6. *c.* 12. gives power to the juſtices to amend, only in affirmance of judgments, ſo that for ſuch miſpriſion of the clerk no judgment ſhall be reverſed; which cannot be extended to the amending writs of error, becauſe the intent of them is to reverſe judgments. 2. That this writ by reaſon of this miſpriſion does not remove the record, 1 *Roll. Abr.* 754. *n.* 7. 13. And therefore ſuch amendment will give a new effect to this writ, which is very material in this caſe; for the writ of itſelf is a perfect writ, and has no fault in it; and nothing is returned which ſhews a fault in it; and then their demand is, to have a new writ made, to remove a record in the time of another king. And Mr. *Boult* cited 28 *H.* 6. 11. *b*, where a writ of error was directed *Johanni Preſot*, to remove a record *coram vobis*, omitting *et ſociis veſtris*; and upon praying to be amended, it was refuſed. Mr. *Northey e contra* ſaid, that it is indifferent upon the writ, whether the judgment ſhall be affirmed or reverſed. But however the ſtatute muſt be underſtood, in affirmance of judgments upon the writ which is to be amended; and therefore ſuppoſe a writ of error brought, and judgment of reverſal given, and a writ of error brought upon that, the amendment of the firſt writ of error will be in affirmance of the judgment. And he ſaid, that he moved *Mich.* 1 *W.* & *M. B. R.* between *Blake* and *Bradford* for amendment of a writ of error, but the inſtructions in the caſe did not warrant it, otherwiſe, he conceived, that the amendment would have been granted. But *per Holt* chief juſtice, no precedent can be ſhewn, where a writ of error has been amended; which is a great argument that it cannot be done: and it is contrary to the deſign of the ſtatute which was to ſupport original judgments, and avoid writs of error, which tend rather to the reverſal of the judgments, being ſued for that purpoſe. And what Mr. *Cowper* ſays is very conſiderable, that the writ is a good writ; for the king's bench has no authority to amend it, becauſe it does not ſuit the preſent caſe; and then as the amendment is granted or not, the record will be removed or not, and we ſhall have a record before us or not, and ſo by the amendment of this we ſhall make ourſelves a commiſſion. *Gould* juſtice. If it cannot be amended by common law, it cannot be amended upon this act. And 1 *Leon.* 134. a matter which was a mere ſlip of the clerk was refuſed to be amended, becauſe it would avoid the judgment. And the amendment was denied. *Ex relatione m'ri Jacob.*

TOMKIN v. CROKER.

Paramore

Paramore *verſ.* Johnſon.

Intr. Mich. 11 Will. 3. B. R. Rot. 90.

S. C. 12 Mod. 376.

Matter of defence, admitting the plaintiff had once a cauſe of action which might be given in evidence on the general iſſue, may be pleaded ſpecially. R. acc. ante, 217. Vide 4 Bac. 60. As an accord and ſatisfaction. Vide Com. Accord. A. 1. 2d. Ed. vol. 1. p. 96.

IN *indebitatus aſſumpſit* brought againſt the defendant, he pleaded an accord for 20*l.* with ſatisfaction made, *&c.* To which plea the plaintiff demurred ſpecially, and aſſigned for cauſe, that the plea amounted to the general iſſue. And it was argued for the plaintiff, that this matter might have been given in evidence upon the general iſſue pleaded. But *per Holt* chief juſtice, a man may plead matter which might be given in evidence upon the general iſſue pleaded, if he admits a cauſe of action in the plaintiff, and avoids it by matter *ex poſt facto*; becauſe ſuch a plea gives colour to the plaintiff, as *Leyfield*'s caſe, 10 *Co.* 88. is. And as in debt for rent a man may plead a releaſe, or may give it in evidence upon *nil debet* pleaded. The ſame law of entry and ſuſpenſion. But to ſay the truth, the admitting the giving payment or accord with ſatisfaction in evidence in *indebitatus aſſumpſit* is (*a*) not proper, but it is only indulgence. And therefore he held the plea good. *Sed adjournatur* (*b*).

(*a*) Vide Gilb. C. B. 65. (*b*) And judgment was afterwards given for the plaintiff on account of a defect in the plea.

Boiture *verſ.* Woolrick.

In treſpaſs for an aſſault, battery, and wounding, and for diſturbing plaintiff in his quiet poſſeſſion, if the defendant pleads the general iſſue, and the damages are under 40*s.* the plaintiff ſhall have no more coſts than damages. Vide Str. 527. 645. Gilb. Eq. Rep. 197. Burr. 1282.

IN an action of treſpaſs *quare clauſum fregit*, of aſſault, battery, wounding, and of diſturbance of him in his quiet poſſeſſion, *&c.* upon not guilty pleaded, a general verdict was given for the plaintiff, and damages under 40*s.* And Mr. *Branthwaite* moved to have full coſts, becauſe the defendant was found guilty of a wounding and diſturbance of the quiet poſſeſſion. But *per Holt* chief juſtice, the practice has been always otherwiſe; and he ſaid, that he did not remember ſuch a motion to have been made. But *Gould* juſtice ſaid, that he moved ſuch a motion as to the peaceable poſſeſſion here in the king's bench, but it was denied him. And the motion here was denied.

Chancellor Somers removed.

Commiſſioners of the great ſeal.

Memorandum, Saturday *the twenty-ſeventh of* April *in this term the earl of* Jerſey *one of the ſecretaries of ſtate, by command of the king, took away the great ſeal from the lord* Somers. *And the ſeal was not diſpoſed of until* Sunday *the fifth of* May, *at which time it was delivered by commiſſion to the lord chief juſtice* Holt, *the maſter of the rolls, the lord chief juſtice* Treby, *and the lord chief baron* Ward. *And* Thurſday *the twenty-firſt*

firſt of May *Mr. ſecretary* Vernon *came, and took away by command of the king the great ſeal from the commiſſioners, and the king in council delivered it to Sir* Nathan Wright *one of his ſerjeants, with the title of keeper of the great ſeal, &c.*

The Hamlet of Spittlefields *againſt* the Pariſh of St. Andrew Holbourn.

S. C. Foſt. 307

J. S. an infant born in the pariſh of *St. Andrew* was nurſed in *Spittlefields*, the father died, and the mother ran away. Neither the father nor the mother had any ſettlement in *St. Andrew's*, but were only lodgers there. This child being become likely to be chargeable to the pariſh of *Spittlefields*, was removed by order of two juſtices to the pariſh of *St. Andrew*, being the place of its birth. Upon appeal from the ſaid order to the quarter-ſeſſions, it was quaſhed; the juſtices being of opinion, that baſtards did not gain a ſettlement by their birth. And upon motion *in B. R.* this order of the ſeſſions was quaſhed, and the order of the two juſtices confirmed; becauſe a child ought to be maintained where it is born, unleſs it obtains another ſettlement. And therefore it is incumbent upon the pariſh where it is born, to find another place of ſettlement.

The legitimate child of perſons having no ſettlement is ſettled where it is born. Acc. 1 Bl. Com. 362. Burn's Juſtice. Poor Settlement by Birth. 2. 14th Ed. vol. 3. p. 355. And may be removed thither, unleſs that pariſh can ſhew that it is ſettled elſewhere. Acc. Burn's Juſtice. Settlement by Birth. 2. 14th Ed. vol. 3. p. 355.

Trin

Trinity Term.

12 Will. 3. B. R. 1700.

Sir John Holt, *Chief Juſtice.*

Sir John Turton
Sir Henry Gould } *Juſtices.*

Nottingham *verſ.* Jennings.

S. C. Salk. 233. Com. 82. 1 P. Wms. 23.

After a deviſe to A. and his heirs, a limitation over to his collateral heirs makes ſuch deviſe paſs only an eſtate tail. R. acc. Cro. Jac. 415. pl. 5. 1 Roll. R. 398. Moor, 852. pl. 1164. Forr. 1 D. acc. 3 T. R. 145. Adm. 2 P. Wms. 370. Dougl. 254. Cro. Jac. 695. D. arg. 2 P. Wms. 369. and ſee Cowp. 234. A limitation which paſſes nothing may explain the intention of the teſtator in other clauſes. R. acc. Cro. Jac. 695.

IN ejectment brought by the plaintiff againſt the defendant upon not guilty pleaded, it was tried before *Holt* chief juſtice at the ſittings in *Middleſex*; and upon the evidence the caſe was thus. *John Jennings* being ſeiſed of the lands in queſtion in fee hath iſſue three ſons, and being ſo ſeiſed, deviſed them to *Daniel* his middle ſon and his heirs for ever after the death of his mother, and if *Daniel* died without heirs, then he deviſed them to the right heirs of himſelf the deviſor for ever. And the queſtion aroſe between the daughters and heirs of *John Jennings* the eldeſt ſon of the deviſor, who were leſſors of the plaintiff, and the deviſees of *Daniel Jennings* defendants, whether *Daniel Jennings* had but an eſtate-tail by the will, or an eſtate in fee-ſimple? If an eſtate-tail, then it muſt be for the plaintiff, if fee-ſimple, then for the defendants. And this matter upon the trial was referred to the chief juſtice as a point of law, who gave order that it ſhould be argued in court. And Mr. *Northey* for the plaintiff argued, that it was but an eſtate-tail in *Daniel Jennings*; becauſe it appears, that it was deviſed to him only by a proviſion, and not abſolutely; and therefore of neceſſity the court muſt reſtrain the word heirs to heirs of the body of *Daniel*. And that this was the intent of the deviſor, appears plainly from hence, that *Daniel* could not die without heirs general, ſo long as any heirs of the teſtator were alive; for the heirs of the body are the only heirs, without leaving which, *Daniel* could not die, ſo long as the deviſor had any poſterity remaining. And this does not differ from the common caſe of a deviſe to a man and his

his heirs, and if he dies without iſſue, remainder over; for the reaſon why ſuch deviſe is an eſtate tail, is, becauſe the laſt words ſhew the intent of the deviſor, what heirs he intended. And the caſe of *Webb v. Hearing*, *Cro. Jac.* 415. *pl.* 5. 1 *Roll. Rep.* 398. *Moor*, 852. *pl.* 1164. is the caſe in point; where a man deviſes his houſe to his ſon after the death of his wife, and if his three daughters, and either of them do overlive their mother, and their brother and his heirs, then to them for life, remainder over; and it was held in the ſaid caſe, that the ſon took an eſtate-tail only, for the very reaſon that he urged in this caſe, *viz.* becauſe the ſon could never die without heirs, leaving the daughters, if it was not heirs of his body, they being his collateral heirs. And in the ſaid caſe, as it is reported in 1 *Roll. Rep.* 399. my lord *Coke* puts the caſe in queſtion, and holds, that it would be an eſtate-tail in the younger ſon. So it is held 1 *Roll. Abr.* 836. 3 *Danv.* 180. *pl.* 6. becauſe the elder ſon is the heir general. There was a caſe *Hil.* 27 & 28 *Car.* 2. *B. R. Tilley v. Collier*, 3 *Keb.* 589. 2 *Lev.* 162. where a man ſeiſed in fee had iſſue three daughters, *A. B.* and *C.* and deviſed his land to his wife, until his heir *A.* arrived at the age of twenty-one years, and that his heir *A.* ſhould pay his debts; and that if his heir *A.* died without heir, that then his heir *B.* ſhould pay his debts, &c. and the court took notice, what heir he meant, and held this to be an eſtate-tail in *A.* As to the caſe of *Hearne v. Allen*, *Cro. Car.* 57. where a man deviſed his lands to his ſon and his heirs, and if he died without heirs, then to the daughter and her heirs, &c. where it was held, that the eldeſt ſon took a fee, and not an eſtate-tail: the court was divided there three againſt two; but there was another point flat againſt the daughter, *viz.* the collateral warranty; and the caſe in *Cro. Jac.* 415. *pl.* 5. 1 *Roll. Rep.* 398. *Moor*, 852. *pl.* 1164. was not mentioned there, and therefore we hope, that it ſhall not be an authority againſt the preſent caſe, which is agreed *Cro. Jac.* 448.

Mr. *Carthew e contra* argued for the defendants, that he would attempt to make a diſtinction between this caſe and the caſe of *Webb v. Hearing*, *Cro. Jac.* 415. *pl.* 5. 1 *Roll. Rep.* 398. *Moor.* 852. *pl.* 1164. which caſe he took to be a middle caſe between the caſe of 19 *H.* 8. 8. *b.* and the caſe of *Hearne v. Allen* in *Cro. Car.* 57. which is the caſe in point. For where there is a deviſe over to a ſtranger, as in the caſe of *H.* 8. there the firſt deviſee has a fee, and (*a*) the remainder over is void; and ſo where the deviſe is poſitive, as in the caſe of *Hearne v. Allen*, and in expreſs words, the remainder over will be void. But in the caſe of *Webb v. Hearing*, *Cro. Jac.* 415. *pl.* 5. 1 *Roll. Rep.* 398. *Moor*, 852. *pl.* 1164. the ſon took the fee-ſimple only by implication; and therefore as his eſtate was created by implication upon the conſtruction of the will, the ſaid eſtate may be qualified more

(*a*) Vide ante 265. and the caſes there cited.

NOTTINGHAM v. JENNINGS.

more eaſily; but the court will not give ſo much favour to an implication, as to overthrow an expreſs deviſe; and therefore theſe reſolutions may ſtand together, and the court will be rather inclined to make ſuch interpretation; becauſe the clauſe which ſhould reſtrain the eſtate of the ſon is a void clauſe and has no operation; for it does not veſt any eſtate in the right heirs by deviſe, but they are in of the reverſion by deſcent; and therefore it is *pro tanto* more hard, that a clauſe which is merely void ſhould controul an expreſs deviſe.

To which Mr. *Northey* for the plaintiff anſwered, that he did not pretend that this clauſe has any operation, to paſs the eſtate, but that it declares the intent of the teſtator, that the ſecond ſon ſhould not have the land abſolutely, but that ſome other perſon ſhould ſucceed him. And as to the other objection, that the ſon ſhould have the eſtate by implication, that makes no difference as to the plaintiff; for the only queſtion is, concerning the conſtruction of the word heirs.

Holt chief juſtice ſaid to Mr. *Carthew*, that he did not take all the advantage of the caſe of *Hearne* and *Allen*, *Cro. Car.* 57. that he might; for if the ſaid caſe were law, it went farther than the caſe in queſtion: and ſo on the other ſide, that he did not anſwer the caſe of *Webb v. Hearing*, *Cro. Jac.* 415. *pl.* 5. 1 *Roll. Rep.* 398. *Moor*, 852. *pl.* 1164. And the chief juſtice ſaid, he permitted this point to come before the court only out of reſpect to the caſe of *Hearne v. Allen*, *Cro. Car.* 57. The caſe in 19 *H.* 8. 8. *b.* is, where the remainder is limited to a ſtranger, which no body ever thought good; for in the ſaid caſe there is nothing to explain what heirs the deviſor intended. But where the limitation is among relations, as in this caſe, there the word heir cannot mean any thing but iſſue; for the ſon cannot die without heir, ſo long as the father has any heir remaining, which is the reaſon of *Webb* and *Hearing*'s caſe, *Cro. Jac.* 415. *pl.* 5. 1 *Roll. Rep.* 398. *Moor.* 852. *pl.* 1164. And as to the limitation over to his own right heir, that it is void; though it is not good in point of limitation, yet it explains the intent of the teſtator; as if a man deviſes land to *J. S.* and his heirs, and if he die without iſſue, then to the right heirs of the deviſor; it is a good eſtate-tail by deviſe, though his own right heirs are in by deſcent.

And *Gould* juſtice ſaid, that he would not make any difference between this caſe and the caſe of *Webb* and *Hearing*; *Cro. Jac.* 415. *pl.* 5. 1 *Roll. Rep.* 398. *Moor.* 852. *pl.* 1164. That there the eſtate of the ſon aroſe by implication, though that did not govern the reſolution, as one may ſee in *Moor*, 852. *pl.* 1164. but the reaſon of the ſaid caſe was, becauſe the intent of the teſtator appeared from the words of the limitation over the ſon, which would ſignify nothing, unleſs the ſon's eſtate was an eſtate-tail. And the court in this preſent caſe made a rule, that the *poſtea* ſhould be delivered to the plaintiff, and that judgment ſhould be entered for him.

Rex

Rex *verſ.* Raines, or Pett *verſ.* Pett.

S. C. Salk. 250. 3 Salk. 138. Com. 87. 1 P. Wms. 25. 12 Mod. 409. Holt, 259.

No repreſentative remoter than the children of the brothers and ſiſters of an inteſtate are as repreſentatives intitled to a diſtributive ſhare of the inteſtate's eſtate. R. acc. 2 Vern. 233. caſe 213. Prec. Cha. 28. caſe 30. 2 Show. 286. pl. 282. 1 P. Wms. 594.

SIR *Peter Pett* had a ſiſter *A. A.* had iſſue *B.* and *C.* her daughters. *C.* had iſſue a ſon *D.* and died. Then Sir *Peter Pett* died inteſtate. *B.* obtained letters of adminiſtration in the ſpiritual court. Upon which Mr. *Lechmere* in behalf of *D.* great nephew to Sir *Peter Pett*, moved the court of king's bench to grant a *mandamus* to be directed to the ſpiritual court, to command them to compel the adminiſtrator to make diſtribution. Upon which the king's bench made a rule, that counſel on both ſides ſhould be heard, whether ſuch *mandamus* ſhould be granted or not. Upon which at the day appointed by the rule Mr. *Lechmere* for the *mandamus* argued, that the queſtion of this caſe aroſe upon the clauſe of the 22 & 23 *Car.* 2. *c.* 10. *ſ.* 7. provided that there be no repreſentatives admitted between collaterals after brothers and ſiſters children; and *ſ.* 7. *clauſe* 3. and in caſe there be no child, then to the next of kindred in equal degree of or unto the inteſtate and their legal repreſentatives as aforeſaid, and in no other manner whatſoever. And firſt he obſerved, that the courts of the common law always favoured diſtributions, and had always conſtrued the ſtatute accordingly. To prove which, he cited the caſe of *Smith v. Tracy*, 1 *Vent.* 307. 316. 323. 1 *Mod.* 209. *T. Jon.* 93. 2 *Mod.* 204. where it was adjudged, that a brother (*a*) of the half blood ſhould be admitted to have diſtribution without a brother of the whole blood of the inteſtate; and the caſe of *Palmer* and *Allicock*, 3 *Mod.* 58. where a man died inteſtate without a wife, leaving only one ſon, and adminiſtration was granted to the ſon, who afterwards died inteſtate, and the queſtion was, whether the next of the blood of the father, or of the ſon, ſhould have letters of adminiſtration *de bonis non*; and as to that the queſtion was, if the ſon ſhould have the goods of the father as an intereſt veſted in him as diſtributee by the ſecond clauſe in the ſeventh ſection of this act, which ſays, that in caſe the inteſtate leaves no wife, that all his eſtates ſhall be diſtributed equally amongſt his children: and it was held, that the ſon, though he was but one child, was within the word children; and he took it as an intereſt veſted, and that therefore adminiſtration *de bonis non* of the father ſhould be granted to his next of blood.

(*a*) R. acc. Carth. 51. 1 Show. 1. 1 Vern. 437. 2 Vern. 134. Sho. Parl. Caſ. 108. 1 Vez. 156.

A perſon intitled to a diſtributive ſhare of the eſtate of an inteſtate has a veſted intereſt from the death of the inteſtate. R. acc. Carth. 51. D. 1 Vern. 403. 3 P. Wms. 50. n. D.

Then this queſtion not being among diſtributees, in what proportion diſtribution ſhall be made, but whether any diſtribution ſhall be granted at all, or whether the adminiſtratrix

REX v. RAINES.

trix ſhall have the whole, the great nephew is intitled to the more favourable conſtruction of the act of parliament. The miſchief before the act was, that the adminiſtrator carried away the whole perſonal eſtate of the inteſtate; and therefore this act was made, to let in the relations of the inteſtate in ſuch a degree of proximity, to ſuch a ſhare as the ſtatute directs, as the law of reaſon requires, and as one may conclude that the inteſtate himſelf would have done it, if he had made his will. And therefore this being a remedial law, ought to be extended as far as the words or reaſon of it will permit for advancing the remedy. The ſtatute gives an equal ſhare to collaterals in equal degree; and as repreſentatives have the right of their ſtock, and therefore among lineals are admitted *in infinitum*; ſo it will be reaſonable, to extend it among collaterals, as far as the words will permit. The words of the proviſo are ſtrong, but they do not affect this preſent caſe; becauſe it precedes the clauſe, which provides for this caſe. Like the caſe of *Gainsford v. Griffith*, 1 *Saund.* 60. where it is held, that a reſtrictive clauſe intervening in the middle of one or two ſentences, ſhall not be applied to the latter part. And there is the more reaſon to make ſuch conſtructions in this caſe; becauſe in the former clauſe they were to take part of the eſtate with the wife, whereas in this caſe the queſtion is only between the one and the other. But then if it ſhall be extended to reſtrain this clauſe, it ſhall be underſtood of the children of brothers and ſiſters of collaterals, *viz.* brothers and ſiſters in the preſent caſe, and not of the children of brothers and ſiſters of the inteſtate, for collaterals are the next antecedent; and the queſtion ariſing about repreſentatives, the perſons repreſenting ought to be accounted from them. And this is agreeable to the other parts of the ſtatute, for the ſtatute gives diſtribution to the next kindred of equal degree and ſuch as repreſent their ſtocks, *ſ.* 3. and *ſ.* 6. The eſtate ought to be diſtributed among the next of kindred, and thoſe who legally repreſent them; ſo that it is the next of kindred, it is the collaterals, who are repreſented; as in *ſ.* 5. it is the children who are repreſented; and the clauſe will ſtand in this manner; provided that collaterals ſhall be repreſented by none but brothers and ſiſters children, which muſt neceſſarily be underſtood, the children of the brothers and ſiſters of the collaterals; and in ſuch ſenſe the whole act will ſtand together.

As to authorities, he ſaid that he knew none in the caſe but that of *Carter* and *Crawley*, the argument of which caſe made by the lord chief juſtice *North* is in *Raym.* 496. But three judges were of a contrary opinion to him, *viz.* that the diſtribution ſhould be extended to the collaterals, *viz.* *Ellis*, *Wyndham*, and *Charlton*, and that a conſultation ſhould be granted; a rule was made *niſi*, &c. and afterwards Mr. juſtice *Ellis* died, and *Levinz* was made a juſtice of the common

common pleas; and then the rule for the conſultation was made abſolute by the opinion of two judges againſt the opinion of the chief juſtice, and *haeſitante Levinz*, who had not heard the arguments. He added farther, that the parliament in making this law had regard to the civil law, and deſigned as to this point to eſtabliſh it; and therefore he cited ſome caſes out of the books of the civil law, to prove that diſtribution ought to be made in ſuch caſe. *Juſtinian. Inſtit. lib.* 1. *tit.* 7. *lib.* 5. *tit.* 7. *Grot. de jure belli et pacis, lib.* 2. *cap.* 7. *ſect.* 1. *num.* 30. 31. *ſect.* 11. *num.* 1. and *Puſſendorff de jure naturae et gentium.*

E contra Mr. *Harcourt* argued, that ſuch diſtribution would be. 1. Againſt the words of the act of parliament. 2. Againſt the intent. 1. The words are expreſs, that no repreſentations ſhall be admitted among collaterals after brothers and ſiſters children. Then, 2. Admitting the intent of the act to have been, the ſetting up of the civil law; yet as it appears by the opinions of the learned civilians, certified under their hands at the end of my lord *North*'s argument, as it is reported in *Raymond*, it is a conſtant rule among them, that *repreſentatio in filiis fratrum et ſororum tantum locum habet, ad ulteriores vero collaterales non extenditur.* And it is another rule, *quod vocantur ad ſucceſſionem reliqui collaterales, quicunque in gradu ſunt proximiores, remotioribus excluſis, ita quod infallibiliter ſemper prior in gradu ſit prior in ſucceſſione.* And this point has been ſince determined in chancery before the lord *Somers*, whilſt he was there, in the caſe of *Maw* and *Harding*, 2 *Vern.* 233. *Prec. Cha.* 28. that the ſtatute ſhould be underſtood of the children of the brothers and ſiſters of the inteſtate; and the bill there, which prayed diſtribution in the preſent point, was diſmiſſed. Beſides, that executors and adminiſtrators are favoured in law; and therefore this act of parliament, which takes away their profit, and leaves them the care and pains, ſhall not be extended to carry diſtribution againſt them beyond the letter of the law. If this had been the queſtion for adminiſtration upon the 21 *H.* 8. *c.* 5. the plaintiff could not have had letters of adminiſtration becauſe the defendant is nearer of kin than he; and therefore the judges in the expoſition of this act will favour proximity of blood, which is favoured by other laws concerning the ſame matter, and will not give the eſtate of the inteſtate from the nearer to the remoter relations.

Note, this caſe of Maw v. Harding was adjudged 20th July 1693. And in another caſe between Beerton and Dakin, decreed in chancery 28th July 1690, the ſame point was determined, as Mr. Vernon related to me, March 8. 1717.

Holt chief juſtice: That he was always of opinion, that in the ſpiritual court the law was underſtood to be according to what is certified by the civilians in the end of my lord *North*'s argument, and that their practice was agreeable; which opinion was given upon very good advice. But if the plaintiff apprehends, that the civil law is with him, he may appeal, and upon that he will have the advantage

Rex v. Rainer.

tage of it. Certain the inteſtate muſt be conſtrued the correlative to brothers and ſiſters children; becauſe the inteſtate is the intire ſubject of the act, the proviſion is made for his wife and children, and the diviſion is to be made of his eſtate. This fact was penned by Sir *Walter Walker* in the time of my lord chief juſtice *Bridgman*, when he was chief juſtice of the common pleas. He had the liberty to argue there for the power of the ſpiritual court in granting diſtributions; and after he had argued for three hours, *Bridgman* chief juſtice inclined in opinion to Sir *Walter Walker*, but the other judges oppoſed it; and it never obtained in *Weſtminſter-hall*, but prohibitions were granted upon the firſt motion. And when he could not obtain his point in the courts of law, he procured an act of parliament, which was reſtrained as here of purpoſe. And *Gould* juſtice ſaid, that the words in this clauſe, upon which the plaintiff relies, are, their repreſentatives as aforeſaid; which muſt mean what they are allowed to mean in the proviſo, and then it will ſtand upon the words of the proviſo: And *Holt* chief juſtice ſaid, that in *Tracy*'s caſe a prohibition was granted, but afterwards a conſultation was awarded upon great debate. And by the opinion of the whole court the rule was diſcharged.

Mutford *verſ.* Walcot.

S. C. Salk. 129. 12 Mod. 410.

An acceptance to pay a bill of exchange *according to the tenor* made after the time appointed for its payment, is a general acceptance to pay upon demand. R. acc. ante, 364.

IN *aſſumpſit* the plaintiff declared upon a bill of exchange drawn the twenty-eighth of *October* at double uſance for 700 ducats payable at *Amſterdam*, which the defendant accepted the thirty-firſt of *December* following, *per quod devenit onerabilis* to pay the bill, *et in conſideratione inde* the ſame day and year he aſſumed to pay it *ſecundum tenorem et formam billae praedictae*. Upon *non aſſumpſit* pleaded, verdict for the plaintiff. Sir *Bartholomew Shower* moved in arreſt of judgment, that the time of payment of the bill being expired at the time of the acceptance, it was impoſſible that the defendant ſhould aſſume to pay it *ſecundum tenorem billae*, for that was out of his power. And though this acceptance was within the three days of grace, *viz.* the laſt day, within which time payment is good, and no proteſt for want of payment can be made, until the ſaid days are elapſed; yet it is a breach, not to have paid the money within the uſance; and the plaintiff has no need to ſay in his declaration upon a bill of exchange, that he did not pay it within the days of grace; but if the fact was, that it was then paid, it ought to be ſhewn of the other ſide. So that here the time of payment was elapſed at the time of acceptance; and therefore it was impoſſible to accept it then, to be paid *ſecundum tenorem billae*. And this objection is the

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stronger in respect of the distance of the place; for admitting, that payment within any of the three days of grace would be according to the tenor of the bill, yet when the acceptance here was upon the last of the said days, it was impossible to pay the money the same day to the plaintiff at *Amsterdam*. 2. The acceptance here is not good, because no house is mentioned, where the bill should be paid. Mr. *Hall* for the plaintiff cited the case of *Jackson* and *Pigot ante* 364. as a case adjudged in point. And Mr. *Northey* for the plaintiff said, that there might be some difficulty, if the action had been brought against the first drawer, but none where the defendant is chargeable by his own acceptance; for a man may tender a bill to be accepted after the time of payment is expired, to oblige the acceptor, if he will accept it, but not to affect the drawer.

Per Holt chief justice. There must be such acceptance as will bind the acceptor, and that is sufficient. As if a bill of exchange be payable at *London*, and the person upon whom it is drawn accepts it, but names no house where he will pay it, the party that has the bill is not (*a*) bound to be satisfied with this acceptance, but nevertheless if he will be content with it, it will bind the acceptor. So if *A.* draws a bill upon *B. B.* refuses to accept it, *C.* rather than it shall be protested, accepts it for the honour of *A.* this (*b*) acceptance will bind *C.* So if a man offer to *B.* a bill of exchange payable in *Amsterdam*, *B.* refuses to accept it unless some merchant in *London* will sign it; if the merchant signs it, he (*c*) becomes acceptor for the honour of the drawer. Acceptance after the day of payment is common, and there is no inconvenience in it. And *Holt* chief justice said, that he remembered a case where an action was brought upon a bill of exchange, and the plaintiff declared upon the bill, where (*d*) it was negotiated after the day of payment; and a question was made, whether the plaintiff could declare upon the bill, or whether he ought to bring *indebitatus assumpsit?* and he said, that he had all the eminent merchants in *London* with him at his chambers at *Serjeant's-Inn* in the long vacation about two years ago, and they all held it to be very common, and usual, and a very good practice. And as to the matter of the *secundum formam, &c.* it is the payment of the money that is the substance of the promise; and so it was held in the case of *Jackson* and *Pigot*. *Gould* justice *accord*. And judgment was entered for the plaintiff.

(*a*) Vide Bayley 15.

(*b*) Vide Bayley 18.

(*c*) Vide Bayley 19.

(*d*) Vide Bayley 16, 17.

Note: *Holt* chief justice and *Northey* agreed the matters said by Sir *Bartholomew Shower* concerning the days of grace, and the manner of reckoning in such cases. *Ex relatione mri Jacob.*

Garret

Garret *verſ.* Johnſon.

The words "then and there" refer to the time and place laſt before mentioned. R. acc. 2 Roll. Abr. 252. 16 Vin. 209. pl 10. Com. Parols. A. 14. 2d. Ed. vol. 4. p. 386.

DEBT upon the ſtatute of 5 & 6 *W.* & *M. c.* 22. upon a clauſe in the ſaid act, *par* 19. by which a penalty of 5*l.* is impoſed upon the owner of any hackney-coach, who ſhall ply upon a *Sunday*, not being appointed by the commiſſioners, *&c.* The plaintiff declared, that the defendant being owner of a hackney-coach, the ſeventh of *April* 1700, at the pariſh of *St. Botolph's Aldgate* in *London*, drove his coach upon the ſeventh day of *April* 1700 *exiſtentem diem dominicum, contra formam ſtatuti* made at *Weſtminſter* the ſeventh of *November* the fifth of this king and of the late queen, *adtenc et ibidem non exiſtens appunctuatus* by the commiſſioners. Upon *nil debet* pleaded, verdict for the plaintiff. And upon motion of arreſt of judgment made by Mr. *Branthwaite*, and oppoſed by Sir *Bartholomew Shower*, the judgment was arreſted; becauſe the *adtunc et ibidem* muſt refer to the laſt time and place mentioned, which is the time and place of the making of the act; and therefore the plaintiff has confined the appointment of the commiſſioners to the ſaid time and place; but it may be, the defendant was appointed at another time and place, and then this action will not lie; and therefore the declaration ſhould have ſaid, *non exiſtens appunctuatus, &c.* generally, or *non exiſtens appunctuatus, &c.* the ſeventh of *April* 1700; for though upon evidence another time or place may be given in evidence, yet upon the face of the declaration the plaintiff ought to make himſelf a good title to the action. *Ex relatione m'ri Jacob.*

Clay *verſ.* Snelgrave.

The maſter of a ſhip cannot ſue in the admiralty for his wages on a contract made on ſhore. S. C. Salk. 33. Holt, 595. Carth. 578. 12 Mod. 405. R. acc. Str. 858. Adm. poſt. 1452 Nor if he dies on the voyage can his perſonal repreſentatives. S. C. Salk. 33. Holt, 595. Carth. 578. The courts have a diſcretionary power of granting or refuſing prohibitions. S. C. Salk. 33. Holt, 595. D. cont. Raym. 3. Semb. cont. Burr. 1950. The court will not on granting a prohibition to a ſuit for a maſter's wages compel the owner to give bail, unleſs by conſent, and where there are no equitable circumſtances in the owner's favour.

THE defendant was executrix to the maſter of a ſhip libelled in the admiralty court for the wages owing to the teſtator by the owner. Upon which the plaintiff to have a prohibition ſuggeſted the ſtatute of 15 *R.* 2. *c.* 3. that the admiralty court ſhall not have conuſance of contracts made upon the land, and ſhews this contract to have been made upon the land, *&c.* And this caſe was ſeveral times moved by Sir *Bartholomew Shower* and Mr. *Acherly* for the prohibition, as well in *Michaelmas*, *Hilary*, and *Eaſter* terms laſt paſt, as in the preſent term; and it was oppoſed by Mr. *Narthey* and Mr. *Hall*. And the counſel for the prohibition argued, that prohibitions are grantable *de jure*, and are not diſcretionary in the court. *Raym.* 3. 4. That the caſe in *Winch.* 8. was the firſt caſe where a prohibition was denied in caſe of a ſuit by mariners for their wages in

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the admiralty court; and the denial was grounded upon compaſſionate reaſons, becauſe they were poor men; and becauſe there they might join in action, but here they muſt ſever; but the ſaid caſe is contrary to the reaſon and grounds of the law, for where the contract is made upon the land, though the ſervice was done upon the ſea, it is out of the juriſdiction of the admiralty; and ſo *vice verſa*, if the ſervice was done upon the land, and the contract upon the ſea. 12 *Co.* 79, 80. *Staunf.* 51. *b. Hob.* 212. A conſultation (*a*) is always denied in caſe of a ſuit by mariners, if there is a charter party. And the ſealing of a writing cannot make any difference in reaſon. *Raym.* 3. a prohibition granted where the maſter libelled alone. Mr. *Northey* and Mr. *Hall e contra* for the defendant ſaid, that the caſe of mariners was now ſettled, and ought not to be ſtirred; but that the great reaſon why they are permitted to ſue there is, the ſhip is the debtor, and by the law of the admiralty they may attach her, which they cannot do by the common law; and in the admiralty court they may all join in a ſuit, whereas by the common law they muſt bring ſeveral actions. That the caſe of the maſter is not different, for the ſhip is ſecurity to him, and he is but a mariner, and his wages are wages at ſea. But, however, where the maſter dies in the voyage, as he did in this caſe, there can be no reaſon to exclude his executors from ſuing in the admiralty, becauſe he had no opportunity of bringing his wages to account with the owners. And in 2 *Vent.* 181. *Alliſon v. Marſh*, the purſer, though an officer of the ſhip, was allowed to ſue for his wages in the admiralty. And in 2 *Keb.* 779. *pl.* 6. *Rex v. Pike*, a prohibition was denied, where the maſter and mariners joined in a ſuit in the admiralty for their wages. [But *Holt* ſaid, that a prohibition ought to have been granted *quoad* in the ſaid caſe.] And he cited a caſe *Hil.* 27 & 28 *Car.* 2. *C. B.* between *Cooker* and *Older*, where *Atkins* and *Ellis* juſtices were of opinion, that a prohibition ought to be granted to the ſuit in the admiralty court by the maſter of a ſhip for his wages; but *North* chief juſtice, and *Windham* juſtice, held the contrary opinion. But *Holt* chief juſtice ſaid, that it is an indulgence, that the courts at *Weſtminſter* permit mariners to ſue for their wages in the admiralty court, becauſe they may all join in ſuit; and it is grounded upon the principle *quod communis error facit jus*; but they will not extend it to the maſter of the ſhip, eſpecially if he was maſter at the beginning of the voyage here in *England*, and the contract was made with him here. Poſſibly (*b*) if the maſter of a ſhip died in the voyage, and another man took upon him the charge of the ſhip upon the ſea, ſuch caſe might be different. As in the caſe of *Groſſwick v. Louthſey*, where it was held in this court lately, that if a ſhip was hypothecated, and money borrowed upon her, at *Amſterdam* upon the voyage, he who lent the money

CLAY & SNELGRAVE.

(*a*) Vide Salk. 31. pl. 1. Str. 968. Butr. 1944. 3 Lev. 60.

(*b*) Vide Str. 937. 2 Barnard. B. R. 160.

CLAY v. SNELGRAVE. (a) Vide ante, 152. and the cases there cited.

(a) may sue in the admiralty for it: and this court granted a consultation in the said case. But in another case, where the money was borrowed upon the ship before the voyage, the king's bench granted a prohibition, and the parties acquiesced under it. There are many precedents in the court of admiralty, of suits by the mariners for their wages, but none for the master of the ship. And the cases differ; for the mariners contract upon the credit of the ship, and the master upon the credit of the owners of the ship, of whom generally he is one. The opinion of lord *Hobart*, that where there is matter of property to be tried, a prohibition shall be granted, is a little too hard. *Gould* justice agreed with *Holt*, and said, he was of opinion, that prohibitions were grantable of right, though it had been controverted in his time. To which *Holt* chief justice said, that *Hale* chief justice, and *Wyndham* justice, held prohibitions to be discretionary in all cases; but *Kelynge* chief justice was of the contrary opinion. And he said he did not esteem them to be matter of right. Then Mr. *Northey* moved, (b) that the court would compel the plaintiff to put in bail to the action to be brought for the wages at common law, or otherwise deny the prohibition; which he said had been done often. *Holt* chief justice confessed, that the court had sometimes interposed, and procured bail to be given; but it was by consent, and in case of the proprietor himself. But in regard that in this case the plaintiff was a purchaser without notice, there was no reason. And a prohibition was granted.

(b) Note, the ground of moving for bail according to the report in Carth. 518. was because the owner was beyond sea.

David Jones *verf.* Stone.

S. C. Salk. 550. Holt 596.

A prohibition cannot be granted to a spiritual court merely because it has no power to try one of the facts stated in the pleadings, unless such fact is denied. R. acc. H. Bl. 100. Semb. acc. ante, 436. Vide post. 609. The spiritual court cannot try the existence of a custom. Vide ante, 435. and the books there cited. A man may be sued in the spiritual court for not saying divine service in a chapel. Vide 5 Co. 73. a.

THE defendant libelled against the plaintiff, vicar of *N.* for that, that whereas by custom time whereof &c. he was obliged by himself, or some other person, to say divine service in the chapel of *Chalbury*, for which he received such a recompence: nevertheless he had neglected to do it, &c. The plaintiff, to have a prohibition, suggests, that all customs and prescriptions are triable by the common law; but does not deny, nor traverse, the custom. And Mr. *Harcourt* for the plaintiff urged, that the vicar is not compellable of common right to say divine service in any place but in the mother church; and therefore this being a custom, to charge the vicar against common right, it ought to be tried at common law. If in fact, such a custom be found, the king's bench will grant a consultation.

Holt chief justice said, that he was not of opinion, that this being a duty incumbent upon the plaintiff by prescription barely of itself is sufficient ground for a prohibition, especially since the prescription is not traversed in the suggestion;

géſtion; for it is an eccleſiaſtical right, to bind an eccleſiaſtical perſon to do an eccleſiaſtical duty; and if the eccleſiaſtical duty be neglected, the perſon who is guilty of the neglect may be ſued for it in the ſpiritual court, though the duty began by cuſtom. And it is the very point of *William's* caſe, 5 *Co.* 72. *b.* where the vicar of *Alderbury* was obliged upon a cuſtom to celebrate divine ſervice, by himſelf or ſome other perſon, in the chapel of *St. John*, within the manor of *Woollaſton*, for the lord of the manor and his tenants; and the lord brought caſe againſt the vicar for negligence in celebrating divine ſervice in his chapel for ſuch a time; and it was held, that it would not lie, but that the remedy was, to ſue the vicar in the court *Chriſtian*, becauſe eccleſiaſtical perſons are more ſubject to the ſaid courts then lay men are. If this was a preſcription to affect lay men, perhaps it might have another conſideration; but it is a mere eccleſiaſtical duty, and might have a legal commencement by the conſent of all parties, as by compoſition. If the vicar for a ſum of money undertook to do divine ſervice, and an act was made in the eccleſiaſtical court by the conſent of all parties, that would have bound the vicar and his ſucceſſors before the 1 *El. c.* 2. And therefore becauſe it may have commenced by an eccleſiaſtical act, the defendant may have his remedy for the neglect in the court *Chriſtian*. And it is upon the ſaid reaſon, that notwithſtanding the opinion of *Coke* 2 *Inſt.* 491. where a ſuit was in the eccleſiaſtical court againſt a perſon, *&c.* for a penſion by preſcription, no prohibition is grantable, though the preſcription was denied.

A perſon may ſue in the ſpiritual court for a penſion payable by preſcription. R. acc. 1 Vent. 3. 265. 1 Mod. 218. D. acc. F. N. B. 51. B. 1 Vent. 120. And ſhall not be prohibited, tho' the preſcription is denied. D. acc. 2 Keb. 41. pl. 82. Semb. acc. F. N. B. 51. B. cont. 1 Vent. 265.

Gould juſtice agreed, and ſaid that he would cite a ſtronger caſe, *Halſey v. Halſey*, *W. Jon.* 230. where a preſcription was alleged for a way to carry his tithes through a cloſe called *S.* and for ſtopping of it the defendant libelled againſt the plaintiff in the eccleſiaſtical court; whereas in fact the way by preſcription was through a cloſe called *W.* and for that, that preſcription for ways ought to be tried at common law, *&c.* and upon demurrer to the declaration, a conſultation was awarded by the opinion of the whole court. So a perſon may ſue for a *modus* in the ſpiritual court. *Holt* chief juſtice ſaid, that if the caſe in *Jones* had now come in judgment in this court, it would be queſtionable, becauſe it (*a*) charges the freehold of another man. The caſe of a *modus* is, as *Gould* juſtice ſays, if the *modus* is admitted; but if the defendant ſays that it is leſs, and inſiſts upon it, it muſt be tried at common law. The rule made to ſhew cauſe why a prohibition ſhould not be granted was diſcharged. *Ex relatione m'ri Jacob.*

(*a*) Vide ante, 212. and the books there cited.

Rex *verſ.* Inhabitants —— in Glamorganſhire.

A certiorari lies to remove the proceedings of any juriſdiction newly erected by act of parliament. S. C. 12 Mod. 403. Salk. 146. Vide ante, 469. and the books there cited.

As orders made by juſtices under an act of parliament for repairing a bridge. S. C. 12 Mod. 403. Salk. 146.

A certiorari lies to remove proceedings before juſtices in Wales. S. C. Salk. 146. Vide Str. 704. Burr. 2456. and alſo Burr. 834.

Under a power to raiſe money to repair a bridge money may be raiſed to repair wears neceſſary to ſupport the bridge.

ORDERS were made by the juſtices of peace, for levying money, for repairing *Caerdiffe bridge*, by virtue of the 23 *El. c.* 11. And it was objected by Mr. *Earle* and Mr. *Lechmere*, that this court cannot in this caſe grant a *certiorari*; becauſe it was a new juriſdiction erected by a new act of parliament, the truſt of the execution of which is repoſed in the juſtices, and this court has nothing to intermeddle with it; for if they proceed according to the ſtatute, then there is no reaſon to remove their orders; but if not, then what they do is *coram non judice*, and void. And the parties may examine the legality of their proceedings in an action; and ſo it was held in a caſe of decrees made by commiſſioners upon the act for the fens, 1 *Sid.* 296. *Ball v. Partridge.* *Hardr.* 480. *Terry v. Huntingdon.* *Cro. Car.* 394. *Nichols v. Walker.* And no *certiorari* lies to remove orders made by commiſſioners of bankrupts. *Sed non allocatur.* For this court will examine the proceedings of all juriſdictions erected by act of parliament. And if they, under pretence of ſuch act, proceed to incroach juriſdiction to themſelves greater than the act warrants, this court will ſend a *certiorari* to them, to have their proceedings returned here; to the end that this court may ſee, that they keep themſelves within their juriſdiction; and if they exceed it, to reſtrain them. And the examination of ſuch matters is more proper for this court. As in the caſe in queſtion; whether the act of queen *Elizabeth* impowers the juſtices to raiſe money to mend wears, and to determine the doubt upon the act. As to the caſes of orders made by commiſſioners of ſewers, and of the fens, the court is (*a*) cautious in granting *certioraris*; and firſt they make inquiry into the nature of the fact, and what will be the conſequence of granting the writ; becauſe the country may be drowned in the mean time, whilſt the commiſſioners are ſuſpended by the *certiorari*. But that is only a diſcretionary execution of the power of the court. And as to the commiſſioners of bankrupts he ſaid, that they (*b*) had only an authority, and not a juriſdiction. And he ſaid, that where the juſtices make orders by virtue of a private act, they ought to return the act with their orders. Then it was objected, that this court cannot ſend a *certiorari* to the juſtices of peace in *Wales*; but their orders ought firſt to be examined in the great ſeſſions, and from thence to be removed hither; becauſe this court has equal juriſdiction over *Wales*, as they have over the king's bench in *Ireland*; and therefore that a *certiorari* ought not to be granted to the juſtices there *per ſaltum*, no more that error will lie in parliament upon a judgment of the common pleas, leaping over this court of king's bench.

(*a*) Acc. ante 467. and ſee the caſes there cited.

(*a*) Vide Str. 609. ante, 469. Com. Certiorari. A. 1. 2d. Ed. vol. 2 p. 16.

But

But *Holt* chief juſtice ſaid, that this matter ought not to be diſputed, it being the conſtant practice to grant *certiorari* into *Wales*, as alſo into the counties palatine of *Durham* and *Lancaſter*, which yet had original juriſdiction, and the ſame courts among themſelves. And if the law were otherwiſe, the great ſeſſions were held ſo ſeldom, that a man might be ruined before a great ſeſſions met.

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Then exception was taken to the orders, that the money ordered to be levied was for repairing the wears, to do which they had no juriſdiction, but only to raiſe money for the repair of the bridge; and their authority being ſpecial, they ought to confine themſelves within it. But *Holt* chief juſtice held, that in regard that at the time of the making of the act, theſe wears were built as neceſſary to ſupport the bridge, by virtue of the powers given by the act of the queen for rebuilding of the bridge, and were eſteemed ſo then and ever ſince, this court will eſteem them accordingly ſtill; and therefore conſequential to the power, for rebuilding and repairing of the bridge, and eſpecially when they are averred to be ſo in the orders. And *Gould* and *Turton* juſtices agreed. Theſe orders were argued, as is uſual in the caſe of orders made by commiſſioners of ſewers, and returns of *habeas corpus* out of *London*, before they were filed. And a *procedendo* was awarded by the court. *Ex relatione m'ri Jacob.*

Rex *verſ.* Chandler.

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THE defendant was convicted for deer ſtealing by a juſtice of peace upon 3 *W. & M. c.* 10. and the conviction was removed into this court by a *certiorari*. And ſeveral exceptions were taken at ſeveral days, and argued. And after it had depended ſeveral terms, this term the court over-ruled the exceptions, and held the conviction good. *Holt* pronouncing the opinion of the court, ſaid, that the caſe did not deſerve to be argued. He ſaid, that in theſe convictions by juſtices of peace in a ſummary way, where the ancient courſe of proceeding by indictment and trial by jury is diſpenſed with, the court may more eaſily diſpenſe with forms; and it is ſufficient for the juſtices, in the deſcription of the offence, to purſue the words of the ſtatute; and they are not confined to the legal forms requiſite in indictments for offences by the common law. For though all acts, which ſubject men to new and other trials, than thoſe by which they ought to be tried by the common law, being contrary to the rights and liberties of *Engliſhmen*, as

In a ſummary conviction by a juſtice 'tis ſufficient in deſcribing the offence to deſcribe it in the words of the ſtatute. R. acc. poſt. 583.

Where a defendant is liable to ſeveral penalties for ſeveral offences on one day a conviction that he between two particular days committed ten offences is good, tho' it does not ſpecify the day on which any one of thoſe offences was committed. S. C. Carth. 501. 5 Mod. 446. and rather differently. Salk. 378. Vide ante 479. All the proceedings before the juſtice on a ſummary conviction may be entered in the preſent tenor, although different parts of them are ſtated to have occurred at different places. vide poſt. 1376. 1 T. R. 320. The juſtice need not introduce his adjudication on a ſummary conviction with the words "therefore it is conſidered" S. C. Carth. 501. A ſummary conviction need not repreſent the offence to have been contra pacem. S. C. Carth. 501. Salk. 378.

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they

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they were ſettled by *Magna Charta*, ought to be taken ſtrictly; yet when ſuch a ſtatute is made, one ought to purſue the intent of the makers, and expound it in ſo reaſonable a manner, as that it may be executed. But it is alſo incumbent upon judges, to take great care, that in the execution of this law they do not go beyond the act of parliament. As to the firſt exception, that it is ſaid, that the defendant between the firſt of *July* and the tenth of *September* killed ten deer, without ſhewing the particular days upon which they were killed, and ſo general and uncertain a declaration of an offence is very ſevere, becauſe it drives the defendant to give an account of all his life, which he cannot poſſibly be prepared to do. There is an indictment in *Weſt's Prac.* 110. *b. &c.* for killing a buck, and there not only the day, but alſo the hour, is ſhewn. And theſe convictions, to which a man cannot have anſwer, ought to be as certain as indictments, to which a man may plead. But to this exception the counſel of the other ſide anſwered, that the days were not material to be proved; for evidence may be given of the facts of any other days, and therefore the omiſſion of ſhewing them will not vitiate; and all that is neceſſary to be laid in point of time is, that the proſecution appear to have been made within a year after the fact committed; that the omiſſion of the days is not any inconvenience to the defendant, becauſe if he can ſhew an authority for killing ſo many as are charged upon him in the ſame time, it will drive the proſecutor to prove more; and if he be charged another time, he may aver, that thoſe for the killing of which he has been convicted are the ſame. And the caſe of *Farrow v. Chevalier*, ante 478 was cited to this purpoſe, where the ſame exception was taken in arreſt of judgment, and over-ruled. And many precedents were cited, to warrant this manner of weſhing ſeveral facts in informations upon penal ſtatutes. *Raſt. Ent.* 410. *Hearn. Plead.* 549. *Winc.* 541, 547. *Thomſ. Entr.* 91, 92. *Brown. Form. Plac.* 1 *par.* 250, 1, 2, 4, 7, 9, 260. *Vide.* 186. *Co. Entr.* 158.

Holt chief juſtice, that in the caſe of *Farrow v. Chevalier* there is but one breach of covenant, and the ſelling there ſeveral times was only in aggravation of damages, but the damages ought to be entire. This caſe differs from all the caſes of indictments and informations for offences at common law. All that is neceſſary in theſe caſes of new offences made by new ſtatutes and in new ſummary methods of conviction by them, is to ſhew ſuch a fact as is within the deſcription of the ſtatute, and to deſcribe it as the ſtatute wills. 2. A ſecond exception was, that the conviction was, *Memorandum, quod octavo die Maii* the tenth of this king *apud Enfield in comitatu Middleſex, venit coram me* ——— *et dat mihi intelligi et informari, quod, &c. et ſuperinde eodem octavo die Maii anno ſupradicto, apud*

dominum

domum meam in parochia ſancti Andreae Holborne in comitatu Middleſex praedicto, venit praedictus ——— et dicit, deponit et jurat quod, &c. where it ſhould have been *deait*; becauſe *det* in the preſent tenſe relates to the time of compleating the record; and it was impoſſible that the informer could give information at *Enfield*, when he was at his houſe in *Holborn*, where the conviction was made. To which it was anſwered by the counſel of the other ſide, and agreed by the court; that it muſt be intended ſucceſſively, the one after the other as the facts might be performed, and not immediately; for the juſtice might take the information at *Enfield*, and come afterwards to *Holborn*, and make the conviction. 3. A third exception was, that the judgment was, *quod forisfaciat* only, whereas it ought to be, *ideo conſideratum eſt*. *Sed non allocatur.* For *per curiam*, it is well enough without it. 4. Objection. That the conviction is, that the defendant killed the deer *ſine conſenſu domini regis proprietarii damarum praedictarum*, and not *adtunc proprietarii*. *Sed non allocatur.* Becauſe it is that he killed them *ſine conſenſu domini regis* (as before) *et adtunc et antea et poſtea proprietarii chaſeae praedictae, aut alicujus alius perſonae praecipue fiduciatae, Anglice* intruſted, *cum cuſtodia damarum praedictarum*; which ſufficiently ſhews, that it was an unlawful killing. 5. Objection. That *contra pacem* is omitted in the conviction. *Sed non allocatur.* For *per Holt* chief juſtice, in indictments and informations one ought to conclude *contra pacem*; but in theſe ſummary convictions there is no need to purſue ſo ſtrictly the forms of law, and they are well enough without *contra pacem*.

Rex *verſ.* Speed.

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EXception was taken to this conviction for deer-ſtealing, that the facts are laid at ſeveral diſtinct days, and then at the end comes *illicite occidit*; and ſo it did not extend to them all. But *per curiam* it is one entire ſentence, and then *illicite occidit* will extend to every one of them, as well as if it had been repeated particularly. Afterwards another exception was taken, that *illicite occidit* is not ſufficient, but they ought to ſay *furtive*, or *cum animo furandi*, or ſomething reſembling it, for every unlawful killing is not within the act. But *per Holt* chief juſtice, if there is a pretence of right, we ought to ſuppoſe, that the juſtice would do right and acquit the defendant: becauſe he is entruſted with the execution of the law. The intent of the act was, to prevent killing in a clandeſtine manner by ſtealth; but it is enough to lay the fact in the words of the act of parliament, and that ought to be admitted upon evidence. The title of the act is, againſt deer-ſtealers, but

In a ſummary conviction by a juſtice it is ſufficient in deſcribing the offence to deſcribe it in the words of the ſtatute. R. acc. ante 581.

On a ſtatute againſt dealers no perſon ought to be convicted who acts under a colour of right. Vide poſt. 901.

A conviction upon a ſtatute impoſing a penalty upon every perſon who ſhall kill a deer need not ſtate how the deer was killed. S. C. Carth. 501. Salk. 378. If a ſtatute directs that a pecuniary penalty ſhall be levied by diſtreſs, and a conviction upon it is affirmed in B. R. B. R. may award a levari facias thereon. S. C. Salk. 379. 12 Mod. 328. R. acc. Salk. 369. poſt. 768. Carth. 231. acc. 3 Danv. 305. pl. 6. But if the ſtatute adds that for want of a ſufficient diſtreſs the party ſhall ſuffer imprisonment, Q. Whether upon ſuch affirmance B. R. can for want of diſtreſs imprison him.

there

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there is not any ſuch word in the body of the act. And therefore if there was a diſpute concerning the limits of a walk in a foreſt; and one claims as part of his walk, what is in fact a part of the diviſion of another, and accordingly kills deer there; the caſe is out of the intent of the act, but is plainly within the words. The intent of the act was to puniſh rogues and vagabonds; and not to puniſh perſons, who by miſtake in the execution of their truſts exceed what the law warrants. If the keeper of a walk gives leave to a third perſon to kill a deer; though this licence does not give ſufficient authority to the third perſon to kill it, yet it will not be an unlawful killing within the ſtatute, becauſe there is a colour of right. Another exception was, becauſe it is not ſhewn how he killed. *Sed non allocatur*, becauſe the killing or not is the material part. And *Holt* chief juſtice ſaid in this caſe, that if a conviction was affirmed in this court, this court might award a *levari facias*; but if the defendant had no goods, he made a queſtion, if they could impriſon him. Both theſe convictions were affirmed. *Ex relatione m'ri Jacob.*

The King *againſt* the Company of Barber Surgeons in London.

If an act of parliament unites two trading fraternities, and directs that they ſhall chooſe annually four maſters, two to be expert in the one trade and two in the other, though each fraternity had before the act power to admit perſons not of the trade, and continue the practice afterwards, none of ſuch perſons can be maſters.

IN an information againſt the defendants for a falſe return made by them to a *mandamus*, directed to them, to command them, to elect a barber to be one of the wardens of the company; to which they returned, that they had elected two barbers. Upon the trial at *niſi prius* in *Middleſex* the ſitting after the laſt term before *Holt* chief juſtice upon the evidence the caſe appeared to be thus. That there is a cuſtom in this and all other companies in *London*, to admit perſons, who are not of the profeſſion or trade of which the company is denominated, to the freemen of the company indifferently with thoſe who are; and upon this, there being two claſſes in this company, the one of barbers, and the other of ſurgeons, a diſpute aroſe about the year 1631 under which claſs theſe foreigners ſhould be ranged; and the company conſidering, that many of the foreigners were conſiderable men, and being unwilling to turn them out of the company, they agreed, that they ſhould be ranked under the claſs of barbers; and accordingly a bye law was made, that all ſuch perſons, as ſhould be admitted into the company and were not barbers nor ſurgeons by profeſſion, ſhould be barbers; and accordingly it has continued ever ſince, and the warden for the claſs of barbers has been uſually elected out of the reputed barbers; and the real barbers have been uſually omitted; and one of the preſent wardens was a reputed barber. This point was reſerved by *Holt* chief juſtice upon the trial, and he acquainted

his

his brothers with it in court. And *Holt* demanded in court their opinion; and ſaid, that he delivered that it would be a hardſhip to the whole company, if this uſage ſhould be ſet aſide. For then if theſe reputed barbers (who are commonly the moſt ſubſtantial men of the company) were excluded from being elected into the government of it, all ſuch perſon would decline the admitting themſelves into the company. But yet the words of the 32 *H.* 8. *c.* 42. are not to be got over. For the ſaid act taking notice, that there were two companies, the one of barbers, the other of ſurgeons, unites them by the name of barber ſurgeons; reſtrains them to their ſeveral employments; and then a clauſe comes and enacts, that they ſhall annually elect four maſters or governors of the company, two of whom ſhall be expert in barbery, and two in ſurgery, to have the correction of all perſons uſing barbery or ſurgery. And the act cannot be underſtood in other manner; for the intent of the act being to unite the perſons of theſe two profeſſions, every member of the company, as ſuch, is a barber ſurgeon; and therefore where the act comes and diſtinguiſhes them, it can be only with relation to their ſeveral profeſſions; for in other manner they cannot be more barbers than ſurgeons. And it is the ſtronger, becauſe it is a qualification of their offices, ſince they muſt have the correction of the practiſers in the ſeveral profeſſions. Then the uſage or bye law can never repeal the act of parliament. And therefore by his opinion, and the opinion alſo of *Turton* and *Gould* juſtices, the *poſtea* was ordered to be delivered to the plaintiff. And the laſt day of the term, a peremptory mandamus was granted. And *Holt* chief juſtice ſaid, that he believed, this mingling of companies was later than the time of *Henry* 8. *Ex relatione m'ri Jacob.*

Rex v. Barber-Surgeons.

Clerke *verſ.* Clerke.

CLERKE died inteſtate. His wife took out letters of adminiſtration to him. *Clerke* brother to the inteſtate cited the defendant into the ſpiritual court, to made diſtribution of the inteſtate's eſtate. The defendant there ſuggeſts, that the brother has goods of the inteſtate in his hands to the value of 200*l.* And upon this the ſpiritual court orders him to bring the 200*l.* into court, to the end that it might be diſtributed. And for not bringing it in, they excommunicate him. Upon which he moves *in B. R.* for a prohibition, and it was granted as to the whole proceſs that compelled him to bring in the 200*l.* For *per curiam*, the ſpiritual court has power to make diſtribution of the eſtate, when it is come in, but not to fetch it in; becauſe that is to hold plea of debt. But the ſpiritual court might refuſe in this caſe to proceed to the diſtribution, until the brother had brought in the 200*l.* but they cannot excommunicate him for not bringing it in.

The ſpiritual court may compel an adminiſtrator to make diſtribution. Vide 22 & 23 Car. 2. c. 10. ſ. 3.

But they cannot compel a debtor of the inteſtate to pay his debt into court.

Though ſuch debtor is the perſon applying for the diſtribution.

But they may forbear proceeding to the diſtribution till he pays it in.

Rex

Rex *verſ.* Fowler.

S. C. Salk. 350. Holt. 334.

The direction of a habeas corpus to a ſheriff or gaoler diſjunctively is bad. S. C. Fort. 243. 3 Danv. Abr. 293. p. 4. 295. p. 1. 296. p. 3, 4.

The ſufficiency of a writ is not to be decided upon from a mere recital of it. R. acc. 1 Saund. 317. Str. 225. Ann. 189. Barnard v. Moſe, C. B. H. 28 G. 3.

THE defendant was arreſted upon an *excommunicato capiendo*. The *ſignificavit* expreſſed, that he was excommunicate for contumacy, in a ſuit *pro ſubſtractione decimarum ſeu aliorum jurium eccleſiaſticorum*. The defendant ſued a *habeas corpus* directed to the ſheriff of the county, *&c. vel cuſtodi gaolae, &c.* and the gaoler returned the warrant of the ſheriff upon the *excommunicato capiendo, &c.* Mr. *Northey* took exception to the return, that it appeared upon the recital of the *ſignificavit* in the warrant, the defendant was excommunicate in a ſuit for tithes or other eccleſiaſtical duties in the diſjunctive, and therefore ill, becauſe the cauſe of excommunication ſhould appear to be ſufficient, and the ſpecialty of it ought to be ſhewn, and not ſo generally. For perhaps the *jura eccleſiaſtica* may be ſuch as he was not obliged to pay. Excommunication ſo generally pleaded, without ſome more ſpecial cauſe, will not be ſufficient to ſtay another's ſuit, 8 *Co.* 68. *b. Trollop*'s caſe, much leſs to deprive a man of his liberty. And the caſe of the king and *Sanchee* was cited, [ſee it before, 323.] where to a writ of *habeas corpus* the defendants were returned committed by warrant of two juſtices of peace in purſuance of 27 *H.* 1. *c.* 20. for contumacy in a ſuit before an eccleſiaſtical judge, for *tithes or other eccleſiaſtical duties*, juſt as it is here; and upon that exception the defendants were diſcharged. The court gave no opinion in this matter, But *Holt* chief juſtice ſaid, that *Sanchee*'s caſe differed from this caſe, becauſe the commitment there was by virtue of a ſpecial authority given to the juſtices of peace by the ſaid act, which ought to be purſued ſtrictly. But the court quaſhed the *habeas corpus* for two reaſons. 1. Becauſe it was directed to the ſheriff or gaoler in the diſjunctive, which the clerks agreed, was contrary to all the courſe, and ill. 2. Becauſe the writ of *excommunicato capiendo* was not returned, but only the warrant of the ſheriff; for the writ ought regularly to be returned, for may be it is right; for if the ſheriff has a good writ againſt a man, and he makes an ill warrant to his bailiffs upon it, to arreſt the man, and they arreſt him accordingly, though the bailiffs cannot, yet the ſheriff may juſtify, by virtue of the writ; for if the ſheriff be in any manner privy to the taking, as if he command his bailiffs to arreſt a man by parol, when he is taken accordingly, he is in the cuſtody of the ſheriff: and if he has a writ againſt him at the ſame time, he is arreſted, and is in cuſtody, by virtue of the writ. Indeed the ſheriff muſt be privy to the taking, or otherwiſe he cannot be in his cuſtody. And *Holt* chief juſtice ſaid, that the carrying of this writ to the gaoler was an

an irregularity; for where a man is committed immediately to the gaoler, there the *habeas corpus* ought to be carried to him; but where he is arreſted by virtue of a warrant upon a writ directed to the ſheriff, there the *habeas corpus* ought to be carried to the ſheriff; for he having the writ in his cuſtody is the only proper perſon to make the return. Since the *habeas corpus* act the gaolers have taken upon them to cheat the ſheriffs of the money for the returns, but that is not regular. The writ was quaſhed, and a new *habeas corpus* granted, returnable *immediate*; upon which the court gave order, that they ſhould procure the writ to be returned. Note; That writs of *excommunicato capiendo* are inrolled in the crown office, which roll was brought into court in this caſe, and the writ appeared there to be in the diſjunctive. *Ex relatione m'ri Jacob. Poſt.* 618.

REX v. FOWLER.

Smith *verſ.* Wallet.

THE ſequeſtrators of the tithes of a vicarage ſued the impropriator in the ſpiritual court for tithes upon the endowment. And the defendant moved here for a prohibition, upon a ſuggeſtion, that it was not a vicarage, and that that ought to be tried at common law. *Holt* chief juſtice ſaid, that the ſuggeſtion is good in point of law; but if the ſuggeſtion appears to the court to be notoriouſly falſe, the king's bench will not grant a prohibition; for they ought to examine into the truth of the ſuggeſtion, and ſee what foundation it hath; for it appears plainly to be falſe in fact, the king's bench ought not to grant a prohibition. *Hob.* 66. *Aſton v. Caſtle-Birmidge*; and it is held there, that though the ſurmiſe be matter of fact, and triable by a jury, yet it is in the diſcretion of the court to deny a prohibition. So it was done *Hob.* 185. *Jones v. Jones.* But at laſt in this caſe a prohibition was granted by conſent, and iſſue to be taken, vicarage or not, and to be tried at the next aſſizes, to ſettle the right. Note, Mr. *Bury* ſhewed in this caſe a copy of an endowment, and of the book of firſt fruits, where the vicarage was rated at ———, And receipts for firſt fruits. *Ex relatione m'ri Jacob.*

The ſpiritual court cannot try the exiſtence of a vicarage.

A prohibition cannot be granted upon a ſuggeſtion which is falſe.

Hartfort

Hartfort *verſ.* Jones.

S. C. Salk. 654.

Trover for ſo many ounces of cloves, mace, and nutmegs, without ſpecifying the quantity of each, good after judgment by default. Vide ante, 20, 133. 191. 1 Barnard. B. R. 47. 65. Com. Action on the Caſe upon Trover. G. 2, 3. 4, 2d. Ed. vol. 1. p. 222, 223. Pleader. C. 21. 2d. Ed. vol. 5. p. 31.

IN trover the plaintiff declared, that he was poſſeſſed *de octo habit. veſtium (Anglice* ſuits of wearing apparel) ſeventy-two ounces of cloves, mace, and nutmegs;—— pounds *aromatum, vocatorum* grocery ware, ſeventy pounds *lini diverſorum generum, &c. et quod caſualiter amiſit, &c.* The defendant permits judgment to be given againſt him by default, and a writ of inquiry was executed, and intire damages given for the plaintiff. And Mr. *Northey* moved in arreſt of judgment upon the uncertainty of the declaration in the ſeveral particulars there mentioned; but the chief objection was ſeventy-two ounces of cloves, mace, and nutmegs, and does not ſhew how much of every one. Mr. *Carthew* to maintain the action cited 2 *Vent.* 67. *Bliſſe v. Froſt*, 78. *Chamberlain v. Cooke, trover de una ſerie cyanorum et granatorum* (*Anglice*, turks and garnets) after verdict held good. 1 *Sid.* 263. *Pledall v.* the Hundred of *Thiſtleworth*, declaration of a robbery of a gorget and cuffs, good after verdict. 98. *trover de plancis granariis*, good. *Stile*, 358. *trover* of a library of books, good. 1 *Mod.* 319. *Wood v. Davies, de tribus ſtruibus foeni*, good(*a*) after verdict. 2 *Saund.* 74. *Hil.* 1 *W. & M. trover de viginti peciis vini branditti*, held good (*b*) after verdict. *Holt* chief juſtice ſaid, the laſt term, when this was moved, that the ſaid caſes cited by Mr. *Carthew* were after verdict, and if there were a verdict in the preſent caſe, the judgment would be according, for then they would intend that they were mixed; but this caſe is after judgment by default. There is a great difference, where the thing, for which the action is brought, is one intire aggregate body, though conſiſting perhaps of many different parts, there it will be good, which is the reaſon of the caſes of the pairs, and the moſt part of the caſes before cited. And for the ſaid reaſon *Trin.* 23 *Car.* 2 *B. R. Boroughs v. Hall*, trover (*c*) for a ſhip *cum armamentis* was held good; whereas if the action was brought for the guns and rigging ſeverally, they (*d*) ought to ſhew what and how much. And ſo it was held in the caſe of *Pollexfen v. Criſpe.* The true reaſon why certainty is ſo much required is, becauſe a recovery in this action may be pleaded in bar, if another action ſhould be brought for the ſame cauſe. This had been ill in *detinue* without ſhewing that they were mixed. But why is not this declaration as certain as a (*e*) declaration in ejectment for twenty acres of land, thirty of meadow, *&c.* in the towns *A. B.* and *C.* without ſhewing how much lies in each town? And afterwards this term, upon the motion of Mr. *Carthew*, judgment was given for the plaintiff, becauſe they eſteemed theſe to be things mixed. *Ex relatione m'ri Jacob.*

(*a*) Vide ante, 191.

(*b*) Vide ante, 191.

(*c*) Vide Gilb. C. B. 123.

(*d*) Vide Gilb. C. B. 123.

(*e*) Vide 3 Lev. 334. Burr. 1129. 3 P. 1126. Goodright v. Fawcon. 2 Barnes, 1 Co. Com. Pleaders. 2. T. 1. 2d. Ed. vol. 5. p. 273.

Ano-

Anonymous.

S. C. Salk. 586.

MR. *Robert Eyre* moved to quaſh the return of a reſcue, which was, *virtute brevis mihi directi feci* a warrant to *J. S.* and *J. N.* my bailiffs, who by virtue thereof *ceperunt et arreſtaverunt* the defendant, *et in cuſtodia mea habuerunt, quouſque* A. & B. *reſcuſſerunt* the defendant *ex cuſtodia* J. S. *et* J. N. *ballivorum meorum.* And it was quaſhed, For *per Holt* chief juſtice, the ſheriff ſhould either have returned, that the defendant was in his cuſtody and reſcued out of his cuſtody, or that he was in cuſtody of the bailiffs, and reſcued out of their cuſtody, either of which returns had been good. But this return is repugnant, *viz.* that the defendant was in cuſtody of the ſheriff, and reſcued out of the cuſtody of the bailiffs. *Ex relatione m'ri Jacob.* 2 *Roll. Abr.* 457. *pl.* 5. *Wilcox*'s caſe.

A return to a capias that the ſheriff's bailiff arreſted the defendant, and had him in the *ſheriff*'s cuſtody until J. S. reſcued him from the cuſtody of *the bailiff*, is repugnant and bad Vide Com. Reſcous. D. 4, 5. 2d. Ed. vol. 5. p. 439.

Rock *verſ.* Layton.

S. C. Salk. 310. Com. 87.

IN caſe againſt the ſheriff for a falſe return of a *devaſtavit* to a writ of *fieri facias*, the caſe upon the evidence at the trial appeared to be thus. An adminiſtratrix had aſſets to the value of 200*l.* She confeſſed judgment in an action brought againſt her for 300*l.* and afterwards permitted judgment to be given againſt her by default in another action; and upon a *fieri facias* upon the laſt judgment the ſheriff returned *devaſtavit*; and whether this was a falſe return, or not, was the queſtion. And Mr. *Montague* for the plaintiff argued, that judgment being in this caſe againſt the adminiſtratrix by default, ſhe ſhall not be eſtopped to give the former judgment in evidence, upon the iſſue of *devaſtavit* or not, upon the *ſcire fieri* inquiry; this caſe reſembling the caſe of two *nichils* to a *ſcire facias*, there one may have an *audita querela*, otherwiſe where the defendant is returned warned. And the reaſon why the award of execution was reverſed in *Pettifer*'s caſe, 5 *Co.* 32. was (*a*) becauſe two *nichils* were returned upon the *ſcire facias*. But in the like caſe between *Mounſon* and *Bourne*, *Cro. Car.* 526. a *ſcire feci* being returned, the award of execution was affirmed. So here the judgment being againſt the plaintiff by default, ſo that he had no opportunity to plead the former judgment, ſhe is not eſtopped to take advantage of it, and conſequently the return of the *devaſtavit* is a falſe return. 2. If the permitting of judgment to be given againſt the plaintiff by default will amount to a confeſſion of aſſets, yet it will not confeſs a *devaſtavit* and converſion. 3. The ſheriff ought not to have returned the *devaſtavit* upon the *fieri facias*, without a *ſcire fieri* and inquiry. Mr. *Northey e contra* for the defendant argued, that as to the return of the *devaſtavit*

By ſuffering a judgment by default an executor admits concluſively that he has aſſets to the amount of the ſum to be recovered by the judgment. R. acc. Str. 732. 1 Will. 258. Acc. 6 Mod. 308. Str. 1075. And if upon a writ of execution the ſheriff cannot find aſſets to that amount, he may return a devaſtavit. Vide Cro. El. 102. pl. 9. Noy. 69. Wentw. 170.

(*a*) Vide ante, 439. and the books there cited.

upon

ROCK v. LAYTON.

upon the *fieri facias*, &c. the ſheriff may return it upon the *fieri facias*, if he will, at his peril. Then as to the confeſſion of aſſets, he ſaid, that he did not believe, that the permitting judgment to be given by default is a confeſſion of aſſets; but that ſhe has made herſelf chargeable for all the aſſets which ſhe at any time had; and if ſhe will not diſcharge herſelf by pleading, ſhe has no other means to diſcharge herſelf, but muſt anſwer for the whole. For where a man has a day to plead a matter before judgment, and omits his advantage, he cannot take advantage of it afterwards. And for this reaſon, if an executor has two actions brought againſt him for 100*l.* each, and has but 100*l.* aſſets; if he does not (*a*) confeſs the one and plead it to the other, he ſhall pay the 200*l.*

(*a*) D. acc. Str. 732. Vide Dougl. 435.

Holt chief juſtice. The ſheriff may return a *devaſtavit* upon the *fieri facias*, if he will; and upon ſuch return judgment ſhall be given againſt the adminiſtrator *de bonis propriis*. The caſe is, ſuch adminiſtratrix hath aſſets, and firſt confeſſes judgment to the value of her aſſets, then permits another judgment to be given againſt her by default; inſtead of which, if ſhe had pleaded the firſt judgment, and no aſſets over, it had been a good bar of the plaintiff's action; the queſtion is here, whether after this neglect of pleading this matter, ſhe can at any time take advantage of it afterwards? It is the common caſe, that where (*b*) a man has matter of bar to plead, and he ſlips his opportunity of pleading it, he loſes the benefit of it for ever. To which purpoſe is the caſe of *Gilburn v. Rack*, 2 *Sid.* 12. mentions it; but he ſaid, that he had a very exact report of it; where judgment of debt was given againſt tenant in tail, the lands intailed deſcend to the iſſue in tail; then a *ſcire facias* is ſued againſt his heir and terre-tenant, and the heir in tail was returned heir in fee, and terre-tenant, and warned; and he not appearing, there was judgment *quod habeat executionem* by default, and an *elegit* iſſued; and the intailed lands were extended, and the plaintiff upon the extent brought ejectment, and the defendant offered to give in evidence that the lands were intailed upon him; but it was held, that he was eſtopped to give that in evidence, becauſe a *ſcire feci* was returned, and he might have pleaded it; which is a ſtrong caſe, all the ſpecial matter being found by the jury. And the caſe of *Hannor v. Maſe*, *Hob.* 283. is grounded upon the ſame reaſon. And it is reaſonable, for if the defendant had pleaded this matter, it may be the plaintiff would have acquieſced; but if this ſhould be allowed, it would compel a man to proceed *nolens volens*. On the other hand, the conſequence of the preſent reſolution will be an advantage to all creditors, in compelling executors to be honeſt and ſhew the truth of their caſe. As to the matter of the judgment being by default, it is agreeable to all the caſes cited; for no (*c*) judgment can be in a perſonal action without appearance, and conſequently

(*b*) Vide Str. 1043. Ann. 220. Cowp. 727.

By ſuffering judgment by default after a ſcire feci upon a ſcire facias on a judgment recovered againſt his anceſtor, an heir in tail precludes himſelf from ſaying he was not heir in fee. S. C. cit. Str. 732.

(*c*) Vide 12 G. 2. c. 29.

conſequently the defendant had an opportunity to plead. The reaſon of the reverſal of *Pettifer*'s caſe was, becauſe at that time ſuch practice had not gained allowance; and it was thought hard to introduce it, becauſe it took away the plaintiff's remedy againſt the ſheriff. But afterwards when it came to be a queſtion in the caſe of *Mounſon v. Bourn*, the judges took notice that it was the conſtant courſe of the common pleas, and approved it; and gave directions that it ſhould be uſed in this court by thoſe that would. The judgment againſt an executor by default is not conditional, but is the ſame that is given in all other caſes; as if upon *plene adminiſtravit* pleaded the jury had found aſſets, yet the judgment muſt be *de bonis teſtatoris*, though the defendant is eſtopped by the verdict to ſay that there are no goods of the teſtator. And the reaſon is, becauſe the ſheriff upon the *fieri facias* has no power to ſeize the proper goods of the executor until a *devaſtavit* returned; which the ſheriff of neceſſity muſt return, becauſe the defendant is eſtopped by the verdict, to ſay that he has no aſſets. As to the conceſſion by Mr. *Northey*, that though an executor permits judgment to be given by default, that will not amount to a confeſſion of aſſets, it is not ſo clear; for why does he permit judgment to go by default? though poſſibly it may be taken in favour of executors. *Gould* juſtice ſaid, that it's being a judgment by default is not material in the caſe, for it had been the ſame if ſhe had pleaded *plene adminiſtravit*; for he would allow her to give every thing in evidence upon *non devaſtavit* upon the *ſcire fieri* inquiry, that ſhe might have given in evidence upon *plene adminiſtravit*; but the former judgment could not have been given in evidence upon it, for by the neglect of the adminiſtratrix in pleading the former judgment the aſſets are become aſſets throughout; and therefore if there is any defect of aſſets to ſatisfy the ſecond judgment, it is a *devaſtavit*. *Holt* chief juſtice would not over-rule that point at the aſſizes, but permitted it to be argued and determined here. becauſe it was a point of great conſequence. The verdict, which was given for the plaintiff, was ſet aſide, and a rule of court made, that the defendant ſhould have his coſts. *Ex relatione m'ri Jacob.*

A man may give in evidence upon a ſcire fieri inquiry whatever he might have given in evidence upon *plene adminiſtravit*. Semb. cont. ante 589. Str. 1075.

Wilbraham *verſ.* Doyley.

S. C. Salk. 500.

MR. *Acherly* moved the king's bench to ſtop a writ of error out of chancery for reverſing an outlawry in the county palatine of *Cheſter*, founding himſelf upon 4 *Inſt.* 214. where *Coke* holds, that in a writ of error to

A cuſtom that a writ of error from an inferior court ſhall not be made returnable until a certain number of courts have been held there after the teſte is deſtroyed by a ſtatute extending the interval between the holding of each court. Such cuſtom extends to thoſe proceedings only which have exiſted within the juriſdiction immemorially. There can be no outlawry in a county in which there is no coroner. Vide 3 Bl. Com. 283. There was no coroner in Cheſter before 33 H. 8. c. 13.

Cheſter,

WILBRAHAM v. DOYLEY.

Cheſter, day ſhould be given for ſo long time as that three counties might be held before the return of the writ in the king's bench, which is four months; by which time the juſtices or lieutenants within the ſame county might redreſs the error, if they would. *Northey e contra* ſaid, that though there was ſuch an ancient uaſage, yet now the ſtatute of 32 *H.* 8. *c.* 43. has taken away the ancient courſe, and enacted, that the adminiſtration of juſtice uſed heretofore to be had at eight ſhire days, ſhould be thereafter executed by the juſtice of *Cheſter* at two times in the year only; at the ſeſſions next after *Eaſter*, and at the other ſeſſions next after *Michaelmas*, (which by 33 *H.* 8 *c.* 13. is made moveable at the pleaſure of the juſtice, ſo as proclamation be made of the time fifteen days before) in like manner as is uſed in the county palatine of *Lancaſter*. And by that ſtatute it is made impracticable in point of time; for if it ſhould be executed now, it would delay the party at leaſt two years, inſtead of the four months delay before. 2. This cuſtom, if it now remained, extends only to caſes of judgments given by the judges *ratione tenurae*, to ſave their fine; and therefore it does not extend to a fine, nor conſequently to this caſe, becauſe the judgment *quod utlagetur* is given by the coroners. 3. Before 33 *H.* 8. *c.* 13. there were no outlawries in *Cheſter*, the electing of coroners in the ſame county being firſt appointed by the ſaid ſtatute; and therefore the cuſtom could not extend to judgments of outlawry. *Holt* chief juſtice agreed *in omnibus*, and ſaid, that there was no colour for the motion; and ſaid farther, that there was no chief juſtice of *Cheſter* before the time of queen *Elizabeth*, there being but one juſtice before. See the account of this cuſtom at large in *Dyer* 345. *b. pl.* 6. 320. *b.* 321. *a. b.* from whence *Coke* tranſcribes it, in 4 *Inſt.* 212. *Ex relatione m'ri Jacob.*

Rex *verſ.* Browne.

S. C. Salk. 376.

The caption of an indictment calling the bill "an indictment" is bad. a preſentment that the ſeveral bills annexed to a ſchedule are true, is good.

SIR *Bartholomew Shower* moved to quaſh an indictment, becauſe the caption was, *Ad generalem, &c. per ſacramentum* of the jury *preſentatum exiſtit, quod ſeparalia indictamenta huic ſchedulae annexa ſunt billae verae*; to which he took two exceptions. 1. That there was no finding; for if there were twenty indictments annexed to the ſchedule, and two of them only were true, and the others falſe, that would anſwer the finding. 2. That they were not indictments, until they were found. As to the firſt, the opinion of the court was, that it was well enough, *ſeparalia indictamenta* importing all the ſeveral indictments. But for the ſecond exception it was quaſhed, becauſe it ought to have been *billae*.

Medina

Medina *verſ.* Stoughton.

5. C. Salk. 210.

CASE. The plaintiff declared, that the defendant being poſſeſſed of certain million lottery tickets, ſold them to the plaintiff, affirming them to be his own, whereas in truth they were the tickets of another man. The defendant pleaded, that he bought them *bona fide* before the ſale, and ſo ſold them *bona fide*; *in quo caſu* the plaintiff ought not to have his action, *et petit judicium de narratione et quod narratio caſſetur*. The plaintiff demurred. *Holt* chief juſtice: The plea is ill, and the action well lies. Where a man is in poſſeſſion of a thing, which is a colour of title, an action will lie upon a bare affirmation that the goods ſold are his own. For in ſuch caſe it amounts to a warranty, and ſo it was adjudged in this court *Mich.* 1 *Will.* & *Mar.* *B. R.* between *Croſs* and *Gardiner*, 3 *Mod.* 261. 1 *Show* 68. where in caſe the plaintiff declared, that there being a diſcourſe between the plaintiff and defendant concerning the ſale of two bullocks then in the poſſeſſion of the defendant, the defendant ſold them to the plaintiff, falſely affirming them to be his own, *ubi revera* they were the bullocks of *J. S.* and upon this reaſon it was adjudged for the plaintiff, after motion in arreſt of judgment, according to 2 *Cro.* 196. *Roſewell v. Vaughan*; but otherwiſe in caſe of land, becauſe there the purchaſer may ſearch into the title. And *Gould* juſtice ſaid, that he drew the declaration in the caſe of *Croſs v. Gardiner*, and purpoſely ſhewed a poſſeſſion of the bullocks, for (*a*) the queries turned upon that difference. But the great queſtion of this caſe was, whether they ſhould give final judgment, or only *reſpondes ouſter?* Mr. *Northey* ſaid, that *petit judicium de narratione* is always in bar in this court; in abatement it is *petit judicium de billa, et quod billa caſſetur*; and judgment *quod billa caſſetur* cannot be given in this caſe, becauſe it is not prayed. *Holt* chief juſtice: That is true in demurrers, but not in pleas, becauſe there it is *actio non*; for a man may plead in abatement of the declaration. *Gould* juſtice: Where a matter of bar is pleaded in abatement, the plaintiff ſhall have judgment in chief. The matter of this plea is plainly in bar, being new matter out of the declaration; and the defendant ſays, *in quo caſu* the plaintiff ought not to have his action, which is in bar. *Holt* chief juſtice: If a man pleads matter which goes in bar, but begins and concludes his plea in abatement, it will be a plea in abatement; for it is the beginning and concluſion that make the plea. See 1 *Sid.* 189, 190. But if he begins in bar, though he concludes in abatement; or concludes in bar, though he begins in abatement; it will be a plea in bar. *Gould* juſtice: In the demurrer the plain-

An action lies againſt the ſeller of goods for affirming them at the time of the ſale to be his own, when they were not, if he was in poſſeſſion of them at the time of the ſale. R. acc. Cro. Jac. 74. pl. 6. Acc. 1 Roll. Abr. 91. 1 Vin. 561. pl. 6. D. a.c. Cro. El. 44. pl. 55. Vide Cont. action on the caſe for a deceit. A. 2. Ed. vol. 2. p. 166. 'Tis no anſwer to ſuch action that he had bought them bona fide, and therefore believed them to be his. Q. Whether in a plea to an action by bill a concluſion praying judgment of the declaration is a concluſion in abatement or in bar. A man cannot aſſign error upon an act of the court in his favour. R. acc. Holt 460. pl. 3. Semb. acc. ante 80. Vide Com. Pleader. 3. B. 16, 2d. Ed. Vol. 5. p. 102.

(*a*) Sid Vide 3 T. R. 58.

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tiff prays his damages; which is ill. *Holt* chief juſtice: It was held in this court in the caſe of *Biſſe v. Harcourt* [3 *Mod.* 281.] ante 339. (*a*) that if the defendant pleads matter of fact in abatement, which the plaintiff confeſſes and avoids, there in the concluſion of his plea he cannot pray damages, but muſt affirm his writ; but if he denies the fact, he may pray judgment *de damnis*; becauſe if the matter of fact be found for the plaintiff, he ſhall have final judgment. And in another caſe afterwards upon a *ſcire facias* they held, that if the defendant pleads matter of fact in abatement, and the plaintiff replies and denies the fact, he may pray execution; but yet if judgment be given for the plaintiff upon demurrer to the replication, it ſhould be only *reſpondes ouſter*. The court gave judgment in this caſe, *quod reſpondeat ulterius*, becauſe they ſaid that would not be miſchievous; for if it were error the defendant could not aſſign it, it being in his favour. And in another caſe laſt term, between *Rooſier* and *Sawkins*, *Holt* 460. *Holt* chief juſtice, held, that if a plea in bar be pleaded, and the court gives judgment only to anſwer over, it cannot be aſſigned for error, becauſe it is for the defendant's benefit; as (*b*) if the court grants an eſſoin, where none lies by law. *Ex relatione m'ri Jacob.*

(*a*) Vide ante 338, and the caſes there cited

Gilb. Hiſt C. B. 44.

(*b*) D. acc. ante 80.

Sir Creſwell Levinz *verſ.* Randolph.

Pleadings poſt. vol. 3. 317.

In debt upon a bond conditioned for the payment of all dues to an inn of court as a barriſter, if the defendant pleads payment, a replication that for a length of time each barriſter has uſed to pay an annual ſum for penſions to the treaſurer of the ſociety for the time being; and that an annual payment was in arrear from the defendant at the time of the commencement of the action is good, though it does not ſhew that ſuch ſum was ever demanded. Upon a bond conditioned for the payment of a ſum in groſs, the obligor is bound to pay it, though it is not demanded. Q. Whether in debt upon a bond conditioned for the performance of ſeveral things, a general plea of performance is good. Vide 1 Sid. 215. pl. 18. 1 Lev. 303. Keilw. 95. 3. b. pl. 3. Com. Pleader, 2 W. 33. 2d. Ed. vol. 5. p. 257.

DEBT upon a bond of 40*l.* brought by Mr. ſerjeant *Levinz*, as late treaſurer of *Gray's Inn*, againſt the defendant, a counſeller at law and member of the ſame ſociety. The defendant craves *oyer* of the bond and condition, which was, that if the above bounden *Herbert Randolph* ſhall from time to time, and at all times hereafter, well and truly pay, or cauſe to be paid, all ſuch ſum and ſums of money as ſhall become due by him for commons, vacations, penſions, dues and duties whatſoever, belonging unto *Gray's Inn*, and ſhall obſerve all ſuch order and orders of penſions as ſhall be made from time to time, and at all times hereafter, in *Gray's Inn* aforeſaid, that then, &c. Upon which the defendant pleaded, that he *a tempore confectionis ſcripti praedicti uſque diem exhibitionis billae praedictae bene et fideliter ſolvit omnes denariorum ſummas et obſervavit omnes ordines in conditione praedicta ſpecificatos mentionatos et contentos ex parte ſua ſolvendos et obſervandos ſecundum formam et effectum ejuſdem conditionis, viz. apud parochiam ſancti Andreae Holborn praedictam in comitatu praedicto. Et hoc, &c.*

Et praedictus Creſwell dicit, quod ipſe per aliqua per praedictum Herbertum ſuperius placitando allegata ab actione ſua praedicta inde verſus eum habenda praecludi non debet, quia proteſtando quod praedictus Herbertus non ſolvit aliquas denariorum

ſummas

ſummas nec obſervavit aliquos ordines in conditione praedicta ſpecificatos ex parte ſua ſolvendos et obſervandos ſecundum formam et effectum ejuſdem conditionis, pro placito idem Creſwell dicit quod praedictum hoſpitium Graienſe, communiter nuncupatum Gray's Inn, *in praedicta parochia ſancti Andreae Holborn in comitatu praedicto eſt et a tempore diu et longinquo praeterito fuit antiquum hoſpitium curiale et antiqua laudabilis et honorabilis ſocietas generoſorum leges hujus regni Angliae ſtudentium, vocatum* an inn of court, *necnon unum de quatuor ſocietatibus et hoſpitiis curialibus, vocatis* inns of court, *hujus regni Angliae de et in quibus aut aliquibus vel uno illorum quatuor hoſpitiorum et ſocietatum omnes et ſinguli generoſi et perſonae leges Angliae ſtudentes ad barram et in conſiliarios ad legem evocandi proficiendi et allocandi admiſſi educati et approbati ſunt et per totum tempus praedictum fuerunt et eſſe conſueverunt priuſquam ſic ad barram evocantur ſeu conſiliarii ad legem profecti et allocati ſunt fuerunt vel eſſe potuerunt, in quo quidem hoſpitio et ſocietate Graienſi ſunt et a toto tempore praedicto fuerunt ſeparales gradus generoſorum ſocietatis illius et inter alios unus et principalis gradus qui ex lectoribus, Anglice* readers, *et eorum aſſiſtentibus conſiſtit, qui quidem lectores et aſſiſtentes ſunt et nominantur ſocii de banco, Anglice* benchers, *hoſpitii ſive ſocietatis Graienſis, ac hujuſmodi ſocii de banco pro tempore exiſtentes ſunt et per totum tempus praedictum fuerunt gubernatores et regulatores ſocietatis et hoſpitii illius, curam habentes inter alia examinandi ad barram evocandi et in conſiliarios ad legem proficiendi et allocandi ſtudentes et membra dictae ſocietatis, unus quorum quidem ſociorum de banco per et inter ſeipſos de tempore in tempus electus adinde nominatus eſt et fuit theſaurarius hoſpitii de* Gray's Inn *praedicti, et nomen et officium illud per duos annos inſimul uſualiter aut eo circiter habet exercet gaudet et occupat et habere exercere gaudere et occupare ſolet et ſolebat a toto tempore ſupradicto, qui quidem theſaurarius pro tempore exiſtens inter alia tanquam ad ejus officium ſpectantia capiat et cepit ac per totum tempus praedictum capere conſuevit ibidem de et a quolibet ad barram evocato et in conſiliarium ad legem profecto et allocato per ſocios de banco dictae ſocietatis aut hoſpitii Graienſis hujuſmodi ſcriptum obligatorium cum hujuſmodi conditione ſuperius ſpecificata ad et ſuper hujuſmodi ejus evocationem ad barram ibidem, et quilibet ſic ad barram evocatus nec non quilibet in eandam ſocietatem admiſſus (dum unus membrorum ejuſdem extitit) ſolvit et a toto tempore ſupradicto ſolvere conſuevit hujuſmodi theſaurario pro tempore exiſtenti in uſum dictae ſocietatis quandam parvam denariorum ſummam, ſcilicet tres ſolidos et quatuor denarios, annuatim nomine penſionum ſuarum, Anglice* his penſions, *viz. duodecim denarios quolibet termino ſancti Michaelis et duodecim denarios quolibet termino ſancti Hilarii ac unum ſolidum et quatuor denarios pro termino Paſchae et termino ſancti Trinitatis, erga ſuſtentationem publicorum et neceſſariorum onerum expenſarum et cuſtagiorum ſocietatis praedictae, ſcilicet apud hoſpitium Graienſe praedictum in parochia praedicta;*

Levins. v. Randolph.

Et idem Creſwell ulterius dicit, quod tempore confectionis ſcripti praedicti ipſemet fuit unus ſociorum de banco ſocietatis illius ac theſaurarius dicti hoſpitii Graienſis prius adinde debito modo electus, viz. apud hoſpitium illud in eadem parochia, quodque praedictus Herbertus (tunc et antea unus generoſorum et membrorum ejuſdem ſocietatis exiſtens) adtunc et ibidem per ſocios de banco ſocietatis et hoſpitii illius ad barram evocatus et unus conſiliarius ad legem profectus et allocatus fuit juxta laudabilem morem inde a toto tempore ſupradicto ibidem uſitatum, et ſuperinde dictum ſcriptum obligatorium cum conditione praedicta in forma praedicta eidem Creſwell adtunc et ibidem fecit, et unus membrorum ſocietatis illius ibidem adhuc exiſtit quodque ultimo die termini ſanctae Trinitatis anno regni domini Gulielmi tertii nunc regis Angliae, &c. nono (quodam Daniele Beding field armigero adtunc et antea et poſtea theſaurario ſocietatis et hoſpitii Graienſis praedicti exiſtente) ſumma trium ſolidorum et quatuor denariorum pro penſionibus ipſius Herberti dicto hoſpitio ſpectans pro uno anno integro adtunc finito aretro fuit et adhuc exiſtit inſoluta contra formam et effectum conditionis praedictae; Et hoc paratus eſt verificare, Unde petit judicium et debitum ſuum praedictum una cum damnis ſuis occaſione detentionis debiti illius ſibi adjudicari, &c. W. Dixon, L. Agar. To which replication the defendant demurred and ſhewed for cauſe, *quod per placitum praedictum non conſtat quod ipſe idem Herbertus conditionem ſcripti obligatorii praedicti aliquo modo infregit, quodque eſt incertum et caret forma, &c. Geo. Barret.* And the plaintiff joined in demurrer.

Mr. *Montague* for the defendant took two exceptions to the replication. 1. That in the aſſignment of the breach no demand was alleged, which ought to be, becauſe it was an uncertain payment. 2. The breach is not poſitively alleged, for it may be the defendant paid his penſions to the treaſurer, and the treaſurer did not pay them to the ſociety, and then they will be arrear to the ſociety, and yet not due from the defendant. *Sed non allocatur.* For *per Holt* chief juſtice no demand is neceſſary for this ſum, being a ſum in groſs. And *per Gould* juſtice, the defendant here after pleading general performance, is (*a*) eſtopped to ſay, that there was no demand. To which *Holt* chief juſtice agreed. *Cro. Car.* 76. *Chapman v. Chapman.* 2. The alleging that ſo much was in arrear for penſions from the defendant is a ſufficient breach; for if they had been paid to the treaſurer, that had been payment to the ſociety, and ſo they had not been in arrear. But it had been better pleading, to have ſaid, that the defendant had not paid, *&c.* And judgment was given for the plaintiff, *niſi, &c.*

(*a*) Vide ante 233.

Afterwards Mr. *Cowper* ſhewed cauſe, why judgment ought not to be given for the plaintiff (*Holt abſente*) *Turton* and *Gould*

Gould juſtices being only in court. And he ſaid, that it did not appear by this pleading that the penſions were due within the condition of the bond, for it is only, that every one *ſolvit et ſolvere conſuevit*, which is no preſcription, and therefore cannot make a due; and it is not ſaid *ſolvere conſuevit et debuit*. But the two judges were of opinion, that theſe penſions appeared to be due upon the record. And therefore judgment for the plaintiff. Note, *Northey* took exception, that their plea was ill, becauſe they ſhould have ſhewn a ſpecial performance. And he ſaid, the opinion of the court was ſo about four years ago in the caſe between the *Middle Temple* and Mr. *Alliſon* upon ſuch a bond, and ſuch a plea, and ſuch a breach. But to this no opinion was given by the court. See for it 1 *Sid.* 215. 334. 1 *Bulſt.* 31. 43. *Cro. El.* 749. 1 *Roll. Rep.* 173. 382. *Cro. El.* 232. 1 *Vent.* 121. *Moor*, 856, *pl.* 1175. *Hob.* 12. 1 *Saund.* 52. 2 *Saund.* 409. *Cro. Jac.* 559. *Cro. Car.* 421. 2 *Mod.* 305. diffenence between the pleading.

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Intr. Mich. 11 Will. 3. B. R. Rot. 502.

After a verdict with intire damages againſt two defendants the plaintiff cannot enter up judgment againſt one of them only, unleſs he firſt either enters a nolle proſequi as to the other. Vide 1 Wilſ. 50. 306. or ſuggeſts upon the record a ſufficient reaſon for omitting him. His death is a ſufficient reaſon. His infancy [in an action in which it is no bar] though he appeared by attorney, is not. In an action againſt one perſon only a nolle proſequi amounts to a retraxit. Semb. Co. Litt. 139. a. Semb. cont. 1 Wilſ. 90. In an action againſt ſeveral, not. Semb. acc. 1 Wilſ. 90. Semb. cont. Cro. El. 762. Vide Co. Litt. 139. a. Cro. Jac. 211. A retraxit in treſpaſs as to one of ſeveral defendants diſcharges all Semb. acc. Cro. El. 762. Sed vide poſt. 716. A retraxit cannot be entered by attorney. A retraxit after judgment ſhall, unleſs the contrary appear on the record, be preſumed to have been entered by the plaintiff in perſon.

Thomas Lowther brought an action of treſpaſs againſt *Lancelot Salkeld ſenior*, *Lancelot Salkeld junior*, and *George Coux*, of his houſe broken, and of the expelling him from his houſe, and keeping poſſeſſion; and of his goods *ibidem inventis captis et aſportatis*, &c. The three defendants appeared by one attorney, and *Coux* pleaded not guilty to the whole; upon which iſſue is joined. *The two Salkelds quoad* the force and arms, and the expulſion, and the extratention of the plaintiff out of the houſe, plead not guilty, upon which iſſue is joined; and *quoad* the reſidue of the treſpaſs they juſtify, as bailiffs to Sir *George Fletcher*, the taking of the goods as a diſtreſs for rent arrear reſerved upon a demiſe to the plaintiff by Sir *George Fletcher* of the premiſſes, &c. The plaintiff replies, that they committed the reſidue of the ſaid treſpaſs of their own wrong, *in forma qua idem* the plaintiff *ſuperius verſus eos inde queritur*, *Abſque hoc* that they took the goods *in et ſuper dimiſſa praemiſſa prout illi ſuperius allegaverunt Et hoc paratus eſt verificare*, &c. The two *Salkelds* rejoin, that they took them upon the demiſed premiſes *prout ſuperius placitando allegaverunt*, *Et de hoc ponunt ſe ſuper patriam*. And the plaintiff *ſimiliter*. The entry was, that at the day in bank the plaintiff *venit per attornatum ſuum praedictum*; and by the *poſtea* it appeared, that the jury found *Coux* guilty of the treſpaſs, &c. *Et quoad primam exitum* between the plaintiff and the two *Salkelds* joined, *unde* they ſaid that they are not guilty; the jury found them

guilty;

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guilty; *Et quoad alium exitum* between the plaintiff and the two *Salkelds interius similiter junctum iidem juratores super sacramentum suum dicunt quod praedicti* the two *Salkelds* the goods *inframentionata in et super dimissa praemissa non ceperunt prout praedictus* the plaintiff *superius replicando allegavit*; and they give damages 14*l.* costs 40*s.* and then the entry continues, *Et super hoc idem* the plaintiff *dicit quod praedictus Lancelot Salkeld senior modo mortuus existit, et praedicti Lancelot junior et Georgius hoc non dedicunt; quodque praedictus Lancelot junior tempore comparentiae suae praedictae per praefatum Josephum Rolfe attornatum suum ut praefertur, scilicet crastino sanctae Trinitatis anno regni domini nunc regis nono, et diu postea fuit infra aetatem viginti et unius annorum. Et ea ratione petit judicium versus praefatum Georgium de et super veredictum praedictum sibi reddi; Ideo consideratum est, quod praedictus Thomas recuperet versus praefatum Georgium damna sua praedicta ad sexdecim libras per juratores praedictos in forma praedicta assessa necnon quatuordecim libras sex solidos et octo denarios eidem Thomae ad requisitionem suam pro missis et custagiis suis per curiam hic de incremento adjudicatos, quae quidem damna in toto se attingunt ad triginta libras sex solidos et octo denarios; Et super hoc idem Thomas fatetur se nolle ulterius prosequi versus praefatum Lancelot Salkeld juniorem super veredictum praedictum, sed ulterius prosequi super veredictum illud penitus deadvocat et recusat; Ideo consideratum est, quod praedictus Lancelot junior eat inde sine die, &c. et quoa praedictus Thomas habeat executionem versus praefatum Georgium de damnis praedictis, &c.* Upon which judgment *Coux* brought a writ of error, and assigned the general errors. And Mr. *Northey* counsel for the plaintiff in the writ of error argued, that this entry of the *nolle prosequi* amounted to a *retraxit*, and therefore cannot be entered by attorney, but ought to be entered in proper person; and therefore being entered by attorney it is error. And for that he cited 8 *Co.* 58. *a. Beecher's* case, in point. 1 *Roll. Abr.* 584. *Co. Litt.* 138. *b.* 139. *a. Co. Entr.* 283. But against this it was argued by *Raymond* for the defendant in error, that the entry here of the *nolle prosequi* is not by attorney; for though the plaintiff in the original action appears at the return of the *postea* by attorney, yet when he enters the *nolle prosequi*, he says *quod idem Thomas, viz.* the plaintiff *fatetur, &c.* and it is not said, as it is in *Beecher's* case, that the plaintiff *per attornatum suum fatetur*, and therefore the court will take it to be entered in proper person; for since it is not expressly said to be by attorney, they will intend it to be in proper person, because such intendment will support the judgment, whereas the contrary intendment would reverse it; and always where the court betakes itself to intendment, it shall be rather to affirm, than to reverse any judgment. And for this he cited the case of *Pemberton v. Stanhope* adjudged in this court this term, where the entry

try was as in this case as to this matter, and *Turton* and *Gould* justices (*absente Holt* chief justice) held, that the entry was in proper person, and not by attorney. And of that opinion they were in this case; but as to this *Holt* chief justice gave no opinion. 2. He argued that this entry of the *nolle prosequi* did not amount to a *retraxit*, which would be a release, but that it is an agreement, that the plaintiff will not proceed against the other defendant, and such agreement and acknowledgment shall be an absolute bar as to him, but that notwithstanding the plaintiff might proceed against the other defendants. And for this he cited *Cro. Cr.* 239. 243. 2 *Roll. Abr.* 100. *pl.* 5. *Walsh v. Bishop*, as a resolution in point; where in battery against two the one pleaded not guilty, the other justified, upon which several issues were joined, and verdicts in both for the plaintiff, and several damages; the plaintiff entered a *nolle prosequi* against the one defendant, and took judgment against the other; and it was objected, that the entry of the *nolle prosequi* amounted to a *retraxit*, and therefore it being entered before judgment against the other, he could not have judgment against him, because a *retraxit* is a release, and a release to one in trespass is a release to all; but the court held that it was not a *retraxit*, but a bare acknowledgment, that he would proceed no further against him. And *Cro. Car.* 551, *Dennis v. Powell.* 3. He cited several cases, where such entries were by attorney. *Co. Entr.* 172. *b.* 650. *b.* 676. *b.* 303. *a.* 699. *a.* 1 *Book of Judgment*, 127. 205. 219. 181. 655. 190. 2 *Book of Judgments*, 239. *pl.* 29. 52. *pl.* 1. 60. *pl.* 12. 70. *pl.* 34. 78. *pl.* 59. 89. *pl.* 16. 153. *pl.* 28. 223. *pl.* 12. 152. *pl.* 6. 237. *pl.* 24. *East. Entr.* 583. *a.* 654. *b.* 2 *Saund.* 379. *remisit damna* entered by attorney. 1 *Saund.* 342. *Jemmot et al' v. Bagus. Intr. Hil.* 3 *W. & M. B. R. Rot.* 759.

And *Holt* chief justice said, that it is a great question, if this would be a *retraxit*; and it seemed to him that it would not. But he gave no positive opinion. And he seemed to make a difference, where there are many defendants, and where but one; that in the former case a *nolle prosequi* will not amount to a *retraxit*, *contra* where there is but one defendant. See 6 *Ed.* 3. 30, 31. Then Mr. *Northey* argued farther, that this judgment ought to be reversed; because at the time when the court gave judgment against *Coux* for the whole damages, to which the other defendants were liable, the damages being joint, they did not know, whether the plaintiff would enter a *nolle prosequi* against the other defendants; and therefore it was erroneous in the court to give judgment against one defendant, and to do nothing as to the other; and therefore that it was a discontinuance, and in trespass a discontinuance as to one is a discontinuance as to all. 39 *Ed.* 3. 3. 30 *Assiz.* 36. 38 *Assiz.* 17. And he cited

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cited *Cro. El.* 762. *Green v. Charnock & Starnell*, where in treſpaſs *Starnell* did not appear at the day ar which he ought by the imparlance; *Charnock* pleaded in bar, to which the plaintiff replied, and upon demurrer day was given till the next term, and then it was adjudged for the plaintiff, and the ſame term he entered a *nolle proſequi* againſt *Starnell*, and then a writ of enquiry was awarded againſt *Charnock*, and upon the return adjudged againſt him; and upon error brought this judgment was reverſed, becauſe there was no judgment entered againſt *Starnell* by *nil dicit*, nor day given, which was a diſcontinuance of the ſuit; and the *nolle proſequi* againſt him comes too late, and a diſcontinuance againſt one was a diſcontinuance againſt both, and of the intire ſuit. And ſo in the preſent caſe the *nolle proſequi* comes too late, the ſuit being diſcontinued before; but it might have been otherwiſe, if the *nolle proſequi* had been entered before the judgment, as the caſes are of *Walſh v. Biſhop*, *Cro. Car.* 239. and *Rodney v. Stroud*, 3 *Mod.* 101. 2. He agreed, that there are authorities, that where the defendants ſever in plea, and the jury find ſeveral damages, that the plaintiff may take judgment againſt the one, and enter a *nolle proſequi* againſt the other, the *nolle proſequi* being entered before the judgment; but there is no (*a*) caſe in the books that warrants ſuch entry of a *nolle proſequi* where the jury find the damages jointly. That this matter of the entry of *nolle proſequi*'s has received already too much countenance, and ought not to expect any more encouragement, ſince they tend to encourage the (*b*) joining of perſons in actions for vexation only, where the party has no cauſe of action againſt them. 3. He ſaid, that the appearance of the infant by attorney was error, and amounted to a diſcontinuance; and that the plaintiff could not take judgment againſt the one defendant without the other, becauſe that were contrary to his demand in his writ, and therefore it abates his writ. And for theſe reaſons he prayed, that the judgment might be reverſed.

(*a*) Vide 2 Will. 306.

(*b*) Vide 8 & 9 W. 3. c. 11. ſ. 1.

E contra it was argued by *Raymond* for the defendant in error. And he agreed, that if in this caſe judgment had been taken againſt all the defendants, it had been erroneous, and ought to have been reverſed as to all, and not only as to the infant, who appeared by attorney, or only againſt the dead man. *Cro. Jac.* 290. 1 *Roll. Abr.* 776. *pl.* 6. *Bird v. Bird*, *Cro. Jac.* 303. *King v. Marborough & Crake. Allen*, 74. *Style*, 121. 125. *Aylett v. Oates.* Aſſault and battery againſt four, one being an infant, and all appeared by attorney; judgment for the plaintiff, and it was reverſed as to all. 1 *Roll. Abr.* 775. *pl.* 2. *Scudamore v. Scriven*, treſs and verdict againſt three defendants, one dies, judgment againſt all, and it was reverſed as to all, and not only as to the dead man. And the reaſon is given in the ſaid books,

An intire judgment againſt ſeveral defendants ſhall be reverſed as to all if it be erroneous as to one. R. acc. Str. 783.

books, becauſe the judgments were intire; which reaſon fails in this caſe, ſince no judgment is taken againſt him who appeared by attorney, nor againſt the dead man. And as to the dead man, that ſeems to be a ſettled point, that where treſpaſs is brought againſt ſeveral, and they plead not guilty, and one of them dies, and a *venire* and *diſtringas* iſſue to try the iſſue between the plaintiff and the two defendants, and a verdict for the plaintiff againſt both; the plaintiff may ſurmiſe the death of one of the defendants, and ſhall have judgment for the whole againſt the other, and good, 4 *H.* 7. 7. 7 *H.* 6. 21. *b. Cro. Car.* 426. *W. Jon.* 367. 1 *Roll. Abr.* 767. 756. *Tipper v. Lenton*, and *Ventr.* 249. 3 *Keb.* 254. *England v. Clerk. Stile.* 299. *Preſton v. Mortlock.* And of this opinion the whole court ſeemed to be as to the dead man. And then he urged, that now no judgment being taken againſt the infant who appeared by attorney, he is *quaſi* out of the caſe. That although there are not many books that warrant the taking of judgment againſt one of the defendants, and the entry of a *nolle proſequi* as to the other, where the damages are joint; yet it ſeems to be warranted by the reaſon of the law; for where divers perſons commit a treſpaſs, the law regards them all as principal actors, though one of them be more active than the other; and therefore the party may either have an action againſt one, and recover all his damage againſt him; or have an action againſt them all, and make them all contribute to his reparation; therefore ſince *Coux* might have been charged with all the damages in an action againſt him alone, he has no reaſon to complain, for the number of the defendants is not any meaſure of the damages to the jury, but the injury ſuſtained; ſo that there is no particular prejudice to this defendant, he ſuſtaining the whole burthen, ſince he was originally chargeable with the whole; and therefore no reaſon to reverſe this judgment, becauſe he is charged with the whole. *Hob.* 70. 1 *Roll. Rep.* 233. 2 *Roll. Abr.* 100. *let. F. pl.* 1. *Parker v.* Sir *John Lawrence* and *Wood.* Treſpaſs, *&c.* againſt three, one of them pleads not guilty to the whole, upon which iſſue was joined; the other two juſtify; upon which there was a demurrer; the iſſue was tried, and verdict for the plaintiff and damages; as to him the plaintiff took judgment, and as to the others he entered a *nolle proſequi*, and good; and yet there the two defendants, againſt whom a *nolle proſequi* was entered, were bound by the damages found by the jury upon the other iſſue, and the ſaid damages ought to be aſſeſſed jointly; for though they ought to be aſſeſſed conditionally as to the demurrer, yet they ought to be joint; for if they were aſſeſſed ſeverally, and judgment afterwards ſhould be for the plaintiff upon the demurrer, he would have two recompences, *viz.* one againſt him who was found guilty, and the other againſt them upon whoſe plea he had demurred. 1 *Roll. Rep.* 395. *Hendley v.* Sir *Anthony Mildmay.*

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Mildmay. 15 *Ed.* 4, 26. *b. per Littleton* juſtice. And all the caſes aforeſaid of the dead man ſeem to be caſes in point; for there the jury found joint damages, yet upon ſuggeſtion that the one was dead, judgment was always againſt the other. And it is no objection to ſay, that there it is the act of God; for the act of God does wrong to no man, and therefore if it were a wrong to the ſurvivor, ſuch ſuggeſtion would not be admitted, *Stile*, 349. *Butcher v. Orchard.* Caſe againſt the huſband and wife, for words ſpoken by both; not guilty pleaded; the huſband was found guilty, the wife not guilty; it was held to be aided by the verdict; and *per Rolle* chief juſtice, there might have been a releaſe of the damages as to the wife, if both had been found guilty. 2 *Roll. Abr.* 100. *pl.* 5. it ſeems to be a caſe in point. *Trin.* 3 *Car. C. B. Rot.* 1948. *Lanman v. Stileman* and three others in treſpaſs; the three plead a ſpecial plea, upon which a ſpecial iſſue is joined, the other pleads not guilty; verdict for the plaintiff, and joint damages; the plaintiff relinquiſhes his ſuit as to the one, and takes judgment as to other three for the damages and coſts; which ſeems to be a caſe in point. And as to the other objection, that the *nolle proſequi* ought to have been entered, before the judgment taken againſt *Coux*; but now the contrary being done, the ſuit is diſcontinued; he argued, that this objection was the reverſe of the objections that were uſed to be made in theſe caſes: for the objection uſed to be, that if the *nolle proſequi* was entered before judgment, it would be a releaſe; but there are many books, that it may be entered after judgment taken againſt the other defendant. 14 *Ed.* 4. 6. *per Littleton. Trin.* 15 *Ed.* 4. 26. *b.* 2 *Roll. Abr.* 100. *pl.* 2. *Evilie v. Slolie. Hob.* 180. *Hob.* 70. *Cro. Car.* 243. 1 *Roll. Rep.* 395. Sir *Antony Hendley v. Mildmay.* And the preſent objection might have been made to the ſame caſes; for the court, when they gave judgment, could not ſay, whether the plaintiff would enter a *nolle proſequi* or not; and if he had not, the whole would have been diſcontinued; but in the ſaid caſes it is held good, and no diſcontinuance when the *nolle proſequi* was entered, for upon the whole it appears that there was not any diſcontinuance.

But the whole court ſeemed to be of opinion for the plaintiff in error. And *Holt* chief juſtice ſaid, that it would be very difficult to maintain this judgment, the damages being joint, and judgment being entered againſt the one, before the *nolle proſequi* was entered as to the other, ſo that at the time of the judgment it was erroneous to charge *Coux* with all the damages, and give no judgment againſt the other. But *adjournatur*, to hear counſel again, &c.

Memorandum.

Memorandum. *Immediately after the end of this term, Sir* Nicholas Lechmere, *baron of the exchequer, petitioned the king to have leave to reſign his office of baron; which was granted to him, and he ſurrendered his patent accordingly.*

Rex *verſ.* Daviſon.

S. C. Salk. 105. Holt, 88.

THE defendant being brought into court upon the return of a *habeas corpus*, it appeared that he was taken upon a writ of *excommunicato capiendo*, being excommunicate for having kept ſchool without licence of the ordinary. And it was ſaid by the counſel, that a man may keep ſchool without ſuch licence; and that in *Oldfield*'s caſe lately, 12 *Mod.* 192. a prohibition was granted, to ſtay a ſuit againſt a man in the eccleſiaſtical court, for having kept ſchool without licence. But the court ſaid, that the prohibition was only granted with intent that the plaintiff ſhould declare upon it, in order that the matter might be more judicially determined. Then Mr. *Northey* moved, that the defendant might be bailed, until the matter in law ſhould be determined upon the return of the *habeas corpus*. And *Holt* ſaid, that Sir *Samuel Aſtry* ſaid, that the courſe of the court was, never to bail upon a *habeas corpus*; but that he was of a contrary opinion; and that they bailed *Clerk* upon the return of a *habeas corpus* two or three years before, whilſt the matter of the return was debated, and that he afterwards diſcharged him. And at another day Mr. *Northey* cited *Vaugh.* 157. *Cro. Car.* 552. 557. and *Mich.* 29 *Car.* 2. *B. R. Rex v. Price*, where *Price* was bailed pending the conſideration of the court upon the return of the *habeas corpus* upon which he was brought to the king's bench, and that afterwards *Price* was recommitted. And *Holt* ſaid, that he was not ſatisfied that *Daviſon* ought to be diſcharged, becauſe (*a*) the excommunication was in force. But he was bailed to appear *de die in diem*, until the matter of the return was determined; and then to render himſelf to priſon, if the judgment of the court were accordingly.

Q. Whether the ſpiritual court can puniſh a man for keeping a ſchool without a licence from the ordinary. Vide 1 Vent. 41. Carth. 464. Salk. 672. Com. Univerſity. D. 2d. Ed. vol. 5. p. 612.

A man may be bailed upon a habeas corpus to appear de die in diem until the court ſhall determin upon the ſufficiency of the return.

(*a*) Vide poſt. 618.

Mich.

Michaelmas Term

12 Will. 3. B. R. 1700.

Sir John Holt *Chief Juſtice.*
Sir John Turton } *Juſtices.*
Sir Henry Gould }

Call of ſerjeants.

MEmorandum, *That upon* Wedneſday *the thirteenth of* October, *Sir* Joſeph Jekyll *knight, chief juſtice of* Cheſter, Robert Tracy, *eſquire, judge of the king's bench in* Ireland, *and* William Hall *eſquire, of the* Middle Temple, John Green, John Keen *and* Henry Turner *eſquires, of* Lincoln's Inn, Charles Whitaker, Thomas Gibbons, Philip Neve, Nicholas Hooper, James Mundy, John Pratt, James Selby *and* Thomas Carthew *eſquires, of the* Inner Temple; Thomas Bury, John Hook, Lawrence Agar *and* John Smith *of* Gray's Inn; *appeared in chancery, in obedience to writs returnable* menſe Michaelis *this term, directed to them, requiring them to take upon them the degree of ſerjeants at law; and the took the oaths there, and the lord keeper* Wright *made a very ſhort ſpeech to them. And* Wedneſday *following, being the ſixth of* November, *they came to* Gray's Inn Hall *(of which ſociety the chief juſtice* Holt *was) where they rehearſed their counts, and were coifed; and then they walked to* Weſtminſter, *and counted at the common pleas according to cuſtom, the lord keeper being preſent in court all the time: And they gave rings, of which the inſcription was,* Imperium et libertas. *And then they made an entertainment at* Serjeant's Inn Hall *in* Fleet Street.

Precedence.

Note; *Sir* Joſeph Jekyll *was made king's ſerjeant, and therefore he preceded all the others, to all of whom he was* junior.

Note; *a queſtion aroſe about Mr.* Tracy *and Mr.* Gibbons *and the other ſerjeants, about ſeniority, becauſe they were more ancient to ſome of the others by admittance in their ſocieties,*

yet

yet their writs bore teſte *after the writs of the others. But the lord keeper determined it in favour of Mr.* Gibbons *and Mr.* Tracy, *that they ſhould not loſe their ſeniority, though their writs were teſted after, ſince they were returnable at the ſame time. But note, that the lord keeper, when he was ſerjeant, always took place of ſerjeant* Bonithon, *to whom he was junior by admittance, becauſe his writ bore* teſte *before that of* Bonithon, *though they were returnable at the ſame time.*

There was another queſtion alſo about Mr. ſerjeant Agar, *for he was transferred from one of the Inns of Chancery to* Gray's Inn; *and the queſtion was, if he ſhould be allowed the time of his admittance at the Inns of Chancery? The benchers of* Gray's Inn *allowed it him; but it being moved to the judges of the Common Pleas, they refuſed to allow it.*

Memorandum, *This term Mr. ſerjeant* Tracy *was made a baron of the Exchequer in the room of baron* Lechmere, *who had reſigned.*

Wilbraham *verſ.* Doyley.

S. C. but difference reported 12 Mod. 545.

ERROR to reverſe an outlawry in *Cheſter.* The defendant pleaded, that no bail was put in before the allowance of the writ of error; and the ſtatute of 31 *El. c.* 3. for error in reverſing outlawries. *Per curiam*: This is no plea; for it is well enough, if bail be put in at any time before the reverſal. The error here was the want of *per comitatu.* Vide Str. 952.

Caweth *verſ.* Philips.

Intr. Trin. 12 Will. 3. Rot. 538.

DEBT upon bond by the plaintiff, as executor of the obligee. The defendant pleaded, that the obligee made the defendant executor during the minority of the plaintiff, and that the plaintiff became executor at his age of ſeventeen. The plaintiff demurred. And per *curiam*, this cannot be a ſuſpenſion of the action, becauſe the defendant was only executor in truſt for the plaintiff during his minority. See *W. Jones* 345. *Dorcheſter v. Webb.* *Adjournatur.*

Making a debtor executor durante minori ætate of another perſon does not diſcharge the debt. Vide Com. adminiſtration. B. 5. 2d. ed. vol. 1. p. 236.

Maſon

Intr. Hill. 11. Will. 3. Rot. 341. B. R.

Maſon *verſ.* Keeling.

S. C. 12 Mod. 332.

An action will not lie againſt a man for miſchief done by his dog, unleſs he knew that he had done miſchief before or was of a miſchievous nature acc. ante 109. and ſee the caſes there cited. Com. action on the caſe for negligence. A. 4. 2d: ed. vol. 1. p. 208.

Though the dog was a mongrel maſtiff and permitted to go at large without a muzzle.

IN an action upon the caſe the plaintiff declared againſt the defendant, for that *quod ille quendam canem moleſſum, Anglice* a mongril maſtiff, *valde ferocem cuſtodivit et retinuit et canem illum in communi platea vocata Water-ſtreet in, &c. ore ejuſdem canis adtunc minime ligato exiſtente, Anglice* not muſled, *libere et ad largum ire permiſit, idem canis pro defectu debitae curae et cuſtodiae ipſius* the defendant *ipſum* the plaintiff *adtunc per communem plateam apud, &c. circa legitima negotia ſua tranſeuntem furioſe et violenter impetivit, et ipſum* the plaintiff *adtunc et ibidem graviter momordit et vulneravit, et furam, Anglice* the calf, *cruris ſiniſtri ipſius* the plaintiff *graviter momordit et vulneravit, &c.* To which declaration the defendant demurred. And the exception taken to this declaration by the defendant's counſel was, that the plaintiff has not ſhewn that the defendant knew that this dog was *valde ferox*; without which knowledge he ſhall not be anſwerable for any injury, that he of a ſudden, and unknown to the defendant, did to the plaintiff. And it was argued three times ſeverally by Mr. *Northey*, *Darnall* king's ſerjeant, and Mr. *Peere Williams*, for the plaintiff; and by Mr. *Boult*, Sir *Bartholomew Shower*, and Mr. *Raymond*, for the defendant. And the counſel argued for the plaintiff, that though in ſuch actions as this here, it has been held neceſſary in many caſes to ſay *ſciens* in the declaration; yet where the fact has ſuch circumſtances as this hath, the omitting of *ſciens* will not vitiate the declaration. For in this caſe the dog is ſhewn to be *valde ferox*; and then to permit ſuch a dog to go at large in the highway, is a common nuiſance; and then whoſoever receives any particular prejudice or damage ſhall have an action 1 *Ventr.* 295, 3 *Keb.* 650. A coachman driving a young pair of horſes in *Lincoln's Inn fields*, to uſe them to the coach, the horſes ran away with the coach, and threw the coachman out of his box, and ran over a man; and for this an action was adjudged maintainable, becauſe every one ought to take care that his tame cattle do no injury to any body, and if they do, he ſhall be compelled to make reparation for the injury ſuſtained. And in the ſaid caſe another caſe was cited, where an action was brought againſt a butcher, where an ox ran out of the ſtall, and gored the plaintiff, and it was laid in default of keeping the ox tied up. And alſo the caſe of a monkey, which bit a child, and an action was brought againſt the owner for it, &c. And in the ſame caſe a diſtinction was taken, that if a fox breaks his chain, and runs away, and does any miſchief, and does not return to the owner, that no action will lie againſt the owner, becauſe it ſeems that the fox was returned to his wild

wild nature; but otherwiſe, if the fox returns to his owner. And the preſent caſe was likened to the caſe, if a coachman leaves his coach and horſes in the ſtreet, and they do any miſchief, for this neglect an action lies againſt him; for a man ſhall be anſwerable for all miſchief proceeding from his neglect or his actions, unleſs they were of unavoidable neceſſity, *Hob.* 234. *Weaver v. Ward*; *T. Jon.* 235. And for theſe reaſons they prayed that judgment ſhould be given for the plaintiff.

But againſt this it was argued by the defendant's counſel, that a man ſhall not be anſwerable for any bite, or other injury, done by his dog, unleſs he had notice of ſuch a thing done by him before. And for this they cited *Reg.* 111. *Dier* 25. *pl.* 162. *Fitz. coron.* 311. *Cro. Car.* 487. 1 *Roll. Abr.* 4. 2 *Sid.* 127. Where it is held, that *ſcienter* at leaſt ought to be in ſuch caſe ſhewn in the declaration, and ought to be proved upon the evidence. Then for the ſame reaſon, if there is nothing to diſtinguiſh this caſe from the ſaid caſes but the word *ferox*, which imports fierceneſs of nature, the plaintiff ſhould have ſhewn that the defendant had notice of this fierce quality; for as in the one caſe he ſhall not be anſwerable for the biting of his dog, without having notice that he had uſed ſo to do; ſo in the other caſe he ſhall not be anſwerable without knowing that he was of a fierce quality; without which knowledge the law permits any man to keep them as domeſtic animals, and does not require ſuch guard to be ſet over them as other animals, which are not ſo familiar to human kind, and conſequently may be ſuppoſed to be more eaſily irritated to do miſchief. And as to the objection, that this dog was a maſtiff, and of conſequence the owner muſt know that he was of a fierce nature; it was anſwered, that this dog is laid to be a mungril maſtiff, and the law does not take notice of any ſuch ſort of dog. 3 *Cro.* 125. 1 *Saund.* 84. where the ſorts of dogs are enumerated (but no mention made of a mungril maſtiff) of which the law takes notice. Farther, that admitting a maſtiff to be fierce, this mungril might degenerate from the fierceneſs and nobleneſs of the nature of the maſtiff by the mixture of the *ſpecies*. Beſides, that in the caſe of a maſtiff *ſciens* ought to be in the declaration; as the caſe is, *Cro. Car.* 254. *Boulton v. Banks.* As to the objection, that this was in the highway, and therefore the maſter ought to give ſatisfaction for the injury done by his dog, becauſe he ought not to permit the dog to go at large there; it was anſwered, that it does not appear that it was in the highway, for it is only ſaid *in communi platea*: but it is not ſaid, that the ſubjects uſually reſort there, or paſs through it. Now it muſt be granted, that a man may be indicted for a nuiſance erected *in communi platea*; but that muſt be as done in the highway, and the indictment ought to be ſo, and

Exod. xxi. ver. 28, 29.

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and not *in communi platea*; for the law takes no notice of *platea*, which ſignifies nothing but a wide place, and oftentimes a court-yard: and it may be, for any thing that appears to the contrary, that this was in the defendant's yard: and then it can never be likened to the caſe of nuiſances. As to the caſe of 1 *Ventr.* 295. the declaration implied a ſufficient notice for the coachman was breaking unruly horſes, in a place where there was a great concourſe of people, and therefore not like the preſent caſe. And for theſe reaſons they prayed judgment for the defendant.

And *per Holt* chief juſtice and *Turton* juſtice, the declaration is ill for want of ſhewing, that the defendant had notice, that the dog was fierce. For there is a great difference between horſes and oxen, in which a man has a valuable property, and which are not ſo familiar to mankind, and dogs; the former the owner ought to confine, and take all reaſonable caution, that they do no miſchief, otherwiſe an action will lie againſt him; but otherwiſe of dogs, before he has notice of ſome miſchievous quality. But in the former caſe if the owner puts a horſe or an ox to graſs in his field, which is adjoining to the highway, and the horſe or the ox breaks the hedge, and runs into the highway, and kicks or gores ſome paſſenger, an action will not lie againſt the owner; otherwiſe if he had notice, that they had done ſuch a thing before. Now for any thing that appears to the contrary, the owner might not have had this dog but one day or two before, and did not know of this fierce nature; and then the dog, becauſe the door was left upon, ran out, and bit the plaintiff; it will be very hard, to ſubject this defendant the owner to an action for it. Otherwiſe, if the defendants had known before, that this dog was of ſuch a fierce nature, for he ought to have kept him in at his peril. And *per Holt* chief juſtice. If *A.* has a dog uſed to bite, *&c.* and he knows it, and he gives it to *B.* *B.* being conuſant of this quality; if the dog bites, *&c.* an action will lie againſt *B.* Otherwiſe if *B.* had not been conuſant of this quality. And (by him) the law does not oblige the owner to keep the dog in his houſe; for if the dog break a neighbour's cloſe, the owner will not be ſubject to an action for it. *Poph.* 161. *W. Jon.* 131. But if a ſervant leaves open the ſtable door, and a coach-horſe runs out and does miſchief, it is otherwiſe. But *Gould* juſtice was of opinion, that the declaration was good; becauſe the averring, that the dog was fierce, made the owner liable to an action for an injury done by ſuch a dog, becauſe he did not keep him in a ſafe place. But *adjournatur*. And afterwards the (*a*) parties agreed between themſelves, and each of them bore the loſs of what each had expended, and therefore no judgment was given. See 20 *Edw.* 4. 11.

A horſe put to graſs does miſchief.

(*a*) In 12 Mod. 135. the court is repreſented to have given judgment for the defendant.

Johnſon

Johnſon *verſ.* Oldham.

MR. *Lutwyche* moved for a prohibition to be directed to the ſpiritual court, to ſtay a ſuit there for a mortuary, upon a ſuggeſtion of the 21 *H.* 8. c. 6. and that there was no cuſtom here for the payment of it. And he urged that no mortuary was due, but by cuſtom; and therefore the cuſtom here being denied, they ought not to proceed in the ſpiritual court. And he cited *Cro Car.* 237. 8. *Hinde* and the biſhop of *Cheſter*. Againſt which it was argued by Mr. *Northey*, that the ſtatute of *H.* 8. has ſaved the juriſdiction to the ſpiritual court, where mortuaries have been uſually paid. Beſides, that they ought to plead, that there was not any ſuch cuſtom in the ſpiritual court, and then upon refuſal there to admit the plea, to move the king's bench, but not before ſuch refuſal; but here they have not pleaded this matter in the ſpiritual court. And *per Holt* chief juſtice, a prohibition cannot be granted, without a denying of the cuſtom in the ſpiritual court, which is not done here. And the whole court ſeemed to be againſt the prohibition. And a rule was made to hear counſel on both ſides. And afterwards the rule was diſcharged by *Turton* and *Gould* juſtices, *abſente Holt* chief juſtice.

A prohibition is not to be granted to the ſpiritual court to ſtay a ſuit for a mortuary upon a ſuggeſtion that there is no cuſtom for its payment, for that fact ought to be pleaded in the ſpiritual court. R acc. 12 Mod. 416. Vide ante, 5-8. Com. Prohibition. G. 11. 2d. Ed. vol. 4. p. 506.

Rex *verſ.* Brown et al'.

S. C. Salk 146.

A *Certiorari* was granted to remove all indictments againſt *B. C.* and *D.* And they return one indictment againſt *B.* another againſt *C.* and another againſt *D.* in which they were indicted alone by themſelves. And upon a motion to quaſh the indictment in which *B.* was indicted; it was held, that it was not removed before the king's bench; becauſe an indictment in which *B.* was indicted alone, is not the indictment intended by the *certiorari*, which means indictment in which *B. C.* and *D.* were jointly indicted. It would have been otherwiſe, if the *certiorari* had been, *vel per quod aliquis eorum indictatus exiſtit.*

A certiorari to remove all proceedings againſt ſeveral perſons will only remove proceedings againſt all of them jointly. R. acc. poſt. 1199. Salk. 152. pl. 21. Vide 2 Saund. 291.

Rex *verſ.* Lamb.

AN indictment againſt him, for having ſaid maliciouſly, *magiſtratos civitatis Litchfield fore ſocietatem aſinorum*, was removed by *certiorari* into the king's bench. And motion was made by Mr. *Hawkins* and Mr. *Muſſo* to quaſh it, becauſe it was inſenſible, for there is no ſuch word as *magiſtratos*. And for this reaſon it was quaſhed by *Turton* and

REX v LAMB. *Gould* justices, *absente Holt* chief justice, though opposed by Mr. *Nott* recorder of *Litchfield*.

Rex *verſ.* Dormy.

S. C. Salk. 260

An inquiſition for a forcible entry muſt ſtate expreſsly that the tenant was diſſeiſed. R. acc. 7 Mod. 115. 123. 3 Salk. 169. pl. 1. Vide Poph. 205. 1 Hawk. c. 64. ſ. 36. to 44. F. N. B. 248. C.

MR. *William Thompſon* moved for the quaſhing of an inquiſition for a forcible entry, for that, that it did not appear what eſtate the tenant in poſſeſſion had; but it was only, that the defendant and others, *&c. in meſſuagium exiſtens* a ſchool houſe *adtunc exiſtens tenementum de J. S. intraverunt*, and the ſaid *J. S. diſſeiſit. expulſum, et ejectum, extratenuere*. And *J. S.* perhaps was but tenant at will, which is not within any of the ſtatutes. But Mr. *Lechmere* ſaid, that the *diſſeiſit*, ſhould be intended *diſſeiſiverunt*; which implying, that the tenant in poſſeſſion had a freehold, it ſhall be well enough, according to 3 *Leon.* 102. *Palm.* 277. *Allen*, 49. But Mr. *Thompſon e contra* ſaid, that 1 *Sid.* 102. *poſſeſſionatus* is held to be ill; and 1 *Vent.* 306. *diſſeiſivit* is held ill. But *per Holt* chief juſtice, there ought to be a poſitive charge of a diſſeiſin; but it is put only adjectively, and an expulſion is not laid; but that *J. S. diſſeiſit. et ejecit. extratenuere*; which is a concluſion without ſufficient premiſes. And therefore the inquiſition was quaſhed. *Ex relatione m'ri Jacob.*

Finch *verſ.* Ranow.

S. C. 3 Salk. 145.

R. acc. Cro. El. 635. 643. Cro. Jac. 324. 2 Bulſtr. 104. 11 Co. 40. b. D. acc. Latch. 212. Co. Litt. 168. a.

A Writ of error was brought upon the judgment, *quod partitio fieret*, in a writ of partition, and before the final judgment. And therefore the record was held not to be removed, and the writ was quaſhed. *Ex relatione m'ri Jacob.*

Read *verſ.* Hudſon.

Words which charge a tradeſman with inſolvency are actionable. Vide Com. action on the caſe for defamation. D. 25. ad. Ed. vol. 1. p. 183. An allegation that words were ſpoken de ſtatu of a tradeſman is equivalent to an allegation that they were ſpoken de arte.

IN caſe for words the plaintiff declares, that he was a laceman, and that the defendant ſpeaking of his trade, ſaid ſuch words, *&c.* and he lays another count, and ſays, that the defendant *ex ulteriori malitia ſua de ſtatu* of the plaintiff *colloquium habens* ſaid theſe words: "You are a raſcal, "you are a pitiful ſorry raſcal, you are next door to break-"ing," *quorum quidem verborum* (omitting *praetextu* or any like word) the plaintiff ſuſtained a ſpecial damage, *ad damnum, &c.* Upon not guilty pleaded, and verdict for the plaintiff, *Darnall* king's ſerjeant moved in arreſt of judgment, that the words of themſelves are not actionable. For there are many caſes, where defamatory words have been held

held not actionable. *Mar.* 15. *Noy* 77. 2 *Cro.* 345. *Hardr.* 8. And then the ſpecial damage in this caſe will not help it, becauſe it is not laid, to have been occaſioned by the ſpeaking of theſe words, the word *occaſione* or *praetexta* being omitted. And they are not laid to have been ſpoken of his trade, for the word *ſtatus* will not import that, but it ought to have been *arte vel miſterio.* But *abſente Holt* chief juſtice, the court gave judgment for the plaintiff; for the plaintiff declaring, that he was a tradeſman, and that the words were ſpoken *de ſtatu ſuo*, it is equivalent to *arte ſua*, and to be intended of his trade; and then being ſpoken of him in his trade they are actionable, though the ſpecial damage be left out of the caſe. *Ex relatione m'ri Jacob.*

READ v. HUDSON.

Snow *verſ.* Firebrace.

S. C. Holt, 609. Salk. 557. 12 Mod. 434.

THE plaintiff declared that the defendant, in conſideration that the plaintiff had found him *ſufficientia eſculenta poculenta lotionem et cubile pro diverſis menſibus ultimo praeteritis*, aſſumed to pay him as much as he ſhould deſerve, and avers that he deſerved ſo much, &c. Upon *non aſſumpſit* pleaded, verdict for the plaintiff. And a motion was made in arreſt of judgment, that this declaration was intirely uncertain, having neither certainty of time nor of things. But *per Holt* chief juſtice. He did not know, why the uncertainty of time was worſe than the uncertainty of things, which have been oftentimes adjudged good. And (by him) it is enough to aver, *quantum meruit. Ex relatione m'ri Jacob.*

An aſſumpſit upon a quantum meruit for ſufficient meat, drink, waſhing and lodging for divers months, is ſufficiently certain, at leaſt it is unobjectionable after verdict.

Clapcott *verſ.* Davy.

INdebitatus aſſumpſit and *quantum meruit*, for work done, and goods ſold and delivered. The defendant pleaded an award, by which it was awarded, that the plaintiff for the work done, &c. ſhould accept a bill of ſale before made of the eighth part of the ſhip *Fortune*, or a like bill of ſale to be made, and that the plaintiff and defendant ſhould give to each other general releaſes. The plaintiff demurred. And Mr. *Brantbwaite* for the plaintiff took exception to the plea. 1. That the award is pleaded to extend to all the promiſes, whereas it appears, that it extends but to the work done, and therefore the defendant ſhould have pleaded *non aſſumpſit* to the promiſe for the goods ſold and delivered; and for want of this the plea is ill. For an award is no plea in bar, unleſs ſomething be awarded in ſatisfaction of the plaintiff's demand; and nothing being awarded for the goods ſold and delivered, it is ill. For though there is a general releaſe from the other, does not oblige the

An award directing the releaſe of a duty without giving a ſatisfaction for it is not before the releaſe is executed a bar to an action for ſuch duty. Vide ante, 247. and the caſes there cited. Com. Arbitrament. E. 14. 2d. Ed. vol. 1. p. 387. Accord. D. 1. 2. 2d. Ed. vol. 1. P. 100. An award that one party ſhall accept a thing latter to deliver it

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awarded, yet of itſelf that will be no bar, according to the caſe of *Freeman* v. *Barnard*, *Trin.* 9 *Will.* 3. *B. R. ante*, 247. though the ſuing of an action in ſuch caſe may be a breach of the award, upon which the defendant might bring his action. 2. Exception. That the award was, that the plaintiff ſhould accept the bill of ſale, and the defendant was not awarded to deliver it, and ſo nothing was awarded to the plaintiff in ſatisfaction for the work done. And he compared it to the caſe of 2 *Saund.* 293. *Yelv.* 98.

And *Holt* chief juſtice ſaid, that nothing was awarded for the goods ſold and delivered, and therefore the caſe the ſame with that of *Freeman v. Barnard*, nothing being awarded for that but a general releaſe. If the bill of ſale had been awarded in full of all demands, it had ben good. But this releaſe awarded here is not a perfect bar, until it be executed. And as to the other matter he ſaid, that the defendant is not enjoined to do it, which is the only ſatisfaction that the plaintiff ſhould have. But the award is only, that the plaintiff ſhould accept. And then the plaintiff cannot be barred, nothing being awarded to be done by the defendant in ſatisfaction.

Afterwarde at another day (*abſente Holt* chief juſtice) Mr. ſerjeant *Carthew* urged, that if the firſt objection ſhould be allowed, the declaration might be ſo varied as to make no award pleadable. To the ſecond objection, he cited a caſe very lately adjudged in the common pleas between *Hooper* and *Hurſt*, where an award was, that the defendant ſhould pay to the plaintiff 10*l.* and fetch away his mare and colt; and upon exception it was held to be mutual, and implied a delivery by the plaintiff; and it was adjudged accordingly for ſupporting of honeſt awards.

But Mr. *Branthwaite* anſwered, that the words of the award are, that the work done was rated at 32*l.* and that for that the plaintiff would accept a bill of ſale, *&c.* Now no action for goods ſold and delivered can be brought for work done.

And *per Gould* juſtice, it is without doubt, that if nothing be awarded but the general releaſes, the plea will be ill. Then leaving them out of the caſe, this award cannot extend to this demand. For though it is objected, that the goods ſold and delivered is the ſame demand with that for work done, yet the court cannot take notice of that upon ſuch generality. But if the defendant had ſhewn it by particular averments, it might have been conſtrued to be within that part of the award. And averments are admitted in pleading to make an award good. 2. The ſecond objection ſeems to be a good objection, for an award cannot be made good by implication. If the defendant would not have delivered

delivered the bill of ſale, the plaintiff could not have aſſigned a breach of the award by implication. And judgment was given for the plaintiff, *abſente Holt* chief juſtice. *Ex relatione m'ri Jacob.*

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Moore *verſ.* Watts.

S C. 12 Mod. 423. Pleadings Lill. Entr. 293. Vide Com. Pleader. 3. k. 1. 2d ed. vol. 5, p. 322.

UPON a *habeas corpus*, the ſheriff returned, that *Watts* was in his cuſtody upon a *capias in withernam*. And the caſe was, that a *homine replegiando* was brought; and the ſheriff returned an inquiſition, finding, that the party was eloined by *Watts*; and upon that a *capias in withernam* iſſued, and the defendant was taken upon it; and a motion was made to the court, that *Watts* might be bailed. And upon ſeveral motions, this caſe being a new caſe, the court took great conſideration upon it, and reſolved theſe matters.

Notwithſtanding an elongatus returned in an homine replegiando, the defendant may plead non cepit. S. C. Salk. 581. R. cont. Skin. 61.

If he comes in upon the elongatus, and pleads it, he ſhall continue at large 'till judgment. S. C. Salk. 581. R. cont. Skin. 61.

If he ſuffers himſelf to be arreſted on a capias withernam he ſhall on pleading it be bailed. S. C. Salk. 581.

But in caſe of ſuch arreſt, he cannot be bailed unleſs he pleads it. S. C. Salk. 581.

1. That the defendant cannot be bailed upon the *habeas corpus*, being taken by the king's writ; and that therefore the defendant's counſel moved too ſoon, the writ not being returnable until *octabis Martini*, which was almoſt fifteen days after the firſt motion made in this caſe; but the defendant ought to come in when the writ was returned, and demand a declaration, and plead *non cepit*, and then the court will bail him. And as to the objection made, that men had been bailed upon appeal of murder brought againſt them, before the return of the writ. *Holt* chief juſtice confeſſed, that he had known ſome judges do ſo at their chambers, but that he always looked upon it as a miſtake, and that it could not be done.

2. Reſolution. That upon a plea of *non cepit* the defendant ſhall be bailed. In *Keilw.* 71. *a.* and *Fitzh. Nat. Bre.* 74. *e.* it is reſolved, that after an *elongat.* returned, the defendant may plead *non cepit*; (and there is no difference between a *homine replegiando* and a common replevin of cattle) and the reaſon is, becauſe the ſheriff cannot make a return, but that the cattle are eloined, or that no perſon came to ſhew, *&c.* or a delivery; but he cannot return, that the defendant *non cepit* the cattle, becauſe it is ſuppoſed in the writ, and is the ground of it, which the ſheriff cannot falſify, and therefore caſe does not lie againſt the ſheriff for a falſe return, if he makes ſuch a return; and for the ſame reaſon the defendant ſhall not be concluded by it, but when he comes, and denies the return by plea of *non cepit*, his denial ſhall be as good as the ſurmiſe of the writ, and rather better, becauſe the proof is incumbent upon the plaintiff. And then what reaſon is there, that the defendant ſhould not be bailed when the matter ſtands indifferent; ſince the lord *Coke* upon *Weſtm.* 13 *Ed.* 1. *c.* 15.

The bail ſhall be bound in a ſum certain for the defendant's appearance de die in diem, and in caſe of judgment againſt him for his render in withernam. S. C. Salk. 581.

Upon ſuch render he will be in cuſtody as upon the capias in withernam. S. C. Salk. 581. A defendant arreſted on a capias in withernam need not wage deliverance; on the return of the capias in withernam the plaintiff may be demanded, and unleſs he appears and declares, be non-ſuited. S. C. Salk. 581. The writ of a writ is always a day for the appearance of the parties, though no day is expreſly awarded thereon. S. C. Salk. 581.

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1. c. 15. which ſtatute preſcribes in what caſes men are bailable, makes this rule, that the party *ſtat indifferenter*. And *Holt* chief juſtice ſaid, that the plaintiff's counſel took the return to be a conviction, as it was taken in the caſe of the lord *Grey*, *Skin*, 61. who coming into court upon the return of an *elongat.* was for that reaſon committed and detained in priſon fifteen days; but *Holt* ſaid, that he never thought the ſaid proceeding legal, becauſe the ſheriff could not make other return, and the ſuggeſtion of the writ is but bare ſurmiſe; and it has been reſolved here, that the defendant may appear and plead *non cepit*, after the return of an *elongatus*. Then it will be conſiderable, *quid operatur* the awarding of the *withernam*. If *elongatus* be returned, and the defendant comes in, and pleads *non cepit*, this ſuperſedes any *withernam*, and the return of the *elongatus* is as ſtrong before the award of the *withernam* as after, and the award of it does not make the return ſtronger, being but the natural conſequence of the return of an *elongatus*. The *withernam* is but *meſne* proceſs, and cannot be an execution, becauſe it is granted before judgment. The intent of the ſuit is to recover damages, and if it be found againſt the defendant, by a new *capias in withernam* by way of execution, he may be impriſoned for ever. But this court cannot convert *meſne* proceſs into execution. In replevin for cattle with *adhunc detinet*, damages (*a*) given for the cattle will change the property; but libetty is not eſtimable, and therefore will alter the caſe. 11 *Hen.* 4. c. 10. 7 *Edw.* 4. c. 15. If upon *elongata* returned the defendant's cattle are taken in *withernam*, yet upon the defendant's appearance and pleading *non cepit*, or claiming property, the defendant ſhall have his cattle again, and if they are eloined, a *withernam* againſt the plaintiff. For if the property or taking be in queſtion, there is no reaſon, that the plaintiff ſhould have the defendant's cattle. In the ſame manner there is not any reaſon that the defendant ſhould continue in priſon. If an *elongatus* be returned to a *homine replegiando*, and the defendant comes in, and pleads *non cepit*, he ſhall not give bail, but ſhall be in court without bail; but if he is brought into court in cuſtody upon the *withernam*, then he muſt put in bail, which is but a continuance of the former taking; and ſo it was in the caſe of *De la Baſtine*. The caſe of *Deſigny*, *Raym.* 474. is an odd incoherent caſe; and *Holt* ſaid that he was ſorry, that the ſaid caſe was reported, but that it was reported truly as it was, for if the court could not bail him, how could the court take a ſum of money to be depoſited for his liberty? As to the objection made by Mr. *Cowper*, that there is a writ in the *Regiſt.* 79. *a.* where the lord of a villain being taken upon *withernam*, brought a writ directed to the ſheriff commanding him to bail him upon delivery of the plaintiff; and therefore that the defendant ought to lie in cuſtody, until he has delivered the

Withernam is but *meſne* proceſs.

(*a*) Vide Str. 1078.

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the plaintiff. *Holt* anſwered, that the ſaid writ was for the benefit of the lord, who was taken in *withernam*, to impower the ſheriff to bail him before the return of the writ, by reaſon of the long return that ſuch writ might have, and perhaps the defendant in this caſe might have ſuch a writ, but that is not a precedent to guide the courſe of this court. But he was of opinion that the ſaid caſe was not like the preſent caſe, for here when the defendant pleads *non cepit*, and denies the taking, which is a bar of the replevin, he ought to be delivered; but there by his claim of property he admitted the taking; beſides that it is an authority ſo far for the opinion of the court at preſent, that as the villain ſhould not be detained in cuſtody upon the ſuppoſal of property in the lord, ſo when the defendant in the replevin denies the taking, he ought not to remain in cuſtody upon the bare ſuppoſal of the writ. A queſtion has been made, whether the plaintiff could have another *withernam*, if the court ſhould bail the defendant upon this, Suppoſe he could not; if a *homine replegiando* be brought, it is a good return, that the defendant claims him as villain, but upon the return of the writ to the court, if any perſons come into the court and give ſecurity to have the plaintiff in court at a day certain, a writ ſhall iſſue to the ſheriff to deliver the plaintiff; and upon the coming of the plaintiff into court at the day, he ſhall give new ſecurity, to appear in court *de die in diem* until the plea be determined, and if judgment ſhall be againſt him, then his bail to bring him in and deliver him to the defendant; and if he cannot find ſuch bail, then he ſhall be committed to the cuſtody of the marſhal, and at the end of the ſuit ſhall be brought by him into court and delivered to the defendant. 8 *Hen.* 4. *c.* 2. *Fitzh. Mainprize*, 23. And the ſaid bail is but for eaſe of the cuſtody. But if judgment be given againſt the defendant, then his bail will render him in cuſtody again, and then he is in upon the former *withernam*. And he likened it to the caſe where a man in execution brings an *audita querela* upon a deed, or for nonage, and is bailed and judgment being againſt him, is rendered into cuſtody, he is in upon the former judgment. But then the queſtion is, that if he ſhould not be rendered, whether this court can award a new *withernam*. And as to that, he likened it to the caſe, where a man is bailed to appear *de die in diem* upon an appeal of murder, if the defendant makes default, proceſs ſhall iſſue againſt the bail, and a *capias* againſt him; and if he renders himſelf, he ſhall be in upon the appeal. If the defendant be in upon the *elongatus* returned, and pleads *non cepit*, and the iſſue be for the plaintiff, the judgment ſhall be the ſame; but a *withernam* ſhall be awarded, becauſe the plea of *non cepit* was a ſuſpenſion of the award of the *withernam*, and therefore the ſaid ſuſpenſion being taken away, a *withernam* ought to iſſue. As where an inquiſition upon the

Proceedings upon a *homine replegiando*.

Moor & Watts. Proceedings upon *Weſtm.* 2. *cap.* 46.

the ſtatute of *Weſtm.* 2. 13 *Ed.* 1. ſt. 1. *c.* 46. is returned, and a *diſtringas* iſſues to inquire, who were the malefactors, and which are the adjacent towns, and what damages the party hath ſuſtained, and to diſtrain the towns to re-erect the hedges and ditches, and to levy the damages; which proceeding was invented by Mr. *Noy*, of which there is a caſe *Cro. Car.* 280. notwithſtanding that this reſembles an execution, and is intended only to levy the damages, *&c.* yet (*a*) it gives a day to the parties to appear and plead, and traverſe the matter; and if they come not in, then a *diſtringas in infinitum* iſſues; but if they come in, that ſtops the proceedings; but when the plea, *&c.* is determined upon iſſue or demurrer, they are revived. So if the defendant pleads *non cepit*, before a *withernam* be awarded, that ſtops the awarding of it; but after ſuch plea is determined, all is at liberty again, to award a *withernam*. *Holt* chief juſtice confeſſed that he did not know any precedent for ſuch a proceeding, but that it is agreeable to the reaſon of the common law. If the bail do not render the defendant, they will forfeit their recognizance, and a new *withernam* will iſſue, as, a new *capias* in the caſe of an appeal aforeſaid. The bail here is but an eaſe of the former cuſtody, and when the defendant is rendered, he ſhall be in cuſtody *ab initio*. And *per Holt*, there is no reaſon, why the defendant ſhould not have his liberty pending the ſuit, as well as the plaintiff.

(*a*) Vide 1 Sid. 107. pl. 19. Bull. Ni. Pr. 217.

3. It was prayed by the counſel, that the defendant might wage deliverance; and *Old Entr.* 94. was cited. But it was reſolved, that when the defendant pleads *non cepit*, he ſhall not wage deliverance, becauſe he cannot deliver whom he never took.

4. Reſolution. That the bail ought to be bound in a ſum certain, with condition that the defendant ſhall appear *de die in diem*; and if judgment be againſt him, that they ſhall render his body *in withernam ibidem remanſurum, quouſque* he render the party, and ſuffer him to go at large.

But then the opinion of the court being, that the defendant could not be bailed, until after he had pleaded *non cepit*; the plaintiff refuſing to declare, the queſtion was, whether he was demandable upon the *withernam* or not. And *Holt* chief juſtice delivered the opinion of the court, and ſaid, that whenſoever a writ is awarded that is returnable, the day of the return is always a day to both parties to appear; and though the writ be returned not ſerved, yet the defendant may appear, to prevent any ill conſequence. The next adjacent towns, in the caſe aboveſaid, have no day upon the *diſtringas* to appear, it being only for levying the damages, *&c.* as aforeſaid, and yet they may appear, and the proſecutor muſt appear

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appear of neceſſity, though no day is given to either party upon the *diſtringas*. The plaintiff has no day in any caſe upon the writ. In caſe of appeal neither the plaintiff nor defendant have any day in court, the proceedings at a gaol-delivery being diſcontinued by the *certiorari*. But here there is a day in court upon the return of the *withernam*, for the ſaid day is a day for the defendant as well as for the attorney of the plaintiff. What day has a man upon a common replevin? The (*a*) *pluries* replevin ſuperſedes the proceedings of the ſheriff, and the proceedings are upon that, and not upon the plaint, as they are when that is removed by *recordari*. Though there is neither ſummons nor attachment in the writ, yet without doubt the defendant has a good day in court, like the common caſe of replevins, though there is no ſummons in the writ, yet it gives a good day to the defendant to appear, and if he does not appear, then a *pone* iſſues, and then a *capias*. The entries in *Raſtal*, &c. that the defendant *attachiatus eſt ad reſpondendum*, &c. *de placito quare cepit*, &c. are made in ſuch manner, becauſe in conſequence of law it is an attachment, the defendant being obliged to appear upon the peril of a *withernam*. But he ſaid that he wiſhed the record were made in this manner, beginning, *Dominus rex mandavit*, &c. and ſo to ſhew the replevin and the *withernam*, and then all the proceedings would appear, as *Raſt.* 560. in the caſe of a common replevin. And it is like the courſe in the king's bench, to recite writs in ſuch manner; but in the common pleas only the ſubſtance of it. And as to the objection made by the counſel, that it was abſurd to imagine, that the plaintiff could make an attorney, when he was eloined, &c. *Holt* chief juſtice anſwered, that the ſame perſons, who ſued this writ in the name of the plaintiff, might make an attorney for him, and that is the conſtant courſe. But it would be a very ſtrange thing, if the plaintiff ſhould not be demandable: for then a man might run away, and a *homine replegiando* might be ſued againſt *J. S.* for a ſuppoſed taking, &c. of the man, and *J. S.* upon this would be kept in priſon for ever. And the court exhorted the plaintiff's counſel to declare, &c. which they refuſed; upon which the court in anger rebuked them, and ſaid, that they did it only to embarraſs the court. But however, they would not declare. Upon which, the plaintiff, being demanded and not appearing, was nonſuit. Note, that Sir *Bartholomew Shower* cited two caſes, where men had been bailed upon a *withernam*, *Mich.* 5 *H.* 4. *Rot.* 25. *Hil.* 16 *R.* 2. *Rot.* 16. *Ex relatione m'ri Jacob.*

(*a*) Vide Gilb. Replevins, 73.

Vide poſt. 634.

Rex

Rex *verſ.* Fowler.

A man in cuſtody under an excommunicato capiendo cannot be diſcharged upon a habeas corpus, though the excommunicato capiendo appears liable to be quaſhed. S. C. 12 Mod. 418. Semb. acc. ante, 603.

B. R. may quaſh an excommunicato capiendo. S. C. Salk. 293. 12 Mod. 418. acc. Salk. 294. pl. 3.

An excommunicato capiendo muſt ſhew what was the cauſe of ſuit in the eccleſiaſtical court. S. C. Salk. 293. 12 Mod. 418. R. acc. 7 Mod. 56. 117. Vide 5 El. c. 23. ſ. 13. and Com. Excommengement. B. 4. 2d. Ed. vol. 3. p. 290.

An excommunicato capiendo for contempt in a ſuit for ſubtraction of tithes or other eccleſiaſtical dues is bad. S. C. Salk. 293. 12 Mod. 418. D. acc. Ann. 314.

An excommunicato capiendo for a contempt in a ſuit for ſubtraction of tithes *and* other eccleſiaſtical dues, good. R. acc. Ann 314. (*a*) Acc. 1 Saund. 317. Str. 225. Ann. 189. Barnard v. Moſs, C. B. H. 28 G. 3.

UPON a *habeas corpus* directed to the ſheriff, to bring the body of *Fowler*, *&c.* he returned, that *Fowler* was taken upon a writ of *excommunicato capiendo*; and upon the recital of the writ in the return it appeared to be in the disjunctive, *viz. in quibuſdam cauſis ſubtractionis decimarum ſive al orum juriam eccleſiaſticorum.* And becauſe the cauſe was uncertainly ſhewn in the writ, it was moved that *Fowler* ſhould be diſcharged. And 8 *Co.* 68. *Trollop*'s caſe, and *F. N. B.* 64. were cited, that a certificate of an excommunication was ill, if it did not expreſs the cauſe in certain; for perhaps the *alia jura eccleſiaſtica* may be matters of which they have not conuſance.

Holt chief juſtice ſaid, that the rule without doubt is good, that ſufficient cauſe ought to appear in certain, becauſe the king's courts are judges of their juriſdiction, and not themſelves, and therefore they ought to ſhew, that the matter was within their conuſance. And for the ſame reaſon doubtleſs the *ſignificavit* is ill, and therefore the defendant may in chancery procure the writ to be ſuperſeded. But the king's bench cannot deliver a man arreſted upon the king's writ, becauſe the chancery has granted it where they ought not to have granted it. If the certificate be ill, the chancery ought to ſuperſede it; but the king's bench cannot proceed upon it, becauſe it is not before the king's bench; for the king's bench cannot give judgment upon a recital, where another court is poſſeſſed of the original. In error brought upon a judgment of the common pleas in debt, an exception was taken, becauſe the writ, as it was recited in the declaration, was *attachiatus*, where it ought to have been *ſummonitus*, and therefore ill; but (*a*) the court refuſed to allowed the exception to be taken, becauſe the was not before the king's bench, but only by recital; but it was held, that diminution ought to be alleged, and a *certiorari* ſued; and if upon that an original was returned which was *attachiatus*, the judgment ſhould be reverſed.

But when the grand queſtion was, whether this uncertainty in expreſſing the cauſe would vitiate the writ, and then whether the court would quaſh it? And in proof of the affirmative, *Moor*, *pl.* 667. *Cro. Jac.* 566. *Cro. Car.* 196. 199. *W. Jon.* 226. *Hil.* 29 & 30 *Car.* 2. *B. R. Rex v. Price*, it was agreed, that juſtice ought to be done here upon the writ. 1 *Roll. Rep.* 136. *T. Jon.* 89. were cited.

After

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After ſeveral arguments at different days, and upon great conſideration and ſearch of precedents, it was reſolved, that the writ ſhould be quaſhed, and a *ſuperſedeas* iſſue. And *Holt*, chief juſtice ſaid, that at common law the cauſe had no need to be ſhewn in the writ of *excommunicato capiendo*; but it was ſufficient to ſay, that the party was excommunicate *pro contumacia manifeſta*. *Regiſt.* 65. 7. But in the *ſignificavit* it ought to be ſhewn. *F. N. B.* 63. 4. And now ſince 5 *El. c.* 23. the cauſe ought to be ſhewn in the writ. And he ſaid, he had ſearched many precedents upon the rolls in the crown office, from the 8 *El.* to this time, and there are ſome precedents where the cauſe is omitted, but the cauſe is mentioned in the greateſt part. In 8 *El. Rot.* 20. there are five writs which are general *pro contumacia*. In 15 *El. Rot.* 54. there are two with cauſe. In 17 *Jac.* 1. *Rot.* 54. there is one without cauſe, and another with the cauſe. In the time of king *Charles* 2. there is one the ſame with this here, and another, *aliorumque*, and one upon the ſame roll, *decimarum* only. And though in ſeveral of the ſaid precedents the cauſe is not well ſhewn, yet its being ſhewn in ſome manner, ſhews the opinion of the courts to have been, that the ſtatute had made ſome alteration; and therefore at this day cauſe ought to be ſhewn. And that is agreeable to reaſon; for when the ſtatute makes the writ returnable here, it is on purpoſe that this court ſhould judge of the cauſe; otherwiſe it had been idle to make the writ returnable here, and eſpecially when the proceſs ought to differ according to the difference of the cauſe for which the excommunication was. As to the nine cauſes mentioned in the act, an *alias* ought to iſſue with a penalty, &c. Then this court being poſſeſſed of the writ, and it not expreſſing the cauſe ſpecially, but in the disjunctive, the writ ought to be quaſhed. Before this ſtatute they ought to have reſorted to the chancery, and procured a *ſuperſedeas* there, 2 *Inſt.* 623. But that cannot be done now, becauſe the writ is returnable here. But becauſe the cauſe is ſhewn inſufficiently out of the writ, it ought to be quaſhed, and a *ſuperſedeas* awarded. But a *habeas corpus* is a very improper method to diſcharge the party, for he is well arreſted by virtue of the king's writ, and cannot be diſcharged whilſt that is in force. And it is a good return to the *habeas corpus*, that he is in cuſtody by writ of *excommunicato capiendo*.

Gould juſtice ſaid, that before the 5 *El. c.* 23. this court could not diſcharge a man taken upon an *excommunicato capiendo*, unleſs he was excommunicated pending a prohibition. And he agreed, that this court had power to quaſh the writ, and award a *ſuperſedeas*, where the cauſe is not ſufficiently expreſſed; but he made a doubt, whether there was here any ſuch uncertainty; for the *five* ſeemed to him to be accumulative.

But

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But by the opinion of *Holt* and *Turton* juſtices the writ was quaſhed, and a *ſuperſedeas* granted. And *Holt* ordered the clerk to enter upon the *habeas corpus*, that the party was diſcharged, becauſe the writ was quaſhed. And *Holt* ſaid in this caſe, that if the writ had been, *in cauſa ſubtractionis quorundam jurium eccleſiaſticorum*, it had been well. The ſame law if it had been, *et aliorum* or *aliorumque*. But he ſaid alſo, that this ſtatute was not well underſtood until the time of *Charles* I. in *Hughes*'s caſe, *Cro. Car.* 196. He ſaid alſo, that the form of the proceedings in the ſpiritual court ought to be regarded; as in a libel for words, their form is to ſay, that he ſpoke ſuch words, *aut alia ſimilia*, and yet a prohibition was denied to be granted for the ſaid cauſe.

An excommunicato capiendo for contempt in a ſuit for not repairing his ſhare munimentorum coemeterii of B. is bad. An excommunicato capiendo cannot be quaſhed in the abſence of the perſon taken up upon it.

In *Trinity* term following *Couſin* was brought up on a *habeas corpus*, and the return was, that he was arreſted upon an *excommunicato capiendo*. And there was a fatal exception to the writ for the uncertainty of the cauſe (it being *pro non reparatione ſortis ſuae munimentorum coemeterii de B.* which was agreed by the court to be uncertain and bad) and yet they would not diſcharge him upon the *habeas corpus*, but compelled him to procure the writ to be returned. And then they deferred to quaſh the writ, becauſe the defendant was not preſent in court, as he ought to be. *Ex relatione m'ri Jacob.*

Harman *verſ.* Owden.

S. C. 12 Mod. 421.

In an action on an agreement to deliver ſix ſplit oatmeal and hair ſieves, the plaintiff need not aver how many of each ſort were to be delivered. In an action on an agreement to deliver goods on board a barge to be provided by the party who is to receive them at a particular place on or before a certain day, breach that the party did not deliver them on the day is unexceptionable after verdict. S. C. Salk. 140. Com. 89. Holt, 127. and perhaps before. S. C. Salk. 140. Com. 89. Holt, 127. at leaſt if it appears on the declaration that the barge was not ſent to the place before that day.

THE plaintiff declares, that the defendant in conſideration of 20*l.* paid to him by the plaintiff, aſſumed to deliver to the plaintiff at or before the eight of *January* forty-five quarters of oatmeal, *ex ſex cribra avenacea, Anglice* oatmeal ſplitted and hair ſieves, and a fan, out of a ſhip into a barge to be brought there by the plaintiff for the ſaid purpoſe; and he avers, that upon the eighth of *January* he brought there his barge, and the defendant *non deliberavit* upon the eighth of *January*, &c. Upon *non aſſumpſit* pleaded, verdict for the plaintiff. And Mr. *Cowper* moved in arreſt of judgment, 1. That the ſieves being of divers ſorts, the plaintiff ſhould have ſhewn how many of each ſort were to have been delivered. To which Mr. *Broderick* anſwered, that in treſpaſs or trover this might have been a good exception, but not in *aſſumpſit*, where we ought to declare as the agreement was. And *Holt* chief juſtice ſaid, that if the agreement was ſuch, this uncertainty could not vitiate it; but the defendant has his election, how

many

many of each of them he will deliver. Suppoſe the agr ee ment was to deliver ſix cows and calves; the plaintiff ought to have ſix of each of them. But beſides, it does not appear here, but that they might be the ſame. 2. The ſecond exception was to the breach, that it was not well aſſigned, the promiſe being to deliver at or before the eighth of *January*, and the breach is aſſigned, that he did not deliver upon the eighth day of *January*; ſo that he might have delivered them before, which would have been a good performance of the agreement. But after conſideration had of this exception, *Holt* chief juſtice delivered the opinion of the court, that the plaintiff ought to have judgment after verdict. But (by him) it would have been good without verdict; for when the promiſe was, to deliver the things out of the ſhip into a barge, to be brought by the plaintiff on or before, *&c.* and the plaintiff ſays only, that he did not deliver upon the day, and not that he did not deliver before, yet in ſuch a caſe as this it will be well enough. For though the defendant has his election, to deliver before, *&c.* yet there ought to be a concurrence of the plaintiff, and he ought to be ready to accept them; for the defendant cannot make a tender before the laſt day to oblige the plaintiff to accept them; and if he comes before the laſt day to make a tender, that will not excuſe him from making a tender or delivery of the goods upon the laſt day, according to *Cro. El.* 14, 73. where a place is appointed for the payment of money. For if the plaintiff be not ready there with his barge, the tender will not be ſufficient. And therefore ſince the (*a*) laſt day is the time appointed by the law, when the one is obliged to deliver, and the other to receive, it will not be preſumed that the plaintiff was there before with his barge ready to receive them. But however, it is aided by the verdict; for if there had been an actual delivery, the jury could not have found for the plaintiff; for at this time performance (*b*) is given in evidence upon *non aſſumpſit*; and if the defendant had delivered the goods, it had been *non aſſumpſit*; and therefore no delivery being proved, they gave a verdict for the plaintiff. And judgment was entered for the plaintiff. *Holt* cited 2 *Saund.* 350. *Peters v. Opie.* 1 *Sid.* 15. 1 *Saund.* 228. 1 *Ventr.* 119. *Ex relatione m'ri Jacob.*

(*a*) Vide Cro. Jac. 499. pl. 8. Co. Litt. 202. a Com. Rent. D. 7. 2d. Ed. vol. p. 432.

(*b*) Vide Gilb. C. B. 65. Bl. 389.

Memorandum, *That Sir* George Treby *knight, lord chief of the Common Pleas, died the thirteenth of* December *in this vacation of an aſthma at* Kenſington *Gravel pits.*

Hilary

Hilary Term

12 Will. 3. 1700-1. B. R.

Sir John Holt *Chief Juſtice.*
Sir John Turton
Sir Littleton Powys *removed out of the Exchequer the twenty-eighth of* January *in this term.*
Sir Henry Gould.
} *Juſtices.*

Memorandum, *That Mr. ſerjeant* Bury *was made a baron of the Exchequer the twenty-eighth of* January *in the room of Mr. baron* Powys *removed into the king's bench.*

Memorandum, *Mr. ſerjeant* Whitacre *was ſworn one of the King's ſerjeants the eleventh of* February *in this term.*

Memorandum, *That Mr. ſerjeant* Levinz *died the twenty-ninth of* January *in this term at* Serjeant's Inn *in* Fleet-Street.

Intr. Trin. 12 Will. 3. B. R. Rot. 156.

Fiſher *verſ.* Wigg.

S. C. 1 P. Wms. 14. Salk. 391. 3 Salk. 206. Com. 88. 92. Holt 369. with the arguments of counſel 12 Mod. 296. cited and commented upon. 2 Vez. 257. 3 Atk. 273, 274. 1 Wilſ. 342. Pleadings Lill. Ent. 205.

The ſurrender of a copyhold muſt be conſtrued as a will. R. cont. poſt. 1144. D. cont. arg. 1 Saund. 151. Vide Cro. Eliz. 29. Cro. Jac. 376. 2. Bulſtr. 272. The words "equally to be divided between them" will make a limitation by way of uſe which would otherwiſe have paſſed a joint eſtate, paſs an eſtate in common. R. acc. 2 Vez. 252. 3. Atk. 731. 1 Wilſ. 341. Say. 67. & vide. Say. 71. 72. Cowp. 660. Co. Litt. 190. b. 13th Ed. n. 4. See alſo 1 Vez. 166. ante 422.

IN ejectment the matter in law in queſtion was thus. A copy-holder ſeiſed of cuſtomary lands in fee at the will of the lord, *&c.* according to the cuſtom of the manor. ſurrendered them, *&c.* to the uſe of his wife for life, and after her deceaſe to the uſe of *B. C. D. E.* and *F.* his children, equally to be divided among them, and their reſpective heirs and aſſigns for ever. And they were admitted accordingly.

accordingly. And the queſtion was, whether *B. C. D. E.* and *F.* were by virtue of this ſurrender jointenants or tenants in common. If they were jointenants, then judgment ought to be given for the defendant; but if they were tenants in common, then it ought to be given for the plaintiff. FISHER v WIGG.

And this caſe was argued ſeveral times at the bar by Mr. *Carthew* and Mr. *Peere Williams* for the plaintiff, and by Mr. *Northey* and Mr. *Broderick* for the defendant. And now this term the judges, *viz.* *Holt* chief juſtice, and *Turton* and *Gould* juſtices, (*Powys* juſtice not having yet taken his place) delivered their opinions, *viz.* *Turton* and *Gould* for the plaintiff, and *Holt* chief juſtice for the defendant. And *Gould* juſtice argued, that judgment ought to be entered for the plaintiff, becauſe the children (by him) were tenants in common. And he ſaid, that the queſtion aroſe upon theſe words [equally to be divided among them, and their reſpective heirs and aſſigns for ever.] And in pronouncing his opinion, he ſaid, he would purſue the ſame rules with *Richardſon* chief juſtice in *Beck's* caſe. *Littl. Rep.* 344, 5. that in expoſition of deeds all parts of them ought to ſtand, and to have effect, if they can; and that the parties intention ought to be purſued, unleſs ſuch expoſition would contradict the known rules of law. He could not find any expreſs authority, where this point hath been ſettled; but the force of the authorities in the books ſeem to warrant his opinion. The preſent queſtion does not depend upon words which will create an eſtate, but which ought to qualify an eſtate; and in ſuch caſes the intent of the parties ought to be purſued. There are no particular words neceſſary to create a tenancy in common. *Littleton ſect.* 292. 298. *Co. Li.* 189. *a.* In the caſe of frank marriage, and change, there are neceſſary words of art in the creation of them, which cannot be omitted; but in caſes of tenancies in common no ſuch preciſe words are requiſite; for if they divide an eſtate, and ſhew that a ſeveral property was deſigned to each party, it is ſufficient. For the making of a tenancy in common does not add to the eſtate, but qualifies it; as in the creation of an eſtate in fee-ſimple, it is neceſſary to add the word heirs, but tenants in common may releaſe to one another without it. A joint eſtate in the premiſſes may be altered in the *habendum.* As *Hob.* 172. lands are given to two, *habendum*, the one moiety to one, the other to the other, they are tenants in common; and there is no other reaſon for it, but becauſe the *habendum* ſhews the intention of the parties, that they ſhould have ſeveral intereſts. If *A.* gives lands to *B.* and his heirs, *habendum* to him and his heirs, it is a fee; but if he goes on and ſays, that if *B.* dies without iſſue, the (*a*) remainder to *C.* &c. it is tail, becauſe the latter words correct the former. *Plowd.* 541. *Litt. Rep.* 345. Then

(*a*) Vide ante 101. 568. and the caſe there cited poſt. 1152. Co. Litt. 21. a 37. Aſſ. pl. 15.

if

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if no preciſe form of words is neceſſary, his intent is apparent, to be an eſtate in common, becauſe it was deſigned as a proviſion for his younger children. There was a caſe in the common pleas *Paſchae* the ſixth of this king between *Bliſſet* v. *Cranwell*. 3 *Lev.* 373. *Salk.* 226. *Comb.* 256. where a deviſe to *T.* and *R.* and their heirs, and the ſurvivor of them, equally to be divided between them (and their heirs) after the death of his wife, *&c.* was held a tenancy in common; but the queſtion in the court was, becauſe this ſeemed repugnant to the former part of the deviſe; but it was held by the whole court, that the laſt words diſtributed the eſtate. [Note, this point was made at the trial before *Treby* chief juſtice, and was referred to him, and he prayed the opinion of the other judges of the common pleas, and it was argued at the bar there, and it was adjudged *Paſchae* 6 *Will. & Mar. C. B.* by *Treby* chief juſtice, *Nevill* and *Rokeby* juſtices, that it was a tenancy in common, but *Powell* juſtice held it to be a jointenancy. *Ex relatione m'ri Place*]. As the law is now held, theſe words will (*a*) make a tenancy in common in a will. Then in this caſe the intent of the parties appearing to be, that they ſhould have it in common, that ought to be purſued as far as it can. But moreover this caſe is a uſe, which reſembles that of a will. The caſe of *Brookes v. Brookes*. *Poph.* 125. *Cro. Jac.* 434. 2 *Roll. Abr.* 67. 14 *Vin.* 151. *pl.* 18. is a ſtrong caſe, where a copyholder ſurrendered his copyhold to the lord, without limiting a uſe, and afterwards the lord *conceſſit ſeiſinam* of the copyhold to the tenant, *habendum* to him and his wife and the heirs of their two bodies; and there though the wife was named only in the *habendum*, it was held, that ſhe would take an eſtate-tail; in a common caſe it would have been ill, becauſe ſhe was not named in the premiſſes; but the intent of the ſurrender was taken in the ſaid caſe to have been to the ſaid uſes, and therefore the manner of the grant was not material, it being only an explanation of the ſurrender. Now this caſe is ſtronger, becauſe it is the expreſs limitation of the uſes upon the ſurrender. And it was alſo held in the ſaid caſe, that the ſurrender of a copyhold ſhall be expounded according to the intent as a will. The caſes of grants *in future* are ill, becauſe they are repugnant to the rules of law; but that caſe of a uſe was held good, though it was contrary to the known rules of law. He ſaid, he could not ſhew any care where this point has been ſolemnly adjudged, but there are parallel caſes. The caſe of *Smith v. Johnſon, Paſch.* 32 *Car.* 2. *B. R. Rot.* 564. was the caſe in point, but no judgment was entered upon the roll; the caſe was, a feoffment to two and their heirs, equally to be divided between them, to the uſe of them and their heirs; upon the breaking of the caſe *Scroggs* chief juſtice and *Dolben* juſtice were of opinion, that it was a tenancy in common, but *Jones* juſtice was of another opinion, upon the difference objected here between

(*a*) R. acc. 3 Co. 39. b. 5th Res. Cro. Eliz. 695. poſt. 721. Prece. Chan. 491. Gilb. Eq. Rep. 146. 1 Atk. 493. 494. 2 Atk. 121. 1 Vez. 165. Cowp. 657. 2 Roll. Abr. 89. 14 Vin. 481. pl. 2. D. acc. Say. 68. 71. 2 Vez. 256. 3 Atk. 733. 2. Bl. Com. 193.

twech a deed and a will. So *Co. Lit.* 190. *b.* if a verdicts finds, that a man hath *duas partes manerii in tres partes dividendi*, they are by the intendment of the verdict tenants in common. Besides, that if these words will not make a tenancy in common in this case they will be vain, and must be totally rejected. In the case of *Whorewood v. Shaw*, *Yelv.* 23. *Cro. El.* 729. *Moor*, 667. *Owen*, 127. where a man by his deed acknowledged to have received of *J. S.* 40*l.* to be equally divided between *A.* and *B.* and to their use; this was held a creation of a several debt of 20*l.* to each of them, being in the case of a personal duty; but *Yelverton* says, that is not like the cases of interest, where land or a lease is given to two equally to be divided between them, for there they are tenants in common; and he makes no difference between a deed and a will. There has been a notion of a distinction between deeds and wills, and the said distinction is taken in the case of *Lewen v. Cox*, *Cro. El.* 695. by *Coke*, then attorney general. He said, he did not know, that the said point had ever been debated. So in the case of *Furse v. Weeks*, 2 *Roll. Abr.* 90. and *Stile*, 211. the same distinction is taken by lord *Rolle*, but it is only an opinion of his *obiter*; and farther, it differs from this case, because this case is of a use, that of a grant or feoffment, which is a conveyance at common law, but uses are governed by the intent of the parties, and ought to be maintained, if they can possibly. These words import something more than ordinary, and therefore the intent seeming to be incontrovertible, he was of opinion, that the plaintiff ought to have judgment. Fisher v. Wigg.

Turton justice argued also of the same side for the plaintiff, and much to the same purpose. But he added these reasons also, why the intent of the surrenderor should be taken to be, to create a tenancy in common; because if any of the five should die without issue, his part would descend to the eldest son; if they had issue this would be a provision for their families, which might be the sole reason that prevailed with the surrenderor, to give it away from his eldest son, and of consequence he would not remove it from his eldest son any longer than the said reason continued. He cited also several cases of wills, where words less significant had been construed to make a tenancy in common. *Lewen v. Cox*, *Cro. El.* 695. Devise to his own sons equally and their heirs, tenancy in common. *Ratcliffe's* case, 3 *Co.* 39. *b.* 5*th Rep.* The words, equally to be divided, in a will, tenancy in common. The same law of the words, part and part alike. *Thoroughgood and Jaques v. Collins*, *Cro. Car.* 75. *Litt. Rep.* 46. *Torret v. Frampton*, *Sty.* 434. Devise to *A.* for life, remainder to *B. C.* and *D.* and their heirs (*a*) respectively for ever, *B. C.* and *D.* were tenants in common. And from thence he inferred, that these words being stronger would make a tenancy in common in a deed. He cited the case in *Littlet. sect.* 298. *Co. Litt.* 190. *b.* where lands

(*a*) R. acc. 2 Atk. 122.

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are given to two, *habendum et tenendum, scilicet* the one moiety to the one and his heirs, and the other moiety to the other and his heirs, they are tenants in common. And from thence he urged, that in regard no particular words were required by law to create a tenancy in common, the words in the present case, having the same sense and import with those in the case in *Littleton*, ought to make a tenancy in common. He said also, that if this case had been before the statute of uses, it would have been taken in equity according to the intent of the surrenderor, to be a tenancy in common; and now since the statute has executed the use into possession, it ought to have the same construction in a court of law, that it would have had before the said statute in a court of equity. Then he cited cases, to prove, that surrenders ought to be construed favourably, and had been oftentimes taken contrary to the rules concerning conveyances at common law; and that they ought to be taken so, in regard that they are considerable as wills, because oftentimes made by the surrenderor *in extremis*, when he is *inops consilii* And therefore he cited *Brookes v. Brookes*, *Poph.* 125. *Cro. Jac.* 434. 2 *Roll. Abr.* 67. 14 *Vin.* 151. *pl.* 18. and also *Wade v. Bache*, 1 *Saund.* 151. where a copyholder in remainder surrendered his remainder to the use of the tenant for life [for his life], and after his death to the use of himself and his wife, &c. and though the limitation for the life of the tenant for life was (*a*) void, and so by consequence by the common law the remainder would have been void also, yet it was held, that in case of a copyhold it should be taken as a mediate settlement upon the husband and wife after the death of the copyholder for life. He cited 2 *Vent.* 365. in (*b*) chancery, where a covenant to stand seised to the use of *A.* for life, and afterwards to two, equally to be divided, and their heirs and assigns for ever, was adjudged by the lord keeper *North*, to be a tenancy in common. And for these reasons he was of opinion, that judgment ought to be given for the plaintiff.

(*a*) Vide ante. 523. 526.

Holt chief justice *e contra* argued for the defendant, that this was a joint tenancy. And he made two points, 1. Whether these words would make a tenancy in common in any deed. 2. Whether this case shall have a more favourable construction, because it is in case of a copyhold, or because it is a conveyance by way of use. And he gave his opinion to the second point first: that as to the raising and passing estates, copyholds ought to be governed by the rules of the common law. 4 *Co.* 29. *b.* And as to *Brookes*'s case, *Poph.* 125. *Cro. Jac.* 434. 2 *Roll. Abr.* 67. 14 *Vin.* 151. *pl.* 18. and the saying in *Poph.* 126. that the case of a copyhold resembles the case of a will; the report in *Cro. Jac.* 434. makes no mention of any such thing; and the said part of *Popham's Reports* being reported by an uncertain au-

Cro. Car. 366.

(*b*) The decree of this case is not entered in the register book. 2 Ves. 256. 3 Atk. 733.

thor,

thor, ought not to be regarded. But however he held as to the ſaid caſe, that if a copyholder ſurrenders to the lord, without limiting any uſe, the copyhold belongs to the lord; and his eſtate is extinguiſhed, in the ſame manner as if tenant for life at common law releaſes to him in reverſion; and then the grant will be a voluntary grant of the lord; and then the reſolution of the ſaid caſe will be no more, than that it is a cuſtom for copyhold eſtates to paſs in the ſaid manner; and if many grants have been made in the ſaid manner, ſuch grants will be good. And he ſaid, he knew manors, where grants have been made to *R. habendum* to *A. B. C.* and *D.* the firſt named took the whole for his life, and to every one in remainder in their order. And as to the matter of the uſe, upon which his brother *Gould* inſiſted, there is no ſuch thing, but it is only a direction of the ſurrender; for the perſon, to the uſe of whom the ſurrender is made, is (*a*) not *ceſtuy que uſe* in the mean time, but when the ſurrenderee is admitted, he is in by the grant of the lord. And for theſe reaſons he was of opinion, that this caſe ought to be conſidered but as a grant at common law. And then he held, that the five children were joint tenants. 1. Becauſe if theſe words have any ſignification, yet it is no more, than what would have been implied in the nature of the thing, if they had been omitted, and therefore no regard ſhall be had to them. For if an eſtate be made to five perſons, each of them has an equal proportion, and the words equally to be divided, mean only, that each of them ſhall have a fifth part, which they have by the conveyance. In *Co. Litt.* 186. *a.* where all the authorities are enumerated in the margin, it appears, that joint-tenants have but their part, to alien or forfeit; and therefore though it is ſaid, that joint tenants are ſeiſed *per my et per tout*, yet every one of them has but his part for diſpoſal; if they join in a feoffment, it ought to be pleaded as the feoffment of both, and the feoffee after the death of one of them, cannot plead that he is in from the ſurvivor. Then if each of them has his part, theſe words ſignify nothing. One may aſk then, what is the difference between joint-tenants and tenants in common? *Littleton*, *ſect.* 292. ſhews it, *viz.* theſe latter come in by ſeveral titles, but the (*b*) former by a joint title. But there is an exception to this in the caſe of a gift made to a corporation and a natural perſon jointly, they (*a*) ſhall be tenants in common, becauſe they have ſeveral rights, which cannot ſtand in jointure. But whenſoever they may hold in jointure, they ſhall be joint-tenants. However there is no difference as to the taking of the profits; for if one tenant in common takes all the profits, his companion has (*d*) no remedy againſt him. At common law none (*e*) of them could have been obliged to make partition. And how then will theſe words, equally to be divided, make any difference, when any one of the joint-tenants might diſpoſe of his part, and

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The ſurrender of a copyhold to A. habendum to A. B. C. and D. will in ſome manors gives ſucceſſive eſtates for life. Vide Cro. El 25. pl. 2.

(*a*) Vide 2 Vez. 257.

(*b*) Vide ante, 312. and the caſes there cited.

(*c*) Vide 2 Lev. 12. 2 Bl. Com. 184.

(*d*) Vide ante, 312 and the caſes there cited.

(*e*) Acc. Litt. ſ. 318. Co. Litt. 198. b. Vide 31 H. 8. c. 1. ſ. 2. 32 H. 8. c. 32.

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when they take the profits alike in both cases? So that it is the same thing, whether these words be inserted or omitted. As to the other words, and to their heirs respectively, they will make no difference; for an estate to two and their heirs, and to two and their heirs respectively, makes no difference; for the limitation must be to the heirs of both to make a joint-tenancy, and then the word heirs respects both parties, which is the whole meaning of their heirs respectively, and so no more than what is in every joint-tenancy. And then according to *Davenport's* case, 8 *Co.* 145. *a.* if words are inserted in a grant, which signify nothing, they will make no difference in the construction of it. As to the objection of *Littleton*, *f.* 298. if lands are given to two, *habendum et tenendum, scilicet*, the one moiety to one and his heirs, and the other moiety to the other and his heirs, they are tenants in common, and yet it is but one conveyance; and then here the words, equally to be divided, are tantamount to those of, one moiety, *&c.* He answered, 1. That he held, that it was not one conveyance only, but several conveyances, though but in one deed; for if such estate be made by deed of feoffment, there must be two liveries; for livery of the one moiety to the one tenant in common will not avail the other because they have several freeholds. And then it cannot be one conveyance, because several liveries must be made upon it, and then it is within the rule. 2. The words are not of like import, for these words make no distribution of the estate, as those others do, by confining each of them to a moiety; but the words, equally to be divided, import no such thing. As to the case of a moiety to the one and his heirs, *&c.* that is a tenancy in common, because it is an undivided moiety, and so proper. But if a feoffment was made of twenty acres, *habendum* ten acres to *A.* and ten acres to *B.* they are several tenants, and not tenants in common. There there are two conveyances, but here the words consist as well with joint-tenancy as with tenancy in common, and therefore to construe them to make a tenancy in common, is to restrain them within a narrower compass than they import of themselves. 2. These words cannot make a tenancy in common, because a tenant in common has an estate undivided, but the words here say, that the estate ought to be equally divided, which cannot make a man tenant *pro indiviso*, but differs from it, as much as divisible differs from indivisible. And when according to *Littleton*, *f.* 292. the nature of tenants in common is, that none of them knoweth thereof his severalty, but they ought by the law to occupy such lands in common, and *pro indiviso*; these words can never create such an estate; but if they signify any thing, it must be, that the grantees shall not take, until the estate be first divided. In *Co. Intr. tit. Partition.* 413. the writs of partition upon the statute of *H.* 8. make no mention, whether the parties be seised jointly or in common, but say only, that they held such lands, *&c. insimul et pro indiviso.* And when as well jointe-

On a feoffment of twenty acres habendum ten acres to A. and ten acres to B. A. and B. are several tenants.

nants

nants as tenants in common hold ſo, the words, equally to be divided, cannot confine it more to one eſtate than to the other. As to the caſe in *Co. Lit.* 190. *b.* that if a verdict finds, that a man hath *duas partes unius manerii in tres partes dividendi*, that by the intendment of the verdict, this is a tenancy in common; he obſerved, that the ſaid caſe is not poſitive, but *Coke* ſays, it ſeems to be ſo; and the opinion is not warranted by 21 *Ed.* 4. *c.* 22. cited in the margin nor was it in the caſe; for there is a writ of entry upon the ſtatute of *Richard* 2. *&c.* the defendant pleaded *non intravit contra formam ſtatuti*, upon which iſſue was joined; and the jury found, that the defendant entered into two parts of the manor in three parts divided: and it was moved in arreſt of judgment, that by the intendment of the verdict the plaintiff and defendant ought to be intended tenants in common, and then the action would not lie: but the court *contra*, and the plaintiff had his judgment. But ſuppoſe it ſhould be taken to be ſo upon the verdict of a jury, when it ſtands *indifferenter*: that will differ much from this caſe. But all that *Coke* intended by the ſaid caſe was, that two parts of a manor in three parts divided cannot be intended tenancy in common, becauſe they were actually divided, and held in ſeveralty (like as it would be, if the lord of a manor ſhould leaſe the third part of his manor, and then *A.* entered upon the other two parts, and the lord brought the action and declared of an entry upon the entire manor, yet the jury could not find an entry, but of the two parts.) But *in tres partes dividendi* might intend a tenancy in common, becauſe *dividendi* argues a common poſſeſſion, in regard that it is not yet divided, but remains to be divided, and therefore at this time muſt be a common poſſeſſion. But notwithſtanding that the poſſeſſion is in common, it may be as well coparcenary or joint-tenancy, as tenancy in common. And then how can it be a tenancy in common, ſince if the import of the words were executed, the eſtate ought to be divided, and then it cannot be a tenancy in common. Then he conſidered the agreement between jointenancy and tenancy in common. The poſſeſſion of one tenant in common is the poſſeſſion of the other. *Heb.* 128. *Small v. Dale. Moor* 868. But it may be objected, that they have ſeveral freeholds. *Co. Lit.* 200. but the eſtate is not divided, but they are ſeveral freeholds in undivided parts, and ſo theſe words, equally to be divided, cannot be of effect, being contrary to the very nature and eſſence of a tenancy in common. As to the objection, that theſe words in a will would have made a tenancy in common. 3 *Co.* 39. *b.* he agreed it; but he ſaid, that was no rule to conſtrue them accordingly in deed. For 1. There is a great difference between wills and conveyances made in a man's life time; the ſame words in the one will have a different conſtruction from what they will have in the other; as a limitation to a man and his aſſigns for ever

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ever is (a) but an eſtate for life in a deed, but in a will it is (b) an eſtate in fee. In 27 *Hen.* 8. 27. *a.* by *Fitzherbert* and *Shelly*, if lands are deviſed to a man and his heirs males it is (c) tail; in a deed it (d) will be otherwiſe. And the reaſon of the difference is, that where lands are deviſable, the law conſiders the circumſtances under which the deviſor is, that he is *inops conſilii*, &c. and therefore will purſue his apparent intent; and this was at common law, where lands were deviſable by cuſtom, 27 *Hen.* 8. 27 *a.* 11 *Hen.* 6. 12, 13.

(a) Acc. Litt. ſ. 1. Co. Litt. 3. b. 2 Bl. Com. 107.
(b) Acc. 2. Bl. Com. 108.
(c) Acc. Co. Litt. 27. b. 2 Bl. Com. 115.
(d) Acc. Litt. ſ. 31. Co. Litt. 27. a. 2 Bl. Com. 115.

2 He conſidered the preciſe reaſon of this judgment in the caſe of a will, for the reaſon of the judgment is the ſtrength of the authority. *Ratcliffe*'s caſe does not ſay, that theſe words equally to be divided make a tenancy in common by force of the words, but becauſe they manifeſt the intent of the deviſor, that the eſtate ſhall be divided, and conſequently that there ſhall be no ſurvivor. Now eſtates in a will may be governed by an implication upon the intent of the deviſor. 13 *Hen.* 7. 17. and *Hob.* 34. *Counden v. Clerke*, where *A.* by his will made *J. S.* his heir; though in ſtrictneſs that could not be done, yet it (e) paſſed a fee by the intent. But in *Seagood* v. *Hone. Cro. Car.* 366. *W. Jones* 342, where a copyholder ſurrendered to the uſe of *A.* and *B.* and the ſurvivor of them, and for want of iſſue of the body of *B.* remainder to *J. S.* and his heir; it was held, that *B.* had only an eſtate for life; for an eſtate for life being limited to him by expreſs limitation, he ſhall have no higher eſtate by implication; and though perhaps it might have been enlarged by implication in a deviſe, yet it ſhall not be ſo in a ſurrender or conveyance (f); which ſhews the difference between a ſurrender of a copyhold and a will, and that the ſurrender is like any other conveyance at common law. He ſtated the caſe of *Furſe v. Weeks*, 2 *Roll. Abr.* 90. *Stile* 211. at large; and he ſaid, that the reaſon of the ſaid reſolution was with him. He cited the caſe to be, that a man deviſed his lands to his two daughters, equally to be divided between them, to have and to hold to them, and the ſurvivor of them and to the heirs of the body of the ſurvivor of them; and the queſtion was, whether they were jointenants or tenants in common? for (ſays the book) though if a deviſe made to two, equally to be divided between them, they ſhall be tenants in common, becauſe in a will the intent of the deviſor ſhall be interpreted to be ſo; yet it is not ſo in caſe of a grant or feoffment: but in a will it is a tenancy in common by conſtruction, and not by expreſs words, but only by collection of the intent of the deviſor: but if the other words of the will ſhew his intent to be ſtronger, that he intended a jointenancy, it ſhall be interpreted accordingly, and it was ruled accordingly by reaſon of the expreſs limitation made to the ſurvivor. Now he ſaid this caſe was a full authority for him, for if it had been a tenancy in common in expreſs words, the *habendum* to them and the ſurvivor of them, &c. had been repugnant and void;

(e) R. acc. 3 P. Wms. 193. 2 Atk. 308. D acc. Noy. 48.

(f) Vide ante 234. and the caſes there cited.

void; as if a man grants lands to two, *viz.* the one moiety to one and his heirs, &c. *habendum* to them and the survivor of them; this laſt limitation would be void, being directly repugnant to the former. Then he ſaid he muſt obſerve, that it was not agreed very ſoon, that theſe words would make a tenancy in common in a will. In *Dyer* 25 *pl.* 158. it is a queſtion. 6 *Eaw.* 6. *New Bendl.* 30. *pl.* 63. by *Montague* chief juſtice, it is a jointenancy. The ſame reſolution *Dalis.* 44. *pl.* 34. *Dickens v. Marſhall. Cro. El.* 330. *pl.* 5. *Moore* 598. Now the reaſon of theſe reſolutions may be, only becauſe it was ſo in a deed; for if it had been a tenancy in common in a deed, it could not have been queſtioned in a will, the argument being *a fortiori* from a deed to a will. As to the objection, *Cro. Eliz.* 695. *Lewen v. Cox*, that it is only the opinion of the counſel; he anſwered that where counſel takes a matter *ex conceſſo* and founds his argument upon it, as *Coke* there does, it is ſome argument that it is law, if the counſel be a man of reputation; for if that were not law, upon which he lays his foundation, he would be anſwered one queſtion by another. 3. There is no reaſon to make any ſtrained conſtruction in this caſe, becauſe a jointenancy is (*a*) favoured in the law; and the reaſon of it is, that as the law does not love fractions of eſtates, no more does it love them in tenures. Now jointenants are but as one tenant; but in caſe of tenancy in common all the intire ſervices are multiplied, 6 *Co.* 1, 2. *Bruerton's* caſe; for (*b*) which reaſon jointenancy is favoured. The ſame miſchief will happen, by conſtruing this to be a tenancy in common, *viz.* to make five copyhold eſtates, where otherwiſe there would be but one, and the lord will have five fines. And the one tenant in common cannot have contribution of ſuit againſt his companion, otherwiſe whilſt they are jointenants; and that is (by him) the reaſon why jointenancy is favoured in law. In the caſe of *Smith* v. *Johnſon*, cited by his brother *Gould*, the judges held as he ſaid; and there was a rule for judgment *niſi*, &c. but there was nobody ſatisfied with the opinion, and upon motion the rule was ſet aſide, and it was made an *ulterius concilium*; and then, as he was informed by Mr. *Lilly*, who was attorney in the cauſe, it ended by the death of the parties. For which reaſons he was of opinion that judgment ought to be for the defendant, but by the opinion of the other two judges, judgment (*a*) was entered for the plaintiff. *Ex relatione m'ri Jacob.*

(*a*) Sed Vide 2 Atk. 55. 122. 1. 1 Vez. 166. 2 Vez. 258. 1 Will. 165.

(*b*) Acc. 2 Bl. Com. 193.

Note; Mr. *Northey* in his arguments of this caſe cited 14 *Car.* 2. *C. R. rot.* (*b*) 43. *Hammerton v. Clayton*, *Carth.* 342. to have been adjudged tenancy in common upon the ſame words,

(*a*) In Stringer v. Philips, Mich. 1730, at the Rolls, it was ſaid by counſel that this judgment was afterwards reverſed, 1 Eq. Abr. jointenants and tenants in common, pl. 4. n. a. 4th. Ed. p. 291. but upon one ſearch by Ld. Harwicke and another by the order of Ld. C. J. Lee, it did not appear that any writ of error was brought. 2 Vez. 256. Say 70. Will. 341.

(*b*) The record is not on this roll. 2 Vez. 256. 3 Atk. 734. but in Carth. 342. it is ſo; to be on roll. 83. and according to Carth. the queſtion in Hamerton v. Clayton was upo limitation in Ward v. Everett, reported ante 42.

Baily

Baily *verſ.* Grant.

S. C. Salk. 33. Holt. 48. 12 Mod. 449.

The mate of a ſhip may ſue in the admiralty for wages on a contract made on land. R. acc. ante 397.

UPON the motion of Mr. *Raymond* towards the end of laſt *Michaelmas* term a rule was made to hear counſel of both ſides the firſt day of this term, why a prohibition ſhould not be granted to the court of admiralty, to ſtay a ſuit there by the mate of a ſhip for his wages. And he urged, that the admitting the mariners to ſue there was rather an indulgence, than any proper juriſdiction that they had to hold plea there of wages ariſing upon a contract made upon the land; and that it was a long while before it was permitted, but that now it ought not to be extended any farther: That in the caſe of a maſter of a ſhip a prohibition was granted laſt *Trinity* term, between *Clay* and *Snelgrave* [*ante* 576.] That this ſeemed to be a middle caſe, but rather inclining to that of the maſter; becauſe in caſe of the death of the maſter he ſucceeded in the government of the ſhip, and was always overſeer of all the other mariners. That the ſame motion was made *Mich.* 10 *Will.* 3. *B. R.* between *Hooke* and *Moreton* [*ante* 397.] and that the rule was made as here, to hear counſel, *&c.* and upon its being many times moved no prohibition was made, and they proceeded no farther in the admiralty; for which, *&c.* But *e contra* ſerjeant *Hall* argued, that no prohibition ought to be granted. And of that opinion was the whole court, becauſe the mate is not diſtinguiſhable from other mariners. But the maſter contracts with the owners, upon their credit; whereas the mate contracts only with the maſter, and not upon the credit of the owners, but upon the credit of the ſhip. And therefore the rule was diſcharged. The ſame rule was made this term upon a motion in the common pleas. See 2 *Ventr.* 181. *Marſh v. Alleſon.*

Freeman *verſ.* John Blewett, Sir Richard Blackwell & al'.

S. C. Salk. 409. 12 Mod. 394. Holt. 408.

An officer to whom meſne proceſs which is returnable is directed, cannot juſtify under it after the day appointed for the return without ſhewing a return. S. C. 3 Salk. 220. R. acc. Str. 1184. acc. W. Jon. 379. Cro. Car. 447. Vide Cowp. 18. any other perſon may. H. W. Jones, 378. pl. 8. Cro. Car. 446. pl. 17. On a replevin by plaint, the precept to replevy is returnable.

IN an action of treſpaſs for his goods taken, *&c.* the defendant pleaded, that a plaint in replevin was entered by *J. S. &c.* in the court of the ſheriff of *London*; upon which a precept iſſued, directed to the defendant, being a ſerjeant at mace, commanding him to replevy the goods; by virtue of which writ the defendant replevied them, and delivered them to *J. S. &c.* The plaintiff demurred. And Sir *Bartholomew Shower* for the plaintiff took exception to this plea, that the defendant did not ſhew that this precept

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was returned by him, which he ought to have done. 20 *Hen.* 7. 13. 21 *Hen.* 7. 22. And the difference is, between the officer himſelf to whom the writ is directed, &c. and a bailiff who juſtifies under ſuch officer, for he has no need to ſhew that the writ was returned, becauſe he has it not in his power. But in eſcape againſt the ſheriff or other officer to whom the writ or precept was directed, there is no need to ſhew that the writ was returned, becauſe the defendant ſhall not take advantage of his own wrong. And it appears, that the ſerjeant at mace is the officer, becauſe an action for eſcape lies againſt him for the eſcape of a man taken by city proceſs, and not againſt the ſheriff; though for the eſcape of a man taken upon a *latitat* it lies againſt the ſheriff, and not againſt the ſerjeant. 1 *Roll. Abr.* 806. *E contra* it was argued by Mr. *Dee* and Mr. *Broderick* at ſeveral days for the defendant. that the plea was good, becauſe the poſſeſſion being changed by delivery of the goods to the plaintiff in replevin, the deſign of the writ (which was only to give back to the plaintiff his poſſeſſion) was ſatisfied, and therefore that the writ has no need to be returned. For the law ſuppoſes the plaintiff in replevin to be owner of the goods, and the defendant to be a bare poſſeſſor; and therefore a claim of property by the defendant ſuſpends the execution of the writ. And therefore when the writ is executed, and the poſſeſſion reſtored to the owner, the matter is determined; but the proceedings upon the plaint are entered in the ſheriff's court, and the defendant may appear to it. And therefore this caſe differs from the caſe of a *capias* or *fieri facias*, &c. which are, *ita quod habeas corpus* or *denarios apud Weſtminſter*, &c. But upon the firſt replevin no return ought to be made; but if it is executed, the matter is determined. In the *pluries* there is, *vel cauſa nobis ſignifices*, and therefore the *pluries* is returned in the common pleas or king's bench. This appears alſo by a recaption *pendente placito*, the words being *ut dicitur*, and not *ſicut nobis conſtat de recordo*, as it ſhould be, if the writ was returned; which demonſtrates that a replevin is looked upon as a writ not returnable. And there is no precedent, where a replevin is pleaded, that a return was ever ſhewn. It was urged alſo, that treſpaſs would not lie for the taking of goods by the delivery of the ſheriff or his bailiff, by virtue of a replevin; but the defendant ought to purſue in the replevin. *Bro. treſpaſs* 48, 76, 104, 154. *Fitz. treſpaſs* 198. After theſe ſeveral arguments now this term *Holt* chief juſtice delivered the opinion of the court, that the plea was ill for want of ſhewing the precept was returned; for the precept is returnable, and the defendant was commanded to make return of it. If a *capias* in *meſne* proceſs is directed to the ſheriff and an action of falſe impriſonment is brought againſt the ſheriff for executing it, the ſheriff cannot juſtify under it, without

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out ſhewing that he returned it. And the difference is as to this matter between the principal officer to whom the writ is directed, and a ſubordinate officer; the former ſhall not juſtify under the proceſs, unleſs he has obeyed the court in returning it; *contra* of another, who has not the power to procure a return to be made. And there is more reaſon for it in the caſe of a replevin, than in the other caſes; for if the officer replevies the goods, the defendant cannot do any thing, unleſs he return the writ; for though he has a day upon the roll, and he may come in and demand the plaintiff; yet if the writ is not returned, the court cannot know what judgment to give; for if it appears upon the return of the replevin that the goods were delivered, then the particular goods will appear: and then if the plaintiff be nonſuit, the defendant will have a *retorno habendo*; but if they were not delivered, but an *elongata* returned, then a *capias in withernam* ought to iſſue. As to the objection made by Mr. *Broderick*, that there are many caſes cited by him, where juſtifications have been made under writs of replevin, without ſhewing that they were returned, he anſwered, that there will be a diverſity; for if they were the firſt or ſecond writs, it would be good, without ſhewing a return; becauſe the firſt replevin, and perhaps the ſecond, (*a*) is not returnable, and yet the ſheriff ought to execute them, becauſe they are in nature of a *juſticies*, upon which he may hold plea in his county court, and the day is given upon them in the county court, but they are not returnable here, and ſo they cannot be returned, nor a return pleaded; but in a *pluries* replevin the ſheriff cannot juſtify, without ſhewing the return of it, becauſe (*b*) the *pluries* replevin is always made returnable. And (by him) if debt or *ſcire facias* be brought upon a judgment againſt the defendant, he may plead, levied by the ſheriff by virtue of a writ, and he has no need to ſhew the return of it. And *Gould* juſtice ſaid, that the moſt part of the caſes cited by Mr. *Broderick* were where the defendant was bailiff. And judgment was given for the plaintiff.

Ante 617.

(*a*) Vide Gilb. replevin 72, 73, 75, 76.

(*b*) Vide Gilb. replevin, 72, 73, 77.

Gidley *verſ.* Williams.

S. C. 12 Mod. 443. rather differently reported Salk. 37.

THE plaintiff as adminiſtratrix of *Richard Gidley* brought debt upon bond, and declared as adminiſtratrix of her huſband; but in the body of the declaration ſhe did not allege that adminiſtration was committed to her, but at the end of the declaration *profert literas adminiſtratorias praedicti Richardi mariti ſui per quas ſatis liquet*, &c. Upon *non eſt factum* pleaded, and verdict for the plaintiff, Mr. Serjeant *Carthew* moved in arreſt of judgment, 1. That it did not appear that the obligee died inteſtate. 2. That it is not

A verdict cures the omiſſion of ſuch allegations only, the ſubſtance of which muſt have been proved upon the trial. Semb. acc. 3 T. R. 25. Vide ante 109 and the books there cited and Com. Pleader C. 87. 2d ed. vol. 5. p. 60. In an action by a man as adminiſtrator the neglect of ſhewing that adminiſtration was granted to him will be fatal upon demurrer. But no advantage can be taken of it after the defendant has pleaded. Vide ante 408. and the books there cited. poſt. 1441.

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ſhewn that adminiſtration was granted to her. 3. There is no *profert* of the letters of adminiſtration; for it is a *profert* of letters of adminiſtration of her huſband, as if her huſband had granted them, and not of the goods of her huſband, as it ought to be. And as to the firſt, it was argued by him laſt *Michaelmas* term, and by Sir *Bartholomew Shower* this term; that there is a difference, where an action is brought by an adminiſtrator, and where againſt an adminiſtrator; for in the latter caſe the precedents are, *qui obiit inteſtatus ut dicitur*, but in the former caſe poſitively: but all the precedents are that it ought to be ſo. As to the ſecond, that if the plaintiff was not adminiſtratrix, a recovery by her in this action will not be a bar in another action brought by the rightful adminiſtrator; and therefore ſhe ought to ſhew herſelf to be adminiſtratrix, to intitle her to her action. And that ſuch defect will not be aided by the verdict, becauſe a verdict cannot ſupply that which did not come in iſſue upon the trial, and adminiſtratrix or not, could not be queſtioned upon the trial upon the iſſue of *non eſt factum*. 2 *Ventr.* 84. 1 *Sid.* 228. So an executor or adminiſtrator brings an action in right of the teſtator, as debt for rent due in the life of the teſtator, and the defendant pleads *non detinet*, the plaintiff is not bound to prove his adminiſtration; but for rent due in his own time, and *non detinet* pleaded, there the (*a*) verdict would have aided this fault in the declaration, becauſe the jury could not have found for him, unleſs he had been proved to be adminiſtrator.

(*a*) Vide Sty. 282.

And it was held by the whole court, that for the want of ſhewing, that the adminiſtration was granted, it would have been ill upon demurrer. 1 *Sid.* 228. They ought to ſhew by whom the adminiſtration was granted, to the end that it may appear to the court; for it may be committed by a peculiar, and then (*b*) the plaintiff ought to ſay, *cui commiſſio adminiſtrationis de jure pertinuit*, or *loci illius ordinarium*; ſo if the adminiſtration was committed by the archbiſhop, they ought to ſay, that the inteſtate had *bona notabilia* in divers dioceſes. Indeed if it was committed by the ordinary, he having the power of committing adminiſtration of common right, one (*c*) has no need to ſay *de jure pertinuit*, &c.

(*b*) Vide Cro. El. 879. pl. 9. 6 Mod. 241. Com. 17.

(*c*) R. acc. Cro. El. 879. pl. 9.

2. It was held, that this was not aided by the verdict, becauſe it was not to be proved upon the iſſue of *non eſt factum*.

Then a queſtion was made, whether the defendant had not admitted the plaintiff to be adminiſtratrix by pleading in chief. And for this Mr. *Broderick* for the plaintiff cited 1 *Roll. Abr.* 791. *Bro. monſtrans des faits*, 82. *variance*, 59. 36 *Hen.* 6. 32. *Cro. Car.* 209, 240. 3 *Leon.* 178. *Yelv.* 129. *Hob.* 232. *Moor* 885. 2 *Sid.* 60. *Owen verſ. Holden*, 1 *Ventr.* 212. And *Holt* chief juſtice this term delivered the opinion of the court to be, that the declaration is made good by the plea in bar of the defendant, at common law. For in a declaration matters have no need to be ſhewn ſo

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ſpecially and certainly as in a plea in bar. In *Hob.* 38. *Cope v. Lewen*, the want of *profert* of the letters of adminiſtration is held matter of ſubſtance, and there are many like caſes. But in 1657 in the common pleas between the lord *Mohun* and *Arthur* (which caſe he ſaid he had a report of in a tranſcript of ſome reports which were in the cuſtody of the lord chief juſtice *Bridgman*) in *aſſumpſit* brought by an executor, he declared generally as executor, but did not produce the probate; and upon *non aſſumpſit* pleaded and verdict for the plaintiff, it was moved in arreſt of judgment, and this exception taken, and the caſe of *Cope v. Lewen* and other caſes cited; but the lord chief juſtice *Hale*, then a judge of the common pleas, ſaid that it had been held otherwiſe ſince the caſe of *Cope v. Lewen*, and that the plea in bar had cured the ſaid fault. And in *Stile* 106. *Clementſon v. Mountford*, both the exceptions taken in this caſe are over-ruled. But if this were not good at common law, yet they held it good ſince the *Oxford* act 16 & 17 *Car.* 2. *c.* 8. *ſ.* 1. for the ſaid act having enumerated many matters of form, as the *profert* of letters of adminiſtration, has theſe general words, and all other matters of like nature; which will extend to ſalve many imperfections of the ſame nature in the declarations. And judgment was given for the plaintiff.

Ingram *verſ.* Bernard.

S. C. 3 Salk. 49.

After the forfeiture of a bond the penalty is the only debt therein which can be attached under a foreign attachment. Vide 1 Sid. 317. pl. 7.

DEBT upon a bond conditioned to perform an award; the caſe was, that the award was, that the defendant ſhould pay money ſuch a day; and he pleaded a foreign attachment in *London* iſſued the ſame day that the money was payable by the award, and that by virtue thereof they attached the money in his hands the day after, which was the day after that on which the money was payable by the award. And exception was taken to this plea, becauſe at the time that the money was pleaded to be attached, the day of payment by the award (which is now parcel of the condition of the bond) was paſſed, and the bond forfeited; and ſo the penalty of the bond was due, and not the money awarded, and therefore that ought to have been attached, and not the other. It was argued for the defendant, that the attachment was awarded upon the very day, though it was not executed until the day after; and that it was their cuſtom to attach *denaries in manibus*, and not the penalty. The court were of opinion, that the plea was ill. And *Holt* chief juſtice ſaid, that it would have been a good plea to an action of debt upon the award, but not to debt upon the bond, the penalty of the bond being due by the failure of payment of the money

money awarded upon the day; and therefore that ought to have been attached, for after the bond is forfeited, the money contained in the condition cannot be attached. If the attachment had been executed, before the bond had been forfeited, it had been well; but though it was attached, yet until it was executed, the defendant might pay the money to whom he would; and therefore not paying it according to the award, he forfeited his bond. And judgment was given for the plaintiff. *Ex relatione m'ri Jacob.*

INGRAM v. BERNARD.

Anonymous.

MR. *Herring* moved for a prohibition to ſtay ſuit by a woman in the ſpiritual court, where the wife libelled in the ſpiritual court for calling her huſband cuckold. And he cited *Cro. Car.* 111. 1 *Sid.* 248. where prohibitions have been granted in like caſes. But the court ſeemed to doubt of it upon the general queſtion; but they took a diſtinction between ſuits by *baron* and *feme*, which the caſes cited were, and this caſe of a ſuit by a wife alone. And in this caſe they clearly denied a prohibition. *Ex relatione m'ri Jacob.*

A woman may ſue a man in the ſpiritual court for calling her huſband cuckold Vide poſt. 1287. ante, 508. Com. Prohibition. G. 14. 2d. Ed. vol. 4. p. 507.

Oſwald *verſ.* Sir Hugh Everard.

A Libel was exhibited againſt the plaintiff in the eccleſiaſtical court for ſeveral ſcandalous offences. And he came, and moved the king's bench for a prohibition, upon a ſuggeſtion that they were pardoned by the laſt general act of pardon, being committed before. *E contra* it was anſwered, that they were excepted in the ſaid act by the exception of adultery, extortion, and any other enormous crime, committed by any perſon in holy orders, *&c.* Therefore they ordered the articles to be read, which appeared to be for the ſolicitation of the chaſtity of women, drunkenneſs, and other notorious crimes. *Holt* chief juſtice ſaid, that upon the act of the firſt of *Elizabeth*, upon which the high commiſſion court was founded, where power is given to the eccleſiaſtical commiſſioners to puniſh, *&c.* many crimes mentioned there, and all enormities whatſoever, a queſtion was made, whether adultery was not an enormity within the ſaid act? And it was held, that it was not, *Cro. Car.* 114. becauſe it was puniſhable by the Ordinary. But this caſe differs from the ſaid caſe, becauſe adultery is mentioned in the exception, and ſo the act takes notice of it to be an enormous crime. And if adultery be an enormous act, ſolicitation of the chaſtity of women, and the like brutiſh actions, are ſuch alſo. If the words had been enormous crimes, generally, it might have been reaſonable, to have conſtrued this act like the act of 1 *El.* but adultery being mentioned, it is otherwiſe. Where endeavours were uſed to debauch women,

The words "enormous crimes" will not *generally* include the crime of "ſoliciting the chaſtity of women." But in a ſtatute taking notice of adultery as an enormous crime, they will.

Oswald v. Everard.

women, it was held proper for the high commiſſion court, as one may find in 12 *Co.* 20. and *Cro. Car.* 114. This ſuit then being before a competent judicatyre, they ſhall proceed to ſentence; and if there be occaſion, the plaintiff may move for a prohibition afterwards, or he may appeal. And the prohibition was denied. *Ex relatione m'ri Jacob.*

Rex *verſ.* Everard.

S. C. Salk. 195. Holt, 173.

The 33 Ed. 1. ſt. 6. is ſtatute.

A caption repreſenting a preſentment to have been made at a court capable of taking, is good, though it ſtates that ſuch court was held with a court incapable.

If a caption ſtates the year of the king in which it was taken, it need not ſtate the year of our Lord. Vide poſt. 794.

And an improper ſtatement of it will be only ſurpluſage.

A ſtatement of it in Engliſh figures is improper. Vide poſt. 794.

A Preſentment at a court leet for erecting of a cottage, &c. contrary to 31 *El. c.* 7. *ſ.* 1. being removed into this court by *certiorari*, Mr. *Williams* took ſeveral exceptions to it:

1. That it was ſaid, and did not lay four acres of land to it according to the ſtatute *de terris menſurandis*, 33 *Ed.* 1. *ſt.* 6. and not ſaid, or ordinance; whereas it was not a ſtatute but an ordinance only. And for this he cited *Cro. Jac.* 603. But the court, over-ruled this exception, and held that it was a ſtatute.

2. That the caption was, *ad curiam viſus franci plegii cum curia baron*, and ſo it did not appear at which of them it was made, and the one of them not having authority to take ſuch preſentment, therefore it is ill. And for this he compared it to the caſe of *Valconbridge*, *Stile*, 228. where the caption of an indictment was before juſtices of aſſize, gaol delivery, and *oyer* and *terminer*; and becauſe it was not ſhewn by virtue of which commiſſion in particular it was taken, it was quaſhed. And he cited a caſe between the king and *Ayers*, 2 *Keb.* 139. where a preſentment in ſuch form was quaſhed. And *Gould* juſtice cited 10 *Ed.* 4. 15. *a.* where a preſentment was *ad magnam curiam T. B. cum leta tentam*, &c. and it was quaſhed, becauſe it did not appear at which of them it was. But *per Holt* chief juſtice, where there are ſeveral commiſſions, each of which has authority to proceed in a matter, and their manner of proceeding is different, the indictment ought to ſhew, before which of them it was taken. But here one of the courts only has juriſdiction in the matter, and therefore though they were both held together, it muſt be taken before thoſe who had authority to proceed in it. The words here are, *cum curia baron*, which do not imply, that the preſentment was made at the court baron, but only that both courts were held together. If it had been *ad curiam baron*, the objection had been ſtronger. The caſe of *Ed.* 4. is ill, becauſe the preſentment is applicable to the *magna curia*, the juriſdiction of which nobody underſtands, nor what court it is. And as to the caſe, it might be becauſe the matter was not preſentable at either. And *Gould* juſtice ſaid, that the caſe of *Ayers* was ruled for the ſaid reaſon, for it was not preſentable at the leet, becauſe it was not a

(a) Vide 1 Inſt. 736. 5 Vin. 367.

public

public nuſance, nor at the court baron, becauſe it was a private right.

3. That the *anno domini* was in *Engliſh* figures. But becauſe the year of the king was in words at length, it was held certain enough, and the year of our lord was only ſurpluſage. And therefore the motion denied. *Ex relatione m'ri Jacob.*

REX v. EVERARD.

Anonymous.

S. C. ſaid to be per cur. 12 Mod. 442.

UPON a motion for a new trial in an action for a ſeaman's wages, *Holt* chief juſtice ſaid, that if the ſhip be loſt before the firſt port of delivery, then the ſeamen loſe all their wages; but if after ſhe has been at the firſt port of delivery, then they loſe only thoſe from the laſt port of delivery. But if they run away, although they have been at a port of delivery, yet they loſe all their wages. *Ex relatione m'ri Jacob.*

Vide Molloy, b. 2. c. 7. 10. poſt. 739 Dougl. 520. Mackarell v. Simmons. B. R. T. 16 G. 3. 12 Mod. 408.

Horne *verſ.* Lewin.

S. C. 12 Mod. 352. Salk. 583. Fort. 233.

REplevin. The defendant made conuſance as bailiff to Mr. *Pullein*, for that Sir *Hugh Smithſon* ſeiſed of the place where, &c. in fee, granted a rent charge of 100*l.* *per annum*, payable half yearly by two equal portions to Mr. *Pullein*, iſſuing out of the place where, &c. *inter alia*; and for the arrears of one year he took the cattle in the place where, as a diſtreſs. As to 50*l.* parcel of the 100*l.* in arrear ſuppoſed, &c. the plaintiff pleaded in bar of the avowry, that the defendant took the cattle of his own wrong, *abſque hoc* that any thing was in arrear; and concluded with an averment. To which plea in bar the defendant demurred ſpecially, and ſhewed for cauſe, that it wanted form, and that it ought to have been concluded to the country, and that no iſſue was to be joined upon it, &c. And to the other 50*l.* the plaintiff pleaded in bar of the avowry, that he was really all the laſt day of payment upon the land at the moſt notorious place, &c. to have paid it, but that no perſon came on the part of Mr. *Pullein* to receive it, *et quod adhuc paratus eſt*, &c. *et profert in curia* the 50*l.* rent, *et petit judicium et damna ſua occaſione captionis et detentionis averiorum praedictorum ſibi adjudicari*, &c. Upon which the defendant comes and ſays, that for that that the plaintiff hath confeſſed the ſaid 50*l.* to be unpaid, and hath brought it into the court, he taketh it out of the court; and *proteſtando*, that the plaintiff was not ready at the day, &c. for the plea to have his damages he ſaith, that he after the laſt day of payment, *viz.* &c. demanded the ſaid 50*l.* &c. and therefore becauſe they were not

A plea to an avowry for rent that no rent is in arrear ought to be pleaded generally and conclude to the country, a plea de injuria with a traverſe, or that the rent is in arrear, concluding to the court, is informal. S. C. 3 Salk. 273. 356.

If rent be tendered at the day upon the land. Q. What demand muſt be made to warrant diſtreſs for it afterwards? Vide 18 Vin. 483. pl. 4. 8. 9.

A man cannot proceed for damages upon a plea of tender after taking the money out of court. R. acc. poſt. 774. D. cont. Imp. B. R. 3d. Ed. 192. and vide Str. 1027.

On a plea of tender to an avowry for rent the plaintiff need not bring the money into court. D. acc. Bull. Ni. Pr. 60. Vide Com. 568. Attending on the land to pay rent will not deſtroy the right to diſtrain, unleſs a tender of payment is actually made.

paid,

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paid, &c. he prays his damages, &c. To which replication the plaintiff demurred, &c. And it was argued by Mr. *Cheshyre*, Mr. serjeant *Hall*, and Mr. *Mulso*, at several times, that the plea in bar as to the first 50*l.* was ill, because the plaintiff ought to have pleaded directly, *riens arrere*, which was the general issue. *Maynard's Ed.* 2. 50. *Fitzh. cessavit*, 28. *issue*, 9. *avowry*, 217. *Long*, 5 *Ed.* 4. 65. *Bro. trespass*, 206. *Fitzh. trespass*, 160. 17 *Ed.* 3. 58. And he ought to have concluded to the country. That this amounts but to the general issue, and therefore that being shewn for cause upon the special demurrer, it was informal and bad. Against which it was argued by Mr. *Raymond* and Mr. *Broderick* for the plaintiff, that the plea was well enough notwithstanding the said exception. And they admitted, that when the plea is a full negative to the material part of the declaration, &c. the defendant or plaintiff respectively, &c. ought to conclude to the country; but where *absque hoc* may be well taken, which is tantamount to a negative, the defendant or plaintiff ought to rejoin to it, or to reply to it, and offer an issue. *Dier*, 353. *a. pl.* 29. 2 *Anders.* 6. 101. 121. From whence the question will be, whether the plaintiff can plead in bar of an avowry of rent *prisal de son tort demesne sans ceo que riens fuit in arrete?* For if such plea can be pleaded, the conclusion in this case will be good; because it will be the same in conclusion with all other pleas which conclude with a traverse *absque hoc*. Where a title is pleaded, the plaintiff cannot reply *de son tort demesne* generally, *viz. absque tali causa*, but the title must be answered specially. *Cro. Jac.* 225. And as to this, there is no difference between an action of trespass and replevin. *Gouldsbor.* 52. *Broad v. Hendy*, in replevin. 2 *Saund.* 294. 2 *Keb.* 712. 735. *White v. Stubbs*, in trespass. But then the books that say that *de son tort demesne* generally is no plea where a title is pleaded or interest claimed, must be understood of general pleas *de son tort demesne absque tali causa*, and not of such pleas, where some material part of the plea of the adverse party is traversed. And that appears from *Cregate's* case, 8 *Co.* 67. where the rule is taken, that when the defendant in his own right, or as servant to another, claims an interest in the land, or to any common, or rent issuing out of the land, or to any way or passage over the land, &c. there *de son tort demesne* generally is no plea, where the *emphasis* is put upon the word *generally*, as appears by that which follows. But if the defendant justifies as servant, there *de son tort demesne* in any of the said cases with a traverse of the command, that being material, will *(a)* be good; which admits, that *de son tort demesne* with a traverse of the material part of the plea will be good; and no difference made between trespass and replevin. Now here, this plea in bar fully answers the avowry, and traverses the material part of it, of which the *de son tort demesne* is but inducement; but it

(a) Vide ante, 310

is

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is a proper inducement, and therefore good. And for caſes *Raymond* cited *Mich.* 5 *H.* 7. 2. *pl.* 3. *per Wood.* 1 *Roll. Rep.* 46. *Lee*'s caſe. *Raſt. Entr.* 557, 558. where to an avowry for rent by preſcription, *&c.* the plaintiff pleaded in bar, *priſal des overs de ſon tort demeſne*, and traverſed the preſcription; which proves that a plea *de ſon tort demeſne* with a ſpecial traverſe of a material point is good in replevin. Beſides which, they argued, that if this plea ſhould be adjudged ill for this reaſon, it would deſtroy all pleas *de ſon tort demeſne* with ſpecial traverſes. For here the plaintiff might have pleaded *riens arrere*, without having induced his plea by *de ſon tort demeſne*; ſo in all caſes, where a man may plead *de ſon tort demeſne*, and traverſe ſome material part of the plea of the adverſe party, he may *(a)* alſo deny the ſaid material part directly, and not induce it with *de ſon tort demeſne*; and yet without doubt a man may plead in many caſes *de ſon tort demeſne*, and traverſe a material part of the plea of the adverſe party, and ſuch pleas have always been held good. Wherefore, *&c.* But notwithſtanding this, the whole court were of opinion, that the plea was bad for this reaſon; for though it is the ſame thing in effect with a plea of *riens arrere*, yet *riens arrere* is the proper plea in bar of an avowry, and is *quaſi* a general iſſue; and here the plaintiff has gone round about to introduce it, where he ought to have pleaded it directly. It is but form, but it is legal form, which the law will have to be followed, and whereof advantage ſhall be taken upon a ſpecial demurrer, as well as of pleading ſpecially that which amounts to the general iſſue. The caſes cited are upon ſpecial pleading, where it is proper to induce a traverſe by a plea of *ſon tort demeſne.* But in this caſe it drives the avowant to an inconvenience, in compelling him to make a replication, where the plaintiff ought to have pleaded his plea of *riens arrere*, and concluded to the country. And for theſe reaſons all the court held this plea in bar of the avowry to be ill.

(a) Vide 2 T. R. 442.

Then it was argued by Mr. *Raymond* and Mr. *Broderick* for the plaintiff, that the replication to the bar to the avowry was ill, for the plaintiff having pleaded a tender at the day of the rent, and that no perſon was ready to receive it, this was a good bar of the damages. 6 *H.* 4. 4. 38 *Ed.* 3. 3. 13. *Debt*, 178. and the avowant ſhall not be intitled to have damages, without making a new demand; but if a new demand be legally made, that will turn it upon the grantor of the rent, or tenant, to pay the rent; and if he does not do it, he ſhall be liable to pay damages: But ſuch demand ought to be made to the perſon, and upon the land; and demand to the perſon without being upon the land, or upon the land and not to the perſon, will not be ſufficient. 7 *Co.* 28. *Maund*'s caſe. If the terre-tenant tenders a rent ſeck upon the land at the day, and no body is there,

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the grantee cannot demand upon the land in the abſence of the perſon, nor of the perſon off from the land; not upon the land, becauſe the tenant is not bound to be there, he having tendered it at the day; not of the perſon only, becauſe he is not bound to carry ſo much money about with him. But if it be demanded of the perſon upon the land, then if it is not paid, the tenant ſhall pay damages and coſts. 2 *Roll. Abr.* 427.

Againſt which it was argued for the avowant, that a man may diſtrain for arrears of rent without any demand; and that the difference is, between a re-entry for non-payment of rent, or a *nomine poenae*, there a demand ought to be of the rent at the day; but in caſe of diſtreſs the demand may be at any time, and the diſtreſs itſelf is a demand. *Hob.* 207. *Crawley v. Kingſmill.* But to this point no reſolution was given by the court. See *Cro. El.* 828. *Cro. Car.* 76. *Hob.* 8.

Another exception was taken by the plaintiff's counſel, that the avowant could not proceed for damages, becauſe he has taken the money out of court. For where judgment ought to be given for the thing itſelf, the acceptance of it ſhall be a bar to the plaintiff from the recovery of damages for detaining of it. *Keilw.* 20. *Dyer*, 227. And for this *Co. Lit.* 207. *Hob.* 199. where it is ſaid, that if upon a tender pleaded the plaintiff will not receive the money, but takes iſſue upon the tender, and it is found againſt him, the money is loſt for ever. And in 21 *Ed.* 4. 25. *pl.* 15. it is held, that if the plaintiff traverſeth the tender, the (*a*) defendant ſhall have his money again; becauſe the plaintiff's intent is, to make the whole obligation forfeited, and he has refuſed the money by matter of record, and taken another iſſue at his peril. 22 *Ed.* 3. 5. The bringing of money into court is conditional, *viz.* that if the plaintiff accepts it, it ſhall be in full ſatisfaction. *Cro. Jac.* 126. *pl.* 13. *Harold v. Clotworthy.* In debt upon bond with condition for payment of a leſs ſum, the defendant pleaded a tender and *touts temps priſt*; the plaintiff received the principal ſum in court, and judgment was given to acquit the defendant of the ſum received; and the plaintiff to have damages, alleged a demand of the money of the defendant; and upon demurrer it was adjudged for the plaintiff (which is falſe printed, as appears by the reaſon given, and it ought to be the defendant) where it is ſaid, that if he would have had damages, he ſhould not have received the money, but have ſuffered it to remain in court, for after judgment *quod eat inde ſine die* no iſſue ſhall be taken. Therefore here the avowant having taken the money out of court, cannot proceed afterwards, but has abated his whole avowry; becauſe it is in a manner intire, ſince he ought to have return of all the cattle.

(*a*) Vide Sect. 1027.

E contra

E contra it was argued by the avowant's counsel, that he may proceed notwithstanding the taking of the money out of court. For it would be absurd, that it should lie in court, only to the intent that the officer should have the interest of it, and to no purpose can it lie in court, since he agrees that it was due. And for this *Co. Entr.* 595, *Aston. Prec. Debt*, 271. *Rast. Entr.* 159. *Liber placit.* 159. *Rast. Entr. Mesne, pl.* 7. are express in point, that a man may proceed after taking of money out of court. And the reason of the case in *Cro. Jac.* 126. is because the judgment was entered, *quod eat inde sine die*. But all the times this point was stirred, *Holt* chief justice seemed to be strongly of opinion, that the avowant could not proceed for damages, after taking the money out of court. For though in (*a*) debt upon a single bill acceptance of the money pending the plea is no plea, because it is no plea to a specialty; yet when the money is brought into court, and taken out by the plaintiff, such acceptance is entered upon record, and therefore will bind the plaintiff. Besides, that the avowant ought to have return of the cattle, if the court be of opinion for him, which cattle ought to be returned to the plaintiff upon payment of the rent, &c. though return irrepleviable had been awarded. 2 *Inst.* 341. *Cro. El.* 162. 2 *Leon.* 174. *Annesley v. Johnson.* But here the rent is received before. And the principal judgment in replevin is to have a return, for no damages were given until the statute of *H.* 8. Besides, that the reason of the case in *Cro. Jac.* 126. is in point. For upon taking of the money out of court judgment ought to be entered, *quod* the defendant *eat inde sine die*; and if the plaintiff agrees, that such judgment shall be given, he ought not to meddle with the money; and therefore where a defendant pleads *touts temps prist*, and brings the money into court, and concludes with a prayer of judgment as to the damages; if the plaintiff takes the money out of court, he must agree to all that the defendant has said, otherwise he ought not to take the money out of court; for a man cannot proceed for damages, after he has barred himself from the having judgment for the principal, where the damages are merely accessory, except in the case of ejectment, where the term expires pending the suit. But as to this point the other three judges seemed to doubt, and they gave no opinion, but rather inclined to be of opinion, that the avowry was not abated by this taking of the money out of court.

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(*a*) Vide 4 Ann. c. 16. s. 12.

But the whole court were of opinion, that the bringing in of the money into court in this case was superfluous; for though in debt upon bond with condition to pay the money, if the defendant pleads a tender with *adhuc paratus*, he ought to bring the money into court, because it is parcel of the demand; yet here in replevin the defendant must avow the taking of the cattle, and whether the money be

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paid or not, is not the queſtion, but whether the diſtreſs was rightly taken or not; if it was, the avowant ought to have return; if not, the plaintiff ought to have damages. And they all held, that the bar to the avowry was ill pleaded. 1. Becauſe it is pleaded with a *paratus*, where it ought to be pleaded with an *obtulit*, &c. 2. Becauſe it is pleaded in bar, where it ought to be pleaded only in excuſe of damages. 1 *Ventr.* 322. *Oſborn v. Beverſham.* [See *Raym.* 418. *Crouch v. Folſtoffe.* 8 *Aſſiſ. pl.* 37. *Bro. touts temps priſt*, 25.] But if the tender had been well pleaded, it would have chaſed the avowant to ſhew a demand to intitle him to the diſtreſs. But here the plea in bar not amounting to a tender, it is ill; and therefore the bringing in of the money, and the taking of it out, is ſuperfluous. And judgment ſhall be upon the avowry for a *returno habendo*. And judgment was given for the avowant accordingly.

An avowry for a rent charge need not enumerate all the lands out of which the rent was granted. R. cont. 155.

Note, that in a caſe between *Horne* and *King*, which was in replevin for a diſtreſs taken for other arrears of the ſame rent granted by Sir *Hugh Smithſon*, and avowry for it, as in this caſe above, exception was taken to the avowry, that the rent was ſaid to be granted out of this place *inter alia*, and it may be that the grantee of the rent has purchaſed the other lands, and then the rent ſhall be ſuſpended, and the grantee cannot diſtrain for it; therefore the grant ought to be ſhewn in the avowry intire, to the end that the plaintiff may ſhew, if there was any ſuch purchaſe, &c. And of this opinion *Holt* chief juſtice ſeemed at firſt to be. But afterwards, *Hil.* 11. *Will.* 3. the avowry was held good, notwithſtanding the ſaid exception. And judgment was given there for the avowant. And therefore the ſaid exception was not moved in this preſent caſe. See *Co. Intr.* 590. 6 *Co.* 39. *H. Finche's* caſe. 5 *Co.* 59. 1 *Co.* 54. 143. *Hearne's Pleader*, 744, 761. 1 *Saund.* 189. 2 *Saund.* 195. *Thompſ. Entr.* 273, 276. *Winch. Entr.* 951. 970. 1013. where a difference ſeems to be made, where the grant of the rent charges it upon a manor, or cloſe, or intire thing, and where it charges it upon divers things. And upon *oyer* of the deed prayed, the plaintiff might well plead purchaſe, &c.

Hockley

Hocklêy *verſ.* Lamb.

Intr. Hil. 9 Will. 3. B. R. Rot. 430.

A claim of common in a field a tempore fractionis campi is bad, even after verdict eſtabliſhing the claim, on account of the uncertainty of the word fractionis.

TReſpaſs for his cattle taken. The defendant juſtifies the taking of them *damage feaſant* in his freehold. The plaintiff replies, and makes title to common in the place where, &c. *tempore fractionis campi* (it being a common field) until, &c. And upon traverſe of the common taken by the defendant, and iſſue joined upon it, a verdict was found for the plaintiff for the common. And it was ſeveral times moved in arreſt of judgment, that it was inſenſible and uncertain what common was here claimed; for a *fractione campi* is a word of the country perhaps, but the law does not underſtand what it means. And of that opinion was *Holt* chief juſtice. But *Gould* juſtice held, that upon a demurrer it would have been ill, but now it is good after verdict. But *per Holt* chief juſtice the verdict cannot aid a thing unintelligible; for it has only found the common, as the plaintiff has replied. *Sed adjournatur.*

Easter Term

13 Will. 3. B. R. 1701.

Sir John Holt *Chief Justice.*

Sir John Turton
Sir Littleton Powys
Sir Henry Gould
} *Justices.*

Lane *verſ.* Sir Robert Cotton and Sir Thomas Frankland.

Intr. Paſch. 10 Will. 3. B. R. Rot. 403.

S. C. Com. 100. 11 Mod. 12. Salk. 17. Holt 582, with the arguments of counſel, Carth. 407. and very much at large, 12 Mod. 482. Pleadings 2 Mod. Ent. 108.

The head of a public office under government with power to appoint and remove the ſervants of the office who are to be paid by, and give at his diſcretion ſecurity to government is not reſponſible to an individual for a loſs occaſioned by the default of ſuch ſervants. R. acc. Cowp. 754.

THE plaintiff brought an action upon his caſe againſt the defendants as poſt-maſter general, for that, that a letter of the plaintiff's, being delivered into the ſaid office, to be ſent by the poſt from *London* to *Worceſter*, by the negligence of the defendants in the execution of their office, was opened in the office, and divers exchequer bills therein incloſed were taken away, *ad damnum*, &c. Upon not guilty pleaded, this caſe was tried before *Holt* chief juſtice at *Guildhall* in *London*, and a ſpecial verdict found there.

The jury found the act of 12 *Car.* 2. *c.* 35. of the erection of the general poſt-office, and that a general poſt was eſtabliſhed purſuant to it between *London* and *Worceſter*: they find the act of 1 *Jac.* 2. *c.* 12. which conſolidates the eſtates in fee and in tail in the ſaid office in the king; that the defendants were conſtituted poſt-maſter general by letters patent of the king that now is, bearing date the firſt year of his reign under the great ſeal of *England*, purſuant to the ſaid act of 12 *Car.* 2. *c.* 35. and that by the ſaid patent they had power to make deputies, and to appoint ſervants, at their pleaſure, and to take ſecurity of them, but in the name, and to the uſe of the king, and that the de-

The poſt-maſter general is not anſwerable for a packet delivered the receiver at the Poſt office and loſt out of the office. S. C. 5 Mod. 455. R. acc. Cowp. 754. But the receiver is. D. acc. Cowp. 765.

The ſervant who is guilty of the default, is.

fendants

fendants ſhould obey ſuch orders as they ſhould receive from time to time from the king under the ſign manual, and as to the management of the revenue, that they ſhould obey the orders of the treaſury, and farther that the king granted to them, that they ſhould not be chargeable, to account for the miſmanagement or default of their inferior officers, but only for their own voluntary defaults; and farther the king granted to them the ſalary of 1500*l. per annum* out of the profits ariſing out of the office, *&c.* that the office was kept in *London*; that the plaintiff being poſſeſſed of eight exchequer bills, incloſed them in a letter directed to *John Jones*, at *Worceſter*, and delivered it to *Underhill Breeſe* the receiver of the letters at the poſt office; that *Breeſe* was appointed by the defendants to receive the letters at the office, and was removable by the defendants, but received his ſalary out of the revenue of the ſaid office by the hands of the receiver-general; that the letter was opened in the office by a perſon unknown, and the bills were taken away; *et ſi, &c.*

This caſe was argued ſeveral times at the bar by Sir *Bartholomew Shower*, Mr. *Northey*, and Mr. *Pratt*, for the plaintiff; and by ſerjeant *Wright*, the ſolicitor general *Hawles*, and the attorney general *Trevor*, for the defendants. And now this term the judges pronounced their opinions in ſolemn arguments, *viz. Turton*, *Powys*, and *Gould*, juſtices, that judgment ought to be given for the defendants: and *Holt*, that judgment ought to be for the plaintiff.

Gould juſtice ſaid, that at firſt he was of opinion with the plaintiff, and now upon great conſideration he had changed it. And he founded his preſent opinion upon conſideration, 1. Of the deſign of the act, and nature of the office, which is ſtiled in the act a letter office, and not regarded there as an abſolute ſecurity for diſpatches, but for promotion of trade in procuring ſpeedy diſpatches. If a letter had barely miſcarried, the defendants could not have been chargeable for it; for though there is property in a letter, yet it is not a valuable property, for which a man ſhall recover damages. Letters in their nature are miſſive, and tranſient from hand to hand, and therefore difficult, if not impoſſible, to be ſecured. And therefore he denied the aſſertion at the bar, that the action would lie for the miſcarriage of a letter, like *Yelv.* 63. where it is held, that the value of the bond is that of the debt, not of the wax and paper. Which determines this caſe, becauſe the exchequer bills being incloſed in a letter (though they are bills of credit,) yet are eſtimable only as a letter. For whatſoever is carried by the poſt, has the denomination of a letter.

2. If

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2. If any thing can support this action, it must be a contract expressed or implied; but here is neither the one nor the other. The security of the dispatches depends upon the credit of the office, as founded upon the act. *Breese* is as much an officer as the defendants, but they are more general officers. But *Breese* is the king's officer, and if there is any contract, it is between the plaintiff and *Breese*; which appears by the act, which appoints several acts for all, and puts confidence in all. And therefore they resemble a community of officers acting in several trusts; and every one shall answer for himself, not one for the act of another; as in case of a dean and chapter, 1 *Edw.* 5. 5. *a.* If the defendants had died, yet *Breese* would have continued officer; and therefore *Breese* has a charge and trust of himself, and is not a deputy to the defendants.

3. This office is founded in government, and reposed in the king; and it cannot be answerable for defaults, but the remedy is, upon application to the king to procure the officer to be turned out. *Dier*, 238. In the act, *par.* 10. and 15. penalties are imposed upon the post-master general for default in his office, so that the parliament has provided punishment, and did not intend, that he should be liable to actions. In *par.* 7. the act appoints the delivery of letters, &c. brought by masters of ships, &c. from beyond the sea to the deputies of the post-master; which shews that the act did not intend, to charge the post-master general. And the inconvenience recited to have happened before by miscarriage of letters, *par.* 6. seems to shew, that no action lay for the miscarriage of a letter; and then this act did not design to give a greater security by any other means than by alteration of the method.

4. It is inconsistent with the nature of the thing, that the post-master general should be liable, because they could not give caution of the receipt of a letter to be sent by the post, as the master of a ship, inn-keeper, or carrier, may of the receipt of goods. Besides, that this office is so extensive, and requires such a number of servants, &c. speed in conveyance, journeys by day and night, when there is no guard in the country: and therefore it resembles the case of piracy, which is *damnum fatale*. 4 *Co.* 84. Robbery a good plea for (*a*) a factor, because he is obliged to expose the goods to sale, and hath them not in safe custody, as a bailee hath. An inn-keeper shall (*b*) not answer for a horse of a guest put to grass by his order for the same reason. *Plowd.* 308. *b*, gives the reason, why a (*c*) parol promise shall not bind without consideration, because it passes lightly from a man without deliberation. So here, all is done in a hurry, and then a letter may easily be taken away and the plaintiff is no stranger to these difficulties.

(*a*) D. acc. post 918. R. acc. 8 Co. 32. b.
(*b*) Semb. acc. ante 264. Vide com. action on the case for negligence. b. 1. 2d ed. vol. 1. p. 210, 211.
(*c*) V. de Furt. 1669. 167 1.

and the Chief Baron's opinion in Rann v. Hughes delivered in Dom. Proc. 14th May 1778.

5. Ob-

5. Objection. 1 *Vent.* 190. 238. Anſwer. The reaſons of the ſaid caſe do not hold here. For here the defendants have only a ſalary for executing of part of the office. It is the recompence that binds the contract. Now that is properly, where it is variable according to the hazard; but here the reward is ſettled, and ſo ſmall that it is not proportionable to the hazard. As to the ſecond reaſon given there, that the maſter is an officer; that is not the only reaſon, though the action would not lie, if he was a ſervant. 3. The poſtmaſter-general cannot give caution for the receipt of a letter.

6. The truſt is only to carry letters. And therefore *Breeſe* having received exchequer bills, which are treaſure, *Breeſe* has exceeded his authority (admitting that the defendants were chargeable by the act of *Breeſe*) and therefore the defendants are not liable. 9 *H.* 6. 53. *b.* *Cro. Jac.* 468. *Doct. & Stud.* 137. *F. N. B.* 71. *f.*

7. If this action lay, it would be of very miſchievous conſequence, becauſe it would expoſe the defendants to all the frauds of the merchants men. As a man might rob the mail of that which he himſelf put into a letter, and afterwards bring an action and recover it, *&c.* And many of the ſame reaſons were agreed by the other two judges, who argued for the defendants.

Powys juſtice agreed, that if ſuch an office had been erected at common law by a private man for gain, an action would have lain at common law againſt him for a miſcarriage. *Hob.* 17. *Cro. Jac.* 330. 1 *Sid.* 36.

He differed from *Gould* juſtice as to the matter of exchequer bills; for he held, that they were not treaſure, but bare bills of credit; and that the word packets in the act was general, and could not be confined to any particular ſort of things more than another. And therefore jewels (by him) might be ſent by the poſt in packets.

3. He obſerved, that the parliament in aſſeſſing the price had regard only to the ſize or weight, and not to the value, as how many ſheets or ounces; which argues, that the parliament did not intend that the poſtmaſter-general ſhould be anſwerable for them, if they were loſt.

4. He held, that an action would lie againſt *Underhill* *Breeſe*, and therefore the plaintiff is not without remedy.

5. The

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5. The expreſs words of the patent are, that the defendants ſhall not anſwer for the default of the inferior officers.

6. The defendants have not the power of the management of the office according to their diſcretion, are but ſubject to the controul of the king and of the treaſury. And becauſe the inferior offices are ſervants of the king, and not of the defendants, their wages being paid to them out of the revenue of the poſt-office, and the ſecurity taken of them in the name of the king; and therefore it is unreaſonable, that the defendants ſhould be anſwerable for the acts of the inferior officers. But it would have been otherwiſe (by him) if the office had been farmed.

Turton juſtice added, that this office was not deſigned for the conveyance of things of value, and therefore it would not be material, whether exchequer bills were treaſure or not, if they were valuable.

2. Exchequer bills were newly invented, and not known at the time of the making of the act, and therefore could not be intended to be within it.

A maſter of a ſhip may reimburſe himſelf out of the mariners wages for a loſs happening by their negligence.

3. He cited a record out of *Molloy*, 24 *Ed.* 3. *n.* 45. that the maſter may reimburſe himſelf out of the wages of the mariners, if the loſs happened by their negligence; which would diſtinguiſh the caſe of the maſter of a ſhip from this of the poſtmaſter-general.

No action lies againſt a public officer for the loſs of any thing lodged officially in the office, if perſons over whom he has no controul have a right of acceſs to the office.

4. He cited the caſe of *Herbert v. Pagett*, *Raym.* 53. 1 *Sid.* 77. where it was held, that an action would not lie againſt the *cuſtos brevium*, for ſo negligently keeping of the records, that a particular record was loſt; becauſe other clerks beſides his had acceſs to the office. And here there are many perſons who have acceſs to the poſt-office. And for theſe reaſons theſe three judges held, that judgment ought to be entered for the defendants.

Holt chief juſtice *e contra* argued, that judgment ought to be given for the plaintiff. And he ſaid, that he would not make it any part of the queſtion, if a letter was broke open upon the road, whether the poſtmaſter-general ſhould be chargeable for it; but he would confine himſelf to the preſent queſtion, where a letter was delivered at the office to the proper officer appointed to receive it, and there loſt, whether in ſuch caſe the poſtmaſter-general ſhall be liable. And he held, that he ſhould, for theſe reaſons.

1. Becauſe

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1. Becauſe the poſtmaſter is by this act intruſted with the intereſt and property of the ſubject, to the end that no damage may accrue to him; which is implied by the making him an officer. The act appoints one general letter office to be erected in *London*, and the care thereof is committed to the poſtmaſter-general; who, his deputies and ſervants, ought to have the management ſolely of the poſt-office. So that all the perſons concerned are as his deputies. And by the nature of the truſt he ought ſafely to keep all letters there at his peril in his cuſtody. This caſe does not differ from the caſe of the marſhal of the king's bench, or warden of the *Fleet*, who are obliged ſafely to keep the priſoners at their peril; and it is no plea for them, that traitors broke the priſon againſt their will. 33 *H.* 6. 1. And the law was ſo at common law in caſe of damages recovered in treſpaſs *quare vi et armis*, and when the ſtatute 25 *Ed.* 3. *c.* 17. made the body liable to execution for debt, the gaoler ought to keep ſuch, as ſafely as defendants condemned for damages in treſpaſs *vi et armis*. The ſame law, if goods levied upon a *levari facias* (which was the only execution before the ſtatute gave a *fieri facias*) in execution were reſcued from the ſheriff, he was liable to an action. The ſame law of a man in execution upon the ſtatute of 13 *Ed.* 1. *ſt.* 3. *de mercatoribus*. The ſame law, if upon an *extendi facias* upon a ſtatute merchant the goods of the conuſor taken by the ſheriff were reſcued from him. And there is no difference between this caſe of the poſtmaſter-general, and the gaoler, ſheriff, &c. for he ought ſafely to keep the letters delivered to him, as the others ought ſafely to keep their priſoners, or goods taken in execution.

2. The ſubject ought to pay a *premium* for the carriage, to him who makes it his employment. And when a man takes an employment upon him, to receive the goods of the ſubjects, and receives a *premium* for it, that (*a*) is ſufficient to charge him to anſwer the loſs at all adventures, for ſuch loſſes as happen within the realm. *Cro. Jac.* 188. *Hob.* 17.

(*a*) Vide Burr. 2300. 2302.

Objection by *Gould* juſtice. That this office is founded in government.

Anſwer. If he means, that it is founded by the law; he could not agree his inference, becauſe it is only founded by a different ſort of law, *viz.* the one by common law, the other by ſtatute law, which cannot make a difference. And he did not ſee in what ſort of goverment it was otherwiſe founded, but only that a truſt is given for the benefit of the ſubject.

Objection

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Objection by *Goula* juſtice. That ſuch charge ought to be by ſome ſort of contract.

Anſwer. He denied that any contract was neceſſary, to charge the defendants; but it is like the caſes, where officers by courſe of law receive goods for the benefit of others, they are obliged to keep them ſafely by them, ſo that they may have the benefit of them.

Objection. The defendants received no *premium* from the plaintiff.

Anſwer. The plaintiff gives a *premium*, which intitles him to a remedy; and againſt whom ſhall he have it, if not againſt the public officer, againſt the poſtmaſter-general, by whoſe negligence he ſuffers. 2. The defendants received a *premium*, *viz.* a ſalary of 1500*l.* *per annum* (which is a ſufficient reward) paid out of the profits of the office. And therefore this caſe is not diſtinguiſhable from the caſe of *Mors v. Slue*, 1 *Ventr.* 190. 238. *Raym.* 220. in which caſe the objection was, that the maſter of the ſhip did not receive the freight to his own uſe; but yet adjudged, that he was liable for the goods of which the ſhip was robbed in the river: and the reaſons given were, 1. becauſe he was an officer known; 2. becauſe he received his ſalary out of that which was paid for freight; both which reaſons hold in this caſe.

Objection. The maſter of the ſhip might take caution, *&c.* the poſtmaſter-general cannot.

Anſwer. He did not know how the maſter of the ſhip could take caution, *&c.* It was ſaid in the caſe of *Mors v. Slue*, that if a man came to lade goods at an unſeaſonable time, he was not obliged to take them in, as before he was ready to ſail. But if he takes them in before, and they are loſt, he will be liable to an action. So a common carrier may refuſe to admit goods into his warehouſe, before he is ready to take his journey; but yet neither the one nor the other can refuſe to do the duty incumbent upon them by virtue of their public employment.

A common carrier may refuſe to receive goods before he is ready to take his journey.

3. This caſe is within the ſame reaſon and equity upon which the caſes are founded, in which men are chargeable for negligent keeping; and this is the reaſon, that if they ſhould not be charged without aſſigning a particular neglect, they might defraud any man, as he would not be able to prove it; and that is the reaſon of the caſes of carriers, *&c.* And this reaſon is given in *Juſtinian*, *lib.* 4. *tit.* 5. *Minſinger. Comment. fol.* 5617. Such matter is tranſacted among

among a multitude of people, and therefore no particular of them can be charged; and therefore the officer ought to be charged, who chuſes ſuch inferior officers. The caſe of *Mors v. Slue* was harder, becauſe there the ſervants were overcome by a ſuperior force.

Objection. The common carrier may ſue the hundred, the poſtmaſter-general cannot ſue any body.

Anſwer. That is no reaſon, becauſe a carrier was chargeable before the ſtatute of *Winton*, at which time he could (*a*) not ſue the hundred. Beſides, that he is liable, where he has no remedy againſt the hundred; as for goods loſt out of his warehouſe, or out of his waggon in the yard.

(*a*) Vide 2 Will. 92. 1 T. R. 73.

Objection. The innkeeper is only chargeable for goods in his cuſtody within his inn, and not for a horſe put to graſs, and therefore it differs from this caſe.

Anſwer. Here the letter was within the walls of the poſt-houſe. But the caſe of the innkeeper is ſtronger, becauſe he obliged, while he has room, to let in all travellers. But *e contra* of the poſtmaſter-general, who may chuſe his deputies and ſervants.

Objection. The innkeeper has people up all the night in the inn.

Anſwer. And the poſtmaſter-general alſo in the poſt-office.

Objection. The caſe of Sir *Henry Herbert* and Mr. *Paget*, 1 *Sid.* 77. *Raym.* 53.

Anſwer. There *prima facie* they held the defendant chargeable, but afterwards they were of opinion for the defendant, that he was not chargeable, becauſe the clerks of Mr. *Henley* had liberty to enter into the treaſury without his conſent, and ſo the acceſs to the records was not confined to his ſervants only. But here no body could enter into the poſt-office but the ſervants of the defendants only. This caſe differs from the loſs of a letter upon the road, but to that he gave no opinion; for a carrier receives goods, ſafely to keep, and ſafely to carry; but the poſtmaſter-general receives the letters, ſafely to keep and ſend; ſo that there may be a queſtion, whether the poſtmaſter ſhall be chargeable, when he has ſafely ſent the letters out of the office. But admit that he ſhould not be liable, when the poſt-boy is robbed upon the road; yet it will not follow, that he is

not

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not chargeable for letters taken out of the office. In the case of *Morse v. Slue*, if the ship had been at sea, the master would not have been liable; yet it does not follow, that he shall not be chargeable for a loss at land. If a man comes to an inn, and orders the innkeeper to put his horse into the stable, being hot, and to let him cool, and then to put him to grass; because the innkeeper should not be chargeable, if he were stole after he is put to grass, it does not follow from thence that he should not be chargeable, if he be stole before be be turned to grass, whilst he is in the stable.

4. It is the duty of the postmaster to receive exchequer bills, and to send them by the mail. For he ought to receive such packets as are proper to be sent by the post; and such are exchequer bills.

An action lies against a farrier for refusing to shoe a horse, when he has time. D. acc. Keilw. 50 a. pl. 4. Against an innkeeper for refusing a guest when he could have accommodated him. D. acc. Dyer, 158. b. pl. 32. Godb. 246. 1 Vin. 227. F. pl. 1. 3 Bl. Com. 166. Vide Keilw. 50. a. pl. 4. Against a carrier for refusing to carry goods when he could have taken them; or against a sheriff for refusing to execute process. D. acc. 3 Bl. Com. 165. Semb. acc. Moor, 432.

1. If a man takes upon him a public employment, he is bound to serve the public as far as the employment extends; and for refusal an action lies, as against a farrier refusing to shoe a horse, against an innkeeper refusing a guest, when he has room, against a carrier refusing to carry goods, when he has convenience, his waggon not being full. He had known such action brought, and a recovery upon it, and never disputed. So an action will lie against a sheriff, for refusing to execute process. The same reason will hold, that an action should lie against the postmaster, for refusing to receive a letter, *&c.*

2. Exchequer bills are proper to be sent by the post. The act does not confine it to any specific thing, but generally of packets. It appears, that the act intended that other things should be sent by the post, as well as letters. By the words of the act, deeds and other things. Also exchequer bills are light. And a pearl necklace of 1600*l.* value may be sent by the post.

Objection. Exchequer bills are new things created by act of parliament.

Answer. A new interest created by a subsequent statute will (*a*) be under the same remedy as a thing in *esse* before of the same nature. And one may as well say, that trover or trespass will not lie for them, because they are new things. Bills of exchange might have been sent by the post, and exchequer bills are like to them. A bill of exchange payable to a man or bearer is a lawful bill of exchange, and may be sent by the post, as well as one payable to a man or order.

(*a*) Vide ante 459. 4 Co. 4. a.

Objection.

Objection. That the poſtmaſter will not be chargeable for bills of exchange loſt, becauſe they are excepted out of the act, that nothing ſhall be paid for them.

Anſwer. That the letter ought to be intended to be written for the ſake of the bill, and therefore payment of the letter is payment for the bill. As where a man comes to an inn, he ſhall pay nothing for the keeping of his goods; yet the advantage which the innkeeper hath by the preſence of the gueſt, makes him liable.

3. Exchequer bills are not excepted, and therefore ſhall pay poſtage.

4. The defendants being public officers are chargeable, though they had no benefit; as the ſheriff, though (a) he has no fees for ſuing of executions. For where the law gives a man cuſtody of a thing *virtute officii* it obliges him to keep it ſafely. And therefore upon the reaſon of *Southcote's* caſe, 4 *Co.* 83. *b. Cro. El.* 8. 5 *pl.* 4. if goods are delivered to a man to be ſafely kept, and he accepts them, he (b) ſhall be chargeable if they are loſt. An officer accepts ſuch things as come to him *virtute officii* upon this truſt, and therefore he (c) ſhall be chargeable for them if they be loſt; and one cannot put a caſe of a public officer to the contrary. The opinion in 4 *Co.* 83. *b. Cro. El.* 815. *pl.* 4. of a general bailment, is (d) not law; for upon a general bailment the (e) bailee ought to keep them only as his own.

(a) Sed vide 29 El. c. 4. ſ. 1.

(b) Vide poſt. 918, 919. D. acc. Co. Litt. 89. a.

(c) Vide Barr.

(d) D. acc. poſt 915.

(e) D. acc. poſt. 913, 914, 915, 916. Vide Co. Litt. 89. a. 13th. Ed. n. 9. 89. b. 13th. Ed. n. 4.

5. Before the 12 *Car.* 2. *c.* 35. any one might have erected a poſt-office, and ſuch erector had been liable for miſcarriage; and therefore this poſtmaſter is liable alſo; for now the act having prohibited the ſubjects to employ any other but this poſtmaſter-general, it would be hard to deprive them of the remedy which they had before.

Objection. The plaintiff has a remedy againſt *Breeſe*.

Anſwer. If it could be proved that *Breeſe* took out the exchequer bills, he agreed that it was ſo; likewiſe any ſtranger that took them out might be charged as a *tort-feaſor*; but *Breeſe* cannot be charged as an officer for neglect: for miſfeaſance of a deputy an action will lie againſt him, but that is not *qua* officer, but *qua tort feaſor*. And according to this is the difference between a negligent and a voluntary eſcape. A gaoler is liable to an action for the latter, but not for the former. This office is manageable only by them, their deputies and ſervants, and what is done by a deputy, is done by the principal; and reaſonable, becauſe

A gaoler is liable to an action for a voluntary eſcape. For a negligent one not.

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becauſe the principal may remove the deputy at pleaſure, though he puts him in for life; for it is contrary to the nature of a deputy, not to be removeable. *Hob.* 13. *Moor*, 856. A deputy may forfeit the office of the principel; as if he does ſuch acts as would be a forfeiture in the principal. 39 *H.* 6. *c.* 34.

Objection. *Dyer*, 238.

Anſwer. It is (by him) directly contrary to the purpoſe for which his brother *Gould* cited it.

Objection. This will be to make the defendants reſponſible here for the ſervants of the deputies.

Anſwer. If a deputy has power to make ſervants, the principal will be chargeable for their misfeaſance, becauſe the act of the ſervant is the act of the deputy, and the act of the deputy is the act of the principal. But here *Breeſe* is the ſervant of the defendants themſelves.

Objection. The defendants are but fellow ſervants with *Breeſe*, becauſe all receive their ſalaries from the king.

Anſwer. He is appointed by the defendants, and is their ſervant, and removeable by them, though they do not pay him his wages. But then ſuppoſe that *Breeſe* is not a ſervant of the defendants, then it will be ſtranger againſt the defendants, for then *Breeſe* will be as a ſtronger, and then they will be the rather liable, the act appointing them to manage the office by their ſervants.

Objection. *Powys* juſtice compared the defendants to a captain of a company; and he ſhall not be chargeable for the cowardice of his ſoldiers, no more ſhall the defendants for the negligence of *Breeſe*, admitting him to be a ſervant.

The captain of a company of ſoldiers is reſponſible for any thing occaſioned by the cowardice of his ſoldiers.

Anſwer. If *A.* received a particular damage by the cowardice of the ſoldiers of a captain, he ſhall be chargeable; but in ſuch caſe the prejudice is national. But the maſter of a ſhip is liable for the neglect of his mariners.

Objection. The act did not intend that the defendants ſhould be chargeable.

Anſwer. He was of a contrary opinion, becauſe all the power is placed in the poſtmaſter-general. And when a ſtatute erects a new office, and places it under ſuch circumſtances,

stances; as in consequence of law make the officer liable; it must be presumed to have been their intent, that he shall be chargeable.

2. It appears by the words of the act, that they intended that the dispatches should be safe.

3. It appears by the act, that it was the judgment of the parliament, that they were liable for the faults of the deputy. *par.* 3. It is provided that the post-masters general, and their deputies, *&c.* Then *par.* 10. a penalty of 5*l.* is imposed upon the post-master, if there be a failure of furnishing with post-horses; from whence it appears, that the parliament looked upon the fault of the deputy to be the fault of the post-master.

Objection. This will ruin the office.

Answer. It will make them more careful.

Objection. This will encourage frauds.

Answer. The method to prevent them is to make the post master liable.

Objection. The plaintiff might have sent his exchequer bills by some other means.

Answer. That will not excuse the defendants; no more than it will be an excuse to an inn-keeper, that his guest, who has lost his goods, might have gone to another inn.

Objection. The *premium* limited by the act is too small.

Answer. The defendants have accepted the office upon those terms.

Objection. The patent is, that they shall observe the orders of the king under the sign manual, and the orders of the treasury concerning the revenue.

Answer. The observance of the orders of the treasury will not interrupt their care of the letters; and if a prejudice happen by observance of the king's orders, that will not excuse; because they are obliged to observe the most convenient methods for the execution of the office according to the directions of the act, and the patent cannot excuse them in any neglect of that.

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Objection. There is a clause in the patent, that the post-masters shall not be answerable for a fault in their deputy, but only for their own act.

Answer. That is only intended of imbezzlement of the revenue by their deputies, and as to that the said clause will excuse them; but it will not excuse them from any remedy that the subject hath against them for this benefit by the law. And no *non-obstante* in such case will avail, nor any charter of exemption. And for these reasons he concluded, that judgment ought to be given for the plaintiff, but the other three judges being of a contrary opinion, judgment was given for the defendants. But however, the plaintiff intending to bring a writ of error upon the said judgment, the defendants seeing that, paid (*a*) the money to the plaintiff, as I was informed.

(*a*) Vide. Cowp. 759.

Parker *verſ.* Kett.

S. C. Salk. 95. Holt 221. More at large 12 Mod. 466.

5 Mod. Cases 108

IN ejectment brought for lands in *Treſingham* in *Norfolk*, on the demiſe of *Charles Kett*, the cauſe was tried before *Holt* chief juſtice of the king's bench; and he making ſome difficulty in the point of law ariſing upon the evidence, he reſerved it as a point for his conſideration, and afterwards gave order that it ſhould be argued *in B. R.* to have the opinion of all the judges of the ſaid court. And it was argued accordingly ſeveral times, by Mr. *Williams* and Mr. *Weld* of one ſide, and Mr. *Broderick* and Mr. *Northey* of the other ſide. And now the chief juſtice pronounced the opinion of the whole court. The caſe was thus: *Charles Kett*, copyholder in fee of the lands in queſtion, held of the manor of *Reſwick* in *Norfolk*, made his will, and thereby deviſed the lands in queſtion to the defendant, *Elizabeth* his wife, for her life, remainder to his ſon *Charles* the leſſor of the plaintiff in tail, remainder to his wife in fee. Mr. *Samuel Keck* the maſter in chancery was conſtituted ſteward of this manor by patent, to exerciſe the ſaid office by himſelf, or his ſufficient deputy; by virtue of which power *Keck* made *Oſman Clerke* his deputy ſteward, and he had executed the ſaid office many years. *Charles Kett* the father being ſick, ſent to deſire *Oſman Clerke* to come to him, to take a ſurrender of theſe lands to the uſe of his will; but *Clerke* not being able to come himſelf, by writing under his hand and ſeal appointed *Thacker* and *Ballaſton* to be his deputies jointly and ſeverally, only to take this ſurrender. Accordingly *Ballaſton* took the ſurrender of *Charles Kett* out of court to the uſe of his will. And at the next court, which was after the death of the ſurrenderor, this ſurrender was preſented before *Oſman Clerke*; and *Elizabeth Kett*, the defendant,

The ſteward of a manor may authorize a man to take a ſurrender out of court. S. C. Com. 84. and ſo may his deputy. S. C. Com. 84. Vide 1 Leon. 288. A deputy may do whatever his principle might have done. D. acc. poſt. 1582. Except make a deputy, and cannot be appointed with leſs power. Sed vide Cro. El. 48. pl. 2. But a deputation to do a particular act will make a man ſervant pro hac vice. A deputy may act in his own name. S. C. 3 Salk. 124. D. cont. 12 Mod. 690. The acts of one who is a ſteward de facto though not de jure, are good. Vide Com. Copyhold. C. 5. 2d ed. vol. 2. p. 489.

tant, was admitted by *Osman Clerke*. Upon which *Charles Kett* demised these lands to the plaintiff, in order to bring an ejectment to try the title; supposing that this surrender was void, being taken by the deputy of a deputy-steward out of court, &c.

But *Holt* chief justice declared, that all the judges of the king's bench were of opinion, that this surrender was a good surrender. And in delivering this resolution he said, that two questions had been made in the arguments at the bar.

1. Whether *Ballaston* had a good original authority to take this surrender?

2. Supposing that he had not, yet whether this defect was not cured by the intention of the law, or by subsequent acts?

And as to the first point they held, that *Ballaston* deriving his authority from a writing under the hand and seal of the deputy-steward, had a good original authority. For where an officer has power to make a deputy, such deputy (when he is created such) may do any act, that his principal might do; and less power he cannot have. *Hob.* 12. *Norton v. Sims*, in case of an under-sheriff; which case goes farther, because there the covenant that the under-sheriff should not execute any execution for more than 20*l.* without the special warrant of the high-sheriff, was held void, because it was repugnant to the nature of the deputation. Then here if the steward could have given such a power (and that was never doubted, but that he might have impowered a man to have taken a surrender out of court; and such person is not a deputy, having only power to do one single act, whereas a deputy by the nature of the deputation has power to do all acts) *Osman Clerke* as deputy for the reasons aforesaid might do the same thing. And it is but the common case of under-sheriffs, who have power to make bailiffs, and to send process all over the kingdom, and that only by virtue of their deputation.

Objection. That the case of the under-sheriff is not parallel, because he acts in the name of the sheriff; but here *Clerke* has acted in his own name.

Answer. It is necessary, that the under-sheriff act in the name of the sheriff, because the writs are directed to the sheriff, and therefore acting under the said writs, he must make use of the name of the sheriff. But here the deputy-steward has a general power, and therefore it is not requisite that he do the acts in the name of *Keck*. But

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Coomb's case 9 *Co.* 76. *b.* may be objected, where it is held that he who acts as attorney, ought to use the name of his principal; but it will be good, as it is done here; for in *Coomb*'s case the point of the case was otherwise determined, for there the surrender was made by the attornies in their own name; and there being sufficient authority, it will be good, though it is not so regular and formal. But the entry should have been, *A.* the copyholder, by *B.* and *C.* his attornies, surrendered, *&c.* for the act of the deputy is the act of the principal; and all the entries in the king's bench upon record are, *A. per B. atternatum suum, queritur, &c.* and if that had been done in this case it had been more formal, but yet this is substantial.

Objection. Farther, in *Coomb*'s case the authority was recited, which is not done here, but he seems to act as principal, whereas he ought to have shewn his deputation by way of recital in the appointment. But notwithstanding this objection, it is good. For where a man does such an act, as cannot be good by any other means but by virtue of his authority, it (*a*) shall be intended to be an execution of his authority; but where a man has an interest and authority, and does an act without reciting his authority, it shall be intended to be done by virtue of his interest. 6 *Co.* 17. Sir *Edward Clere*'s case. So here the constituting of *Ballaston* by *Osman Clerke* as his attorney will be good by his authority, without reciting it, because otherwise it would be of no avail. Besides, that a deputy may hold a court either in his own name as deputy-steward, or in the name of the steward, and so for the same reason he might make this appointment in his own name. But it is objected farther; that he calls them deputies in this appointment, *&c.* and a deputy connot make a deputy, nor can a deputy be made to do any single act.

(*a*) Vide Cont. Priar c. 4. 2d. ed. vol. 4. p. 412.

Answer. It appears sufficiently, what *Clerke* meant, *viz.* that they should be his servants. And there are also words large enough in the appointment, to comprehend it. And the case in *Cro. Eliz.* 533. rules it; for the reason there was, because he was a servant, and the deputy of a ministerial officer may appoint a servant. And therefore for these reasons they all held the surrender to be originally good.

2. They held, that admitting that the authority originally was defective, yet they were sufficient stewards *de facto*, and the surrender for that reason good. Doubtless a steward *de facto* may take a surrender. Then such steward is no other, than he who has the reputation of being steward, and yet is not a good steward in point of law. Now here *Clerke* was a good deputy. Now suppose, that he had made *Thacker* and *Ballaston* deputies absolutely, which would have been

been void; yet it would have given *Thacker* and *Ballaſton* the reputation of being good ſtewards; and a ſurrender to them, and a preſentment afterwards in court, and admittance made accordingly, would be good. The caſe of *Knowles v. Luce*, *Moore* 109, 110. is a caſe ſtrong in point. The caſe there was; there were two joint ſtewards, one of them held a court, and took a ſurrender, and it was held good; now one of them could not act alone, but yet being named in the patent, it gave a colour and reputation to the thing; there *Manwood* delivered the opinion of the court, and ſaid that there was a difference between a copyhold granted by a ſteward who has a colour and no right to hold a court, and a ſteward who has neither colour nor right; for if a colourable ſteward aſſembles the tenants, and they do their ſervice, the acts are good that he does, as an under ſteward after the death of the chief ſteward, or the clerk of the lord of the manor who holds court without the contradiction or diſturbance of the lord, though he has no patent, nor any expreſs authority to be ſteward; and the reaſon is this, becauſe the tenants are not obliged to examine the authority of the ſteward whether it be lawful or not, nor is he compellable to give account of it to them. Now in this caſe *Thacker* and *Ballaſton* without doubt had an authority as a good as the deputy of a dead ſteward or the lord's clerk. And this is agreeable to the reaſon of the law in other caſes, as a (*a*) legal act done by an executor *de ſon tort* will bind the rightful executor. 5 *Co.* 30. *b.* and yet he is but an executor *de facto*; and if the rightful executor bring trover againſt him, he ſhall recover only ſo much in damages, as he has adminiſtered unduly; and the reaſon is, becauſe the creditors are not bound to ſeek farther than him who acts as executor; therefore if an executor *de ſon tort* pays 100*l.* of the teſtator's in a bag to a creditor, the rightful executor ſhall not have trover and converſion againſt the creditor. There is alſo the caſe of the biſhop of *Oſſory*, *Cro. Jac.* 554. 2 *Roll. Rep.* 101. 130. *Palm.* 22. that if a biſhop *de facto* in poſſeſſion grants inſtitution, and thereupon induction is had, it will make a plenarty; and yet there can be but one biſhop of one dioceſe; but by reaſon of the appearance and colour, which he in poſſeſſion hath of being biſhop, all judicial acts done by him are good. And he concluded with the caſe of 1 *Leon.* 288. of the lord *Dacres* which is ſtronger; for the underſigning of the copy in the ſaid caſe by the lord *Dacres* ſignified nothing, being after the grant, and could amount to no more than a declaration of his conſent or at moſt to a confirmation, but could not amount to a grant; and a releaſe or confirmation of copyhold lands is of no avail in law, unleſs the copyholder be in by admittance, 4 *Co.* 25. *b.* but it was neceſſary, it being a voluntary grant, which without ſuch conſent or confirmation had been void. Then if the grant by the ſteward's ſervant (which

(*a*) Vide com. adminiſtrator, C. 3. 2d ed. vol. 1. p. 266.

was

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was the case of the lord *Dacres*) in court was good; this surrender taken out of court, and afterwards presented in court, and admittance made in pursuance of it, will be good also. And a rule was made, that the verdict, which was given for the plaintiff for his security in this case, should be set aside, and that the defendant should have her costs.

Intr. Pasch. 13 Will. 3. B. R. Rot. 253.

Thorpe *verſ.* Thorpe. *Ante* 235.

S. C. Salk. 171. Holt 96. at large Holt 29. Lut. 249, with the arguments of counsel; and particularly at large. 12 Mod. 455. Arguments of counsel Com. 98. Pleadings in Lutw. 245. post. vol. 3. 341.

The release of an equity of redemption is a good consideration for a contract. Vide Bl. &c. Cowp. 294. Com. Action on the case upon assumpsit B. 2d ed. vol 1. p. 138. Q. Whether in a deed relating to a particular subject general words shall be confined to that subject or taken in a general sense. Vide ante 235. and the cases there cited. Com. Parols. A. 23. 2d ed. vol. 4. p. 338. On a contract where by one party agrees to do an act in consideration whereof the other agrees to pay a sum of money, the performance of the act is a condition precedent to the right to demand the money. Vide Com. Condition b. 1. 2d ed. vol. 2. p. 441. Burr. 809. 1 Term. Rep 645. But if a day had been fixed for the payment of the money, and the act could not have been done until afterwards, the money might have been demanded on the day. Vide Com. Pleader c 55. 2d ed. vol. 5. p. 47. 1 Term Rep. 642. A declaration ought to state at large the performance of whatever appears to have been a condition precedent to the right of bringing the action. But if it contains a general averment of performance, no advantage can be taken of the want of such statement after the defendant has pleaded.

ERROR of a judgment *in C. B.* In *assumpsit* the plaintiff declares, that 19 *Jan.* 1693. the defendant held of the plaintiff certain lands *per modum mortgagii*, and that there was a discourse between the plaintiff and defendant concerning the said mortgage, and that the plaintiff should release his equity of redemption, and thereupon the plaintiff agreed to make a good and sufficient release of his equity of redemption *in consideration cujus* the defendant agreed to pay the plaintiff 7*l.* and that the defendant in consideration of the agreement aforesaid, and that the plaintiff would perform his part of the agreement, assumed to perform his; and assigned for breach, that although the plaintiff had performed *omnia in agreamento illo contenta ex parte* of the plaintiff to be performed, nevertheless the defendant had not paid the 7*l.* and then there is another count of *indebitatus assumpsit pro relaxatione aequitatis redemptionis* of the plaintiff, &c. To which the defendant pleaded, that after the making of the said promise, *viz.* 29 *July* 1694, the plaintiff released to the defendant and *Heale* all and all manner of actions, suits, causes and accounts, debts, duties, reckonings, sum and sums of money, and demands whatsoever, which the said *John* had or might have against the defendant and the said *Heale* for any matter cause or thing whatsoever. The plaintiff prayed *oyer* of the release; and it appeared to be made between the defendant and *Heale* of the one part, and the plaintiff of the other, bearing date the 29 *July* 1694, and recited, that whereas the plaintiff had surrendered to the use of the defendant by mortgage certain copyhold lands, and had also surrendered to the use of *Heale* in the same manner, a capital messuage, and certain other lands, the plaintiff released to the defendant and *Heale* all provisos and conditions in the said deeds, writings, and surrenders mentioned and contained, and also by the said deed for ever acquitted and released all his estate, right as well in law as in equity, equity of redemption, title,

claim

claim, and demand whatſoever to the ſaid lands, meſſuage, and all and ſingular the premiſſes, and every of them; and that he the ſaid plaintiff by the ſaid writing remiſed, releaſed, and for ever quit claimed, to the defendant and *Heale*, their heirs, executors, adminiſtrators, and aſſigns, all and all manner of actions, ſuits, cauſes, and accounts, reckonings, ſum and ſums of money, and demands whatſoever, which the plaintiff at any time had, &c. And after *oyer* the plaintiff demurred. And after argument judgment was given for him in the common pleas. [As ſee before, 235.] And it was argued ſeveral days by Mr. *Peere Williams* and Mr. *William Cowper* for the plaintiff in error, and Mr. *Raymond* and Mr. *Cheſhyre* for the defendant in error. And the counſel for the plaintiff in error argued, 1. That there was not here a ſufficient conſideration to maintain the *aſſumpſit*, becauſe the mortgagee after the condition broken has an abſolute eſtate in the land, and the common law does not take notice of the equity of redemption, which is a mere proceeding in chancery, and therefore the releaſe of it after the condition broken in the eye of the common law cannot mend the title of him, who had an abſolute title before, and of conſequence the releaſe of it is no conſideration. 2. Admit that the law will take notice of the equity of redemption that the mortgagor hath, and that it is a thing valuable; and conſequently the releaſe of it a valuable conſideration; yet in this caſe the plaintiff ought to have ſhewn, how he was entitled to ſuch equity of redemption becauſe it may be, that his equity of redemption was not valuable, and then a releaſe of it will not be a valuable conſideration; as if the mortgage was for the whole value of the land; or if this mortgage was made, that the mortgagee ſhould have the land, until he was ſatisfied his money by perception of the profits; in this caſe the mortgagor would have an equity of redemption, and yet it would not be valuable. But *Holt* chief juſtice ſaid, that (*a*) the laſt caſe would not be a mortgage; and all the court held, that without doubt a releaſe of an equity of redemption is a very good conſideration, and the common law will take notice, that the mortgagor has an equity to be relieved in chancery. See *Cro. Eliz.* 768. 2 *Bulſt.* 41. 2 *Ventr.* 214.

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(*a*) Vide 2 Bl. Com. 157.

2. It was argued by the counſel for the plaintiff in error, that this releaſe ſhall not be reſtrained by the recital, but ſhall be conſtrued as a general releaſe, and ſo the plaintiff in the original action barred by it. And for this was cited the rule taken in *Altham's* caſe, 8 *Co.* 148. *generalis clauſula, &c.* 9 *Edw.* 4. 4. *b. Bro. releaſe* 29. 19 *Hen.* 6. 4. *b. Plowd.* 289. *b.* and that every man's deeds ſhall be taken moſt ſtrongly againſt himſelf.

But againſt this it was argued by the counſel of the other ſide; that where there are general words all alone in a deed

of

Thorpe Thorne. of releaſe, they ſhall be taken moſt ſtrongly againſt the releaſor; but where there is a particular recital in a deed, as here, and then general words follow, the general words ſhall be qualified by the particular recital; and ſo it has been oftentimes adjudged. And to prove this were cited 2 *Roll. Abr.* 409. *pl.* 3. 1 *Saund.* 414. 1 *Anderſ.* 64. *Digg*'s caſe. 3 *Mod.* 277. *Cole v. Knight.* But to this point the court gave no opinion, though the judgment in the common pleas was given only upon this point.

3. The third matter, and which was principally urged by the counſel for the plaintiff in error was, that this action is not founded upon the making of the releaſe, but upon the promiſe to make it, and conſequently the plaintiff in the original action had right of action at the time of the promiſe made, and then the releaſe coming afterwards releaſed it, and was a good bar of this action. *March* 75. *Hob.* 88. *Cro. Eliz.* 343. All which books prove, that the cauſe of action aroſe upon the promiſe made. *Cro. Eliz.* 703, 889. *Cro. Car.* 19. But if it ſhould be admitted, that the cauſe to have this action aroſe upon the making of the releaſe, becauſe the releaſe was the conſideration of the money to be paid, and ſo this releaſe could not be a bar of it; yet the declaration will be erroneous, becauſe then the making of the releaſe being the conſideration to maintain this action, it ought to have been ſhewn how it was made ſpecially; and a general performance averred, as here, is not ſufficient; and conſequently the judgment of the common pleas is erroneous.

But againſt this it was argued by the counſel for the defendant in error. Of which opinion was the whole court. And *Holt* chief juſtice pronounced the reaſons of their opinion, and that judgment ought to be affirmed.

He agreed, that if the plaintiff could have an action upon this promiſe, before he made the releaſe; then this releaſe would bar the plaintiff. But *e contra*, if the plaintiff could not have had an action upon this promiſe before the releaſe made, then the plaintiff cannot be barred of his action by the releaſe made; becauſe the plaintiff will be entitled to his action only by the making of the releaſe, and before that no promiſe was broken by the defendant. *Cro. Jac.* 777. *Hancock v. Field.* A releaſe of all demands will not diſcharge a covenant before it is broken. 5 *Co.* 70. *Hoe*'s caſe. The queſtion then will be whether the plaintiff could have maintained his action againſt the defendant before the making of the releaſe.

Where there are mutual promiſes, it is not neceſſary, to aver performance of the conſideration.

It was objected by Mr. *Cowper*, that there are here mutual promiſes, and in ſuch caſe the one is the conſideration of the other, and then the plaintiff is not obliged to aver performance of his part.

Vide Com. Pleader. C. 54. 2d. ed. vol. 5. p. 46.

Anſwer

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Anſwer. That is true, but it depends upon the words of the agreement. If there had been a poſitive agreement, that the plaintiff ſhould releaſe, and that the defendant ſhould pay 7*l.* the plaintiff might have maintained an action, before he had made the releaſe. But here the promiſe is *in conſideratione cujus*, which makes the releaſe on the part of the plaintiff to be a condition precedent. He agreed the caſe of *Nichols v. Raynbred*, *Hob.* 88. where there are poſitive agreements. But if the agreement be, that the one ſhall do ſuch an act, and that for the doing thereof the other ſhall pay 10*l.* there the performance of the act is a condition precedent, and he cannot have an action againſt the other for the money before performance. 15 *H.* 7. 10. *b.* But this rule depends upon many diſtinctions.

1. If a day be appointed for payment of the money, and the day comes, before the thing, for which the money is to be paid, can be done; there, though the agreement be, to pay the money for the doing of the thing, yet the action may be brought for the money before the thing done; becauſe the agreement is poſitive, that the money ſhall be paid at the ſaid day. And agreeable to this is 48 *Ed.* 3. 2, 3. cited in 7 *Co.* 10. *b.* *Ughtred*'s caſe; though the caſe there is put more generally, for there the money was to be paid upon days certain, which would happen, or at leaſt might happen, before the ſervice was performed. To the ſame purpoſe are 1 *Vent.* 147. *Large v. Cheſhire.* 2 *Sauna.* 319. *Perdage v. Cole.*

2. Though a day certain be appointed for payment of the money, yet if the ſaid day is to incur after the time, in which the conſideration ought to be performed, for which the money ſhould be paid, the performance of the conſideration ought to be averred in an action brought for the money. So *W. Jon.* 218. *Ruſſell v. Ward*, ought to be underſtood. The caſe there indeed is intricate, but upon conſideration it proves that for which it is cited. And *Dier*, 76. *pl.* 30. is in point. There have been contrary caſes upon the authority of *Ughtred*'s caſe, and in *Roll. Abr.* 414, 415. there are ſeveral of them put together. The firſt caſe there is that of *Gurnell et al' v. Clerke*, upon a charter-party; and as the caſe is put there, *non conſtat* at what time the day of payment was to happen, before or after, &c. ſo that the caſe can be no great authority; but then the ſaid caſe, which was adjudged 7 *Jac.* 1 *C. B.* was afterwards in 9 *Jac.* 1. upon error brought *in B. R.* reverſed for this very reaſon, becauſe *pro tota tranſportatione* made a condition precedent. 1 *Bulſtr.* 167. The next caſe is that of *Layton v. Dixon*, 1 *Roll. Abr.* 415. *Mich.* 15 *Car.* 1. where *A.* covenants with *C.* that *B.* ſhall convey land to *C.* and *C. pro conſideratione praedicta* covenants to pay to *B.* 160*l.* there it is held,

Vide Com. Pleader. C. 53. 2d. Ed. vol. 5. P. 46.

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held, that *C.* is obliged to pay the money, although *B.* does not convey. But the ſaid caſe is not parallel to the caſe in queſtion, becauſe in that there is an expreſs covenant by *A.* that *B.* ſhall convey to *C.* and then *pro conſideratione praedicta* there muſt not be underſtood in conſideration of the conveyance, but in conſideration of the covenant of *A.* that *B.* ſhould convey. There is another caſe in the ſame page between *Vivian* and *Shipping*, which is a ſtrong caſe (as he ſaid) againſt his preſent opinion; and the ſame point in effect is ſaid to be adjudged, *Hil.* 11 *Car.* 1. between *Hayes* and *Hayes*. But the ſaid caſe of *Vivian v. Shipping*, as it is reported, *Cro. Car.* 384. is directly contrary; for there *Jones* and *Berkley* juſtices held, that it was a condition precedent, againſt *Croke*. And in the caſe of *Hayes v. Hayes*, as it is reported, *Cro. Car.* 433. there is no ſuch point.

He conſidered then the reaſonableneſs of the caſes, that are founded upon mutual remedies. And (by him) the bargain of every man ought to be performed as he underſtood it; and if a man will make ſuch an agreement, as to pay his money before he has the thing for which he ought to pay it, and will rely upon the remedy that he has to recover the ſaid thing, he ought to perform his agreement. But on the other hand, if his agreement was otherwiſe, there is no reaſon that he ſhould be compelled to give credit, where he did not intend it. And therefore if two men agree, the one that the other ſhall have his horſe, and the other that he will pay 10*s.* to him for the horſe; becauſe the one may have an action for the horſe, yet there is no reaſon that the other ſhould have an action for this money, before the horſe is delivered. Therefore (by him) it is very dangerous to admit proof of mutual promiſes, unleſs they are reduced to writing; for if upon diſcourſe *A.* and *B.* agree, that *A.* ſhall buy, *&c.* and *B.* ſhall ſell, *&c.* in evidence this ought not to be looked upon, but as a bare communication, *Dier*, 30. *pl.* 203. becauſe ſuch expoſition of mutual promiſes in ſuch caſe would be very dangerous to trade. Otherwiſe if it be put in writing, for then it ſhall be reckoned the folly of the purchaſer, to agree to pay his money, before he has the conſideration of it delivered to him. There is another caſe, 2 *Mod.* 33. *Smith v. Shelden*, againſt his opinion; where the plaintiff agreed to aſſign a term for years, *&c.* to the defendant, and the defendant *proinde* agreed to pay to the plaintiff 250*l.* and there the court held, that the action would lie, without averring performance, upon the authority of *Ughtred*'s caſe; without regarding the authorities now cited by him; and they alſo founded their judgment upon a caſe in *Stile*, 186. which is intirely different; for there is no truſt in the ſaid caſe, but two diſtinct acts are to be done, the performance of one of which does not depend upon the performance of the other; nor is one the reward of the

other

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other, for then there would be a dependance; but the one ought to do his part, and the other his. But it is otherwise where the one thing is the consideration of the doing of the other; as here the money ought to be paid in consideration of the release, and therefore the execution of the release is a condition precedent to the payment of the money; and so until such time as the release was executed, nothing was due, and therefore nothing could be released.

As to the objection to the declaration, that the plaintiff has not sufficiently averred, that he has made a release, &c. for he ought to have shewn how he had done it, to the end that the court might judge, whether it was done according to the agreement. He answered, that the declaration in this respect might have been better; but nevertheless the plaintiff has averred it in general, by saying, *quod performavit omnia in agreamento illo contenta ex parte sua performanda*, though not so formally. But then the defendant by pleading of the release has admitted that it was done, and aided this defect in the declaration. The plaintiff in his declaration ought to have shewn the time and place, when and where the release was executed, and how the equity of redemption was released; and for want of that, this declaration had been ill upon a demurrer. But now the defendant has admitted the declaration to be true, by his plea of the release. There are stronger cases than this of general declarations aided by pleading over. 3 *H.* 6. *c.* 8. 9 *H.* 6. *c.* 16. 18. *Pasch.* 23 *Car.* 2. *B. R. Bernard v. Mitchell.* 1 *Vent.* 114. 126. such a general declaration held good after plea pleaded; and the case *of Vivian v. Shipping*, 1 *Roll. Abr.* 415. *Cro. Car.* 348. aforesaid, is a case in point, that such general averment, *viz.* that the plaintiff had performed all things that were on his part to be performed, was good after plea pleaded. So here, there not being any duty or demand before the release was executed, the release cannot operate upon it. Therefore judgment was affirmed.

Freke *verf.* Thomas.

S. C. Salk. 39. Com. 110.

An administration during the minority of an administrator does not determine before the administrator attains the age of twenty one. R. acc. ante, 338. Vide Com. Administration. F. 2d. Ed, vol. 1. p. 450.

DEBT upon bond brought by administrator *durante minoritate* of an administrator. Upon demurrer to the declaration, Mr. *Comyns* for the defendant took exception, that it appeared upon the declaration, that he, during the minority of whom administration was granted to the plaintiff, was above the age of seventeen, and so the administration determined. That this case does not differ in reason from the case of an administrator during the minority of an executor, which determines at the age of seventeen, 5 *Co.* 29.

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29. nor from the case where a woman executrix under the age of seventeen marries a husband of the age of eighteen, nineteen, &c. For the only thing that the law considers, is the ability of the person to administer the estate of the dead, who ought to have the administration of it, which ought to be the same in both cases. And in *Vaugh.* 98. the rule of averment of the age of an administrator or executor to be under seventeen, is equally put of both. And the statute of distributions will make no difference, because an infant may find sureties, though he cannot be bound himself. *Sed non allocatur.* For *per Holt* chief justice, there is a difference between administration *durante minoritate* of an executor, and of another person; for an administrator during the minority of a residuary legatee ought to be understood to be during his legal minority. For the authority that the administrator hath, is given to him by the statute; and an infant hath not been adjudged a legal person, to be intrusted with the management of an estate. But an executor, who comes in by the act of the party himself, hath been adjudged capable to administer at seventeen. But the law in the exposition of a statute will not make such construction. And care is taken of the administration, by the commission of administration during his minority to his next friend. And this is the opinion of the civilians, and it has been held accordingly by commissioners delegates, And therefore judgment was given for the plaintiff.

Fox *verf.* Wilbraham.

Intr. Trin. 12 Will. 3. B. R. Rot. 323. On a covenant that a man had done or suffered no act to affect an estate, a breach "that he had been outlawed" ought to shew in what reign the outlawry was. Pleading cannot be amended after a demurrer and argument. Cont. Str. 954. Burr. 321, 322. Vide ante, 305. post. 679, 1 T. R 783.

COVENANT against the assignor of a term, upon a covenant that the lease was free from incumbrances, and that the assignor had not done nor suffered, &c. and the breach assigned was, that at the sessions held at *Chester*, 4 *Jac.* the defendant was outlawed. Upon demurrer the declaration was held ill, because it was not shewn, in the time of which king *James* the outlawry was. For *per Holt*, the pleading ought to be very certain, as to shew in what term the outlawry was; but this uncertainty of the king's reign was greater. Mr. *Cheshyre* for the plaintiff urged, that the time was immaterial; because if there was a record of outlawry at another time, the judges would certify it, and such certificate would be good. *Hob.* 179. 209. *Keilw.* 193. 1 *Brownl.* 51. 74. But nevertheless the declaration was for this exception held ill. But the court would have persuaded the defendant, to consent, that the plaintiff should amend; but he refused. Then the court gave day to Mr. *Cheshyre*, to search precedents, that they might grant an amendment without the defendant's consent. And at another day he said, that by the statute of 14 *Ed.* 3. the judges may amend

amend a word mistaken by the clerk; which by 8 *H.* 6. *c.* 12. was extended to the case in question, that this mistake was the clerk's in transcribing the record. And he cited *Cro. Car.* 147. *Holt.* The case there was after verdict: *Cheshyre.* The words of the act are, challenge of the party, which must be understood of a demurrer. *Holt contra.* Challenge of the party is for arrest of judgment. But it would be hard to spoil the defendant's demurrer, where he perhaps demurred for this cause. If the defendant should join issue, the plaintiff might amend. After error brought, after verdict he shall amend, or after a plea in abatement, because that is not final. And the amendment was denied, but the plaintiff had leave by the court to discontinue. *Ex relatione m'ri Jacob.*

Fox v Wilbraham.

Palmer *verf.* Stavely.

S. C. 12 Mod. 516. Salk. 24. Com. 115.

INdebitatus assumpsit for money had and received by the defendant for the plaintiff, to the use of the defendant. *Non assumpsit* pleaded. Verdict for the plaintiff. And now Mr. *Montague* moved in arrest of judgment, that the plaintiff had no cause of action, the money being received for the use of the defendant. Mr. *Branthwaite* and serjeant *Hall* compared this to the case of *Nosworthy verf. Wildman*, 1 *Mod.* 42. 2 *Keb.* 615. and said, that being for money received, it shall be intended that the defendant ought to use it, but that nevertheless he should be answerable to the plaintiff for it. 1 *Sid.* 306. *pl.* 15. where the plaintiff *assumpsit solvere*, instead of the defendant, and held good. That the words, to the use of the defendant, should be rejected after verdict, being inconsistent with the finding of the jury. *Holt.* We must reject the words that are insensible, and retain those that are sensible. Money received by the defendant for the plaintiff is good, and then the words, to the use of the defendant, must be rejected. And judgment was given for the plaintiff, *nisi*, &c.

In an action for money had and received, if the declaration states that the money was had and received by the defendant for the plaintiff *to the use of the defendant*, the court will after a verdict reject the words "to the use of the defendant." Vide 4 Mod. 161.

Proctor *verf.* Johnson.

Mich. Will. 3. Rot. 341.

S. C. Salk. 600.

ERROR *C. B.* A *scire facias* was brought against the defendant upon a judgment in ejectment obtained against the casual ejector, suggesting that the defendant since the said judgment *ingressus est et modo tenet*, &c. The defendant being warned comes in, and pleads *nul tiel record.* Upon which the record being brought in, judgment was given *in C. B.* for the plaintiff, *quod haberet executionem*, &c. Upon which the defendant *in C. B.* brought error *in*

On a judgment in ejectment a scire facias lay at common law against the terre-tenants. R. acc. post. 806. Vide Com. Pleader. 3L. 1. 2d. Ed. vol. 5. p. 341. Such scire facias may either specify the names of the terre tenants, or omit them. The judgment does not bind persons claiming by a title paramount to it; but it does all other persons.

B. R.

PROCTOR v. JOHNSON.

(a) Vide post. 807, 808. and 13 Ed. 1. st. 1. 45.

B. R. upon the said judgment. And *Pratt* serjeant argued, that a *scire facias* would not lie in this case; because at (a) common law a *scire facias* lay only in real actions. 2 *Inst.* 469. Against which it was argued by Mr. *Cheshyre*, that the action well lay, and that the judgment was well given. And he cited *Rast. Entr.* 367. 590. *Co. Entr.* 630. 632. *Form. placit.* 328. *Herne's Plead.* 652. *b.* 653. *b.* *Pasch.* 25 *Car.* 2. *B. R. Rot.* 392.

Holt chief justice. The meaning of *Coke* in 2 *Inst.* 469. is only, that a *scire facias* did not lie at common law upon a judgment for debt or damages; but this *scire facias* sounds in the realty, and a *scire facias* lay at common law upon a judgment in an action real or mixed; as a man might have had a *scire facias* at common law upon a judgment in assize. And though the term recovered is personal, *quatenus* it is a chattel; yet it is real, *quatenus* it concerns land. The reason of the *scire facias* is, because the land is bound by the recovery, and that makes a title to the recoveror. If there is tenant for years, reversion in fee, tenant for years is ousted, and he in reversion disseised; at common law the remedy for the tenant for years was ejectment, and assize for the reversioner. Then if the lessee for years obtain judgment against the disseisor for the term, that makes him a title; and if it happen, that the judgment is not executed in the life of the disseisor, the termor shall not lose the benefit of his recovery, but he shall have a *scire facias* against the terre-tenants; and if they have title paramount the recovery, they shall avoid it; if they claim under it, they are estopped, as for the purpose of the heir of the lessor, *&c.* It is absolutely necessary that a *scire facias* should lie in this case, because there is no other means to execute the judgment, if the parties die, or are changed. But in judgments for debt or damages, the judgment might have been executed at common law by action of debt upon the judgment. Therefore upon the reason of the law, without consideration of precedents, a *scire facias* will lie in this case. Upon the *scire facias* the terre-tenants will have notice, and *scire feci* ought to be returned; and therefore it is not so hard as the serving the tenants with a copy of the declaration in ejectment. The *scire facias* may be general against the terre-tenants, and leave it to the sheriff to return who were terre-tenants; or it may be suggested in particular, who they are, as here. And they, being strangers to the judgment, may falsify; or if they claim under the defendant, they are bound by it. Judgment was affirmed, *nisi*, *&c.*

Mitchell

Mitchell *verſ.* Harris.

S. C. Salk. 71. and rather more at large, 12 Mod. 512.

IN debt upon bond, with condition to perform the award of *A.* and *B. ita quòd* they made their award on or before the twenty ninth of *June*, and if they made no award, then to perform the umpirage of him whom *A.* and *B.* ſhould elect, *&c.* Upon *nul agard* pleaded, the plaintiff replies, that *A.* and *B.* upon the twenty-ninth of *June* elected *C.* to be umpire, and that he had made his umpirage, *&c.* and aſſigns a breach, *&c.* And upon demurrer, exception was taken, that *A.* and *B.* had all the twenty-ninth of *June* to make their award. *Sed non allocatur.* For *per Holt* chief juſtice, If a ſubmiſſion be made to *A.* and *B. ita quod* they make their award before *Midſummer*, and if they do not agree, then to ſuch umpire as they ſhall chuſe, ſo as he make his umpirage before *Midſummer*, and an umpirage is made accordingly, it is good; becauſe the arbitrators have determined their power before by electing the umpire. And ſo it was reſolved in the caſe of *Twiſleton v. Travers*, 1 *Lev.* 174. 2 *Keb.* 15. (*a*) But if the umpire be named in the ſubmiſſion, he cannot make his umpirage, before the time is expired which is given to the arbitrators to make their award. Judgment for the plaintiff, *niſi*, *&c.* *Ex relatione m'ri Jacob.*

Arbitrators who have power if they make no award to elect an umpire, may elect him before the expiration of the time appointed for the making of their award. R. acc. Lutw. 541. Say. 221. 2 Barnard. B. R. 154. D. cont. ante, 222. Cro. Car. 191. 2 Saund. 133. Semb. cont. T. Jon. 167. Vide Com. Arbitrament. F. 2d. Ed. vol 1. p. 390, 391. 1 Roll. Abr. 261. 3 Vin. 93.

(*a*) D. acc. 2 Keb. 16.

Wilmot *verſ.* Tyler.

S. C. 12 Mod. 448.

THE plaintiff brought an appeal againſt the defendant for the murder of her huſband. The defendant pleaded a (*a*) conviction of manſlaughter, and clergy had. And after ſeveral (*b*) exceptions taken to the plea by Mr. *Earle*, which were over-ruled, the queſtion was, whether the court ſhould give final judgment upon the plea in bar, or only judgment to abate the writ, there being a fault in it; there being only eleven days between the *teſte* and return of it. And *per Holt* chief juſtice, final judgment ſhall be given. For though the writ be ill, ſo as an outlawry upon it would be erroneous; yet having appeared and pleaded in chief, and not having inſiſted upon that, he has loſt the advantage of it. Now there ought to be fifteen days between the *teſte* and return of original writs, and there is here but eleven. And the reaſon why there ought to be fifteen, is in 2 *Inſt.* 267. becauſe every day a man may go a day's journey, which in law is accounted twenty miles, and is called *dieta*; and according to the ſame computation fifteen days are a convenient time for a man to appear, in whatſoever part of *England* he lives. According to this is *Bract. lib.* 3. 135, *lib.*

An appeal after the defendant has pleaded in chief he cannot object that there were not fifteen days between the teſte and the return of the original. S. C. Salk. 63. After judgment for the defendant in appeal on a writ which might have been abated, though the defendant has been convicted and received his clergy on an indictment before the court will give the proſecutor leave to arraign the defendant in the cuſtody of the marſhall. Vide 2 Hawk. B. 2. c. 23. ſ. 4. ante, 556.

(*a*) Vide Com. Appeal. G. 9. 2d. Ed. vol. 1. p. 371. (*b*) See them in 12 Mod. 448.

Wilmot v. Tyler.

4. 238. And it was reasonable, that a man should have convenient time; and if he had not, the process was looked upon as too strait, and erroneous. But if the defendant appeared, and pleaded in chief, and did not take advantage of it, he made it good. 9 *Ed.* 4. *c.* 18. In case of a *scire facias* upon a fine, which partakes of the nature of a real action, the fine shall be good, although there be not fifteen days between the *teste* and the return of the original; it appears in the said book, that this is a received doctrine, though there is some diversity of opinions. 12 *Ed.* 4. *c.* 11. But if the defendant pleads the shortness of the time between the *teste* and return, or in affize pleads *nient attach per quinzime jours*, then the writ will be ill: but if he answers, and does not take advantage of it, the writ will be well enough. And an acquittal upon a bill of appeal, or a bad indictment, is no bar. Judgment was given for the defendant. And Mr. *Earle* moved, that he might arraign the defendant *de novo in custodia marescalli*, and had leave to do it, and did it accordingly. But note, that the court resented this proceeding of Mr. *Earle*, as vexatious, and unbecoming a man of the profession of the law; and the chief justice gave him a very severe rebuke.

Rex *verf.* Douse.

For an offence newly erected by a statute which imposes a forfeiture for it, and points out the mode for recovering such forfeiture, an indictment will not lie. Vide ante, 347. and the books there cited.

THE defendant was indicted for having kept a school without licence of the bishop of the diocese, *&c. contra formam statuti.* Upon which Mr. *King* moved to quash the indictment (being moved hither by *certiorari*) and the exceptions that he took the last term were, 1. That there was no statute, that prohibited keeping school without licence, but 1 *J.* 1. *c.* 4. *f.* 9. and the said act prescribed a particular punishment, *viz.* forfeiture of, *&c.* Therefore it was not an offence indictable, being a new offence. 2. This indictment was found before the justices of peace at the quarter sessions, and they have no power by the act, and therefore it was void. 3. This school was not within the act of *James* I. because the act extends but to grammar schools, and this school was for writing and reading. And afterwards, in this term, after a rule made, that cause should be shewn upon notice, why, *&c.* the indictment was quashed.

Archer's

Archer's *Case*.

SIR *Bartholomew Shower* moved for a *habeas corpus*, to be directed to *John Archer* of *Welford* in the county of *Berks* esquire, son of judge *Archer* to command him to bring the body of Mrs. *Eleanor Archer* his daughter, being kept in her father's house by her father, and by him barbarously abused; upon producing a letter written by the said Mrs. *Archer* to her mother (who was separated from her husband) testifying that she was severely used. On the other side, another was produced, by which she declared before God, and offered to confirm the truth thereof by taking of the sacrament, that he used her very well. And the court granted a *habeas corpus*, to have Mrs. *Archer* present in court, to examine her, returnable *immediate*. And at another day upon examination of Mrs. *Archer* herself, she affirmed, that she had no cause of complaint against her father; and therefore no order was made in it.

A habeas corpus is grantable to bring up a daughter from her father on a letter from her stating that her father used her severely.

Note; Mr. *Northey* said, that in the case of the lord *Leigh* of *Stoneley* a *habeas corpus* was granted, only upon the letter of my lady *Leigh*. And *per Holt*, without doubt a *habeas corpus* may be granted upon the sight of a letter.

Mitchell *verf.* Broughton.

Intr. Hil. 12 Will. 3. B. R. Rot. 506.

IN *assumpsit* upon a special promise to transfer stock in ——— the plaintiff declared upon an agreement in writing, by which the defendant agreed in 1692, in consideration of ——— to transfer so much stock to the plaintiff or order upon request; and he shewed a request, &c. ——— and averred that the defendant had not transferred. The defendant pleaded the act of 8 & 9 *W.* 3. *c.* 32. against stock-jobbing. The plaintiff demurred. And it was urged, that this contract was within the said act, because it may be, the transfer was not to be made before the ——— day of ——— But *per Holt*, the said act shall be taken strictly, because it destroys bargains, and therefore if the request was before the said day, it is well enough. A second exception was to the declaration, because the plaintiff has not averred, that the defendant has not paid ——— to the plaintiff's order. *Sed non allocatur*, for that ought to come of the other side, of breach that the transfer was not made to the man. Vide

If a statute imposes a regulation upon contracts for the performance of particular acts after a certain day, a contract to do one of the acts upon request is not within the statute, if the request is made before the day. Vide ante 316. On a contract for making a transfer to a man of his order it is sufficient to assign by way Str. 228. 231.

MITCHELL v. BROUGHTON. if payment was made to the order of the plaintiff. Judgment *nisi*, &c. for the plaintiff. See the case of *Smith v. Westal. Ante* 316.

Horne *verf.* Hunter.

Intr. Trin. 12 Will. 3. B. R. Rot. 440.

Goods levied in execution upon a levari facias out of a hundred court cannot be delivered to the plaintiff. Vide ante 346. Com. El. 504. pl. 28.

TRespas. The defendant justified under process in the hundred court against the plaintiff, upon a plaint there levied, and judgmant against him, and the goods, for which the action was now brought, levied in execution by *levari facias*, and delivered to the plaintiff in the action there, &c. The plaintiff demurred. And the plea was adjudged ill, because the goods levied in execution were delivered to the plaintiff in execution, which could not be. And therefore judgment for the plaintiff.

West *verf.* West.

Declaration, Lill. Ent. 51.

A defendant cannot plead specially what merely negatives a fact stated in the declaration. R. acc. ante 112. post. 680. 688. Vide Com. Dig. tit. E. 14. 2 Inst. vol. 5. The defendant may waive the general issue at any time within four days after issue joined, if it is not entered. S. C. with some difference 3 Salk. 274. Holt 559. Vide 2 Will. 54. 1 B. R. 3d Ed. 211. Str. 906. 1267. 1271. 1 Will. 177. 254. 2 Will. 204. Ll. 55. 1 Croisp. 2d Ed. 168.

THE plaintiff brought an action upon his case against the defendant, mayor of *Banbury*, for having made a false return to *mandamus*, &c. The defendant pleaded, that he was not mayor at the time of the emanation of the writ. And upon motion concerning the waving of this plea, and pleading the general issue, *Holt* chief justice held, that this plea amounted to the general issue, being only a denial of a matter of fact alledged in the declaration. And *per curiam*, if a man pleads the general issue, and that is not entered; he may wave it, and plead specially within four days; and *Sunday* shall not be reckoned one of the four days. But *Sunday* is reckoned one of the fifteen days upon the return of writs, &c.

Cheesly *verf.* Baily.

S. C. Salk. 72. Com. 114.

A clause in the condition of an arbitration bond that the obligor shall consent to have the submission made a rule of court, is evidence of a consent that it should be so.

THE parties entered into mutual bonds, with respective conditions, that they respectively should stand to the award to be made by *J. S.* of, &c. and if they should consent to make that submission by rule of court, according to the late act of parliament 9 and 10. *W.* 3. *c.* 15. *f.* 1. that then the bond shall be void. And now a motion was made, that this should be made a rule of court, upon *affidavit* of the execution of these bonds. But it was opposed by Sir *Bartholomew Shower*, because it was only parcel of the condition, and his client would rather forfeit the penalty of the bond. And *per curiam*, the consent to make a submission

submission a rule of court ought not to be a part of the condition, but only inserted in the condition, by the late act. But nevertheless *Holt* held that this was a plain evidence of the consent of the parties; and if it were not so, the condition would signify nothing; for no subsequent consent afterwards would be sufficient within the act. And a rule was made, that it should be made a rule of court, *nisi*, &c. Upon which *Shower* urged, that the award was made by the arbitrators partially. Whereupon day was given to hear both parties as to that, &c.

CREASLY. v. BAILY.

Trinity Term

13 Will. 3. B. R. 1701.

Rex *verſ.* Inhabitants Mile-end.

If B. R. confirms an order of ſeſſions, it will compel obedience to it by attachment. D. acc. poſt. 858. But after it has been obeyed for ſome time, it will not grant an attachment againſt a man who diſobeys it.

BY the act 30 *Car.* 2. *c.* 3. which prohibits the burying in linen, under the penalty of 5*l.* the one moiety of this is given to the informer, and the other moiety to the poor of the pariſh. *Mile-end* is a hamlet of itſelf and has diſtinct officers, and a chapel of eaſe, but lies within the pariſh of *Stepney*. The *Jews* have a burying place there in *Mile-end*. And the juſtices of peace in 36 *Car.* 2. made an order at their ſeſſions, that the church-wardens of *Mile-end* ſhould give account of their receipts of the buryings ariſing within their precinct to, *&c.* to the end that there might be an equal diſtribution through the whole pariſh; which order being removed heretofore in the time of *Charles* II. into the king's bench, was confirmed, and the church-wardens of *Mile-end* accounted accordingly for ſome time. But the preſent church-wardens of *Mile-end* not having accounted according to the ſaid order, Mr. *Moxon* moved laſt term for an attachment to be granted againſt them, for not accounting according to the ſaid order, it being confirmed in this court, and ſo a contempt of this court. And a rule was made to ſhew cauſe. And now the ſaid rule was diſcharged, and an attachment denied, becauſe application ought to be made to the juſtices for a new order, and that is the proper remedy. And the whole court held the order juſt and good.

Selby

Selby *verſ.* Clarke.

MR. *Broderick* moved for a prohibition, to be directed to the ſpiritual court of ——— to ſtay a ſuit there againſt the plainriff for tithes of hay and lambs, fed, dropped and nouriſhed upon the plaintiff's land, *&c.* upon ſuggeſtion of a *modus*, that in conſideration that they uſed to pay the tenth lamb of all the lambs dropped in their pariſh, they uſed to be diſcharged of the tithes of all lambs there fed, *&c.* and as to the tithes of hay, it ſuggeſted a cuſtom within the pariſh, that if any pariſhioner fed his ſheep with his graſs until *June* and *Auguſt*, that then he might mow the coarſe graſs, with which they fed their ſheep in the winter, whereby the perſon had *uberiores decimas* of the ſheep, *&c.* And a rule was made, to ſhew cauſe wherefore, *&c.* And now Mr. *Cheſhyre* againſt the prohibition urged, that this was a plain preſcription *in non decimando*, becauſe nothing was payable, if there were not ten lambs; like the caſe of *Delman v. Barton*, 1 *Roll. Abr.* 648. *C.* 4. 1 *Mod.* 229.

A modus in conſideration of paying the tenth of all the lambs dropped in the pariſh to be diſcharged of tithe for lambs fed there, is bad. Vide ante, 358. Lambs are de jure tithable in the pariſh in which they are dropped. D. acc. Bunb. 139. Vide Burn's Eccleſiaſtical Law. Tithes xi. 1ſt. Ed. vol. 2. p. 425, to 429. For fewer than ten lambs no tithe is payable. Semb. acc. Bunb 139. Vide Cunn. 102. Bunb. 198. A cuſtom for any pariſhioner who ſhould feed his ſheep with his graſs till June and Auguſt to mow his coarſe graſs without paying tithe for it, is bad. Vide ante, 358.

But Mr. *Broderick e contra* urged, that this was a good *modus*, becauſe by the canon (*a*) law diſtribution ought to be made of the tithes of lambs, at the places where the ſheep had been all the year; and therefore the parſon not having right to every tenth lamb, becauſe ſome of them might be but newly bought, the plaintiff paying every tenth lamb, might well in conſideration thereof preſcribe to be diſcharged of the lambs there fed. And he cited 1 *Roll. Abr.* 648. *c.* 1. 649. *pl.* 7. But *per Holt* chief juſtice, the tenth lamb is due to the parſon by common right. And though they may make diſtribution in the eccleſiaſtical courts, that is only among the parſons themſelves, but does not concern the proprietors of the land, who ought to pay the tenth lamb to the parſon by the common law; and therefore this cuſtom cannot be eſteemed by this court as beneficial to the parſon, and conſequently it is no ground for a prohibition. But this caſe differs from the caſe cited by *Cheſhyre*, becauſe wool is ſeverable, and every part of it tithable, and the parſon may have the tenth ounce, or part of an ounce, but lambs are intire. But this is not a preſcription *in non decimando*, becauſe under the tenth tithe is not due. And therefore this is not a *modus in non decimando*, but no *modus* at all.

2. As to the *modus* for the hay, *Cheſhyre* urged, that it was a plain *non decimando*. And for that he cited 1 *Roll. Abr.* 650. *pl.* 13. *Cro. Jac.* 47. *Moor*, 683. And the court held it to be a void cuſtom, and therefore the rule was diſcharged.

(*a*) Vide Burn's Eccleſiaſtical Law. Tithes xi. 1ſt. Ed. vol. 2. p. 426.

Parker

Intr. Hil. 12 Will. 3. B. R. Rot. 464.

Parker *verſ.* Atfield.

S. C. but incorrectly reported, 12 Mod. 517.

In an action againſt an executor if he pleads a judgment recovered againſt him for 100l and only 5l. aſſets, and the plaintiff replies that the perſon who recovered the judgment would take 12l. in ſatisfaction, and that is is kept on foot by fraud, a rejoinder that the defendant has not aſſets beyond 5l. is bad.

THE plaintiff brought an action of debt againſt the defendant as executor to *J. S.* upon a bond of the ſaid *J. S.* The defendant pleaded in bar a judgment for 100*l.* recovered againſt the ſaid *J. S.* by *J. N.* in his life-time, and that he hath not aſſets above 5*l.* which he detains *ergo ſatisfactionem* of the ſaid judgment. The plaintiff replies, that *J. N.* would have received 12*l.* in full ſatisfaction of the ſaid judgment, and that the defendant refuſed to pay it, but keeps the judgment on foot by fraud, to defraud the plaintiff, *&c.* The defendant rejoined, that he had not aſſets, but to the value of 5*l.* Upon which the plaintiff demurred. And Mr. ſerjeant *Carthew* for the plaintiff argued that the rejoinder was ill; becauſe the defendant ought to have traverſed the fraud. For the plaintiff is not concluded by his allegation of aſſets but to 5*l.* but by the plea of the judgment he admits that he has aſſets to the value of 100*l.* the fraud not being traverſed,

Acherly e contra for the defendant ſaid, that this plea did not admit aſſets for 100*l.* becauſe if the defendant had not any aſſets, yet he ought to have pleaded this judgment, and not to have left the judgment to go by default againſt him. For in ſuch caſe if aſſets afterwards ſhould come to the hands of the executor defendant, no advantage could have been taken of that judgment not being pleaded, and ſo he would be liable to the ſaid judgment, and to the plaintiff alſo, whereas perhaps he might not have aſſets to ſatisfy either of them. [See the caſe of *Rock v. Layton* before, 589.] But *per curiam*, judgment ought to be given by the plaintiff. For though it be true, that the defendant ought to plead the judgment, yet he ought alſo to plead truly, how much is due upon it, and that he hath not aſſets to ſatisfy. And in this caſe not having pleaded truly in his plea, he ought to have traverſed the fraud alleged in the replication. For now by pleading over, he has admitted that it was kept on foot by fraud. For the allegation, that he has no more than 5*l.* aſſets, does not conclude the plaintiff, but his replication ought to be anſwered. In this caſe if the defendant had joined iſſue upon the fraud, if it had appeared upon the trial, that the defendant had not aſſets to pay the 12*l.* he (*a*) would not have been charged, but by direction would have had a verdict for him. And *per Holt* chief juſtice, if there are three judgments againſt the teſtator, each one for 20*l.* the executor has aſſets but to the value of 20*l.* if he pleads theſe

(*a*) S. P. Salk. 312.

theſe three judgments, and one of them is ill pleaded, or upon iſſue joined one of them is found againſt the executor (though in fact perhaps he has but 20*l.* which will not be ſufficient to ſatisfy the other two judgments of 20*l.*) yet by pleading the three, it (*a*) is an implicit confeſſion of aſſets, more than the two judgments; and therefore in ſuch caſes judgment ſhall be againſt him for the value of the ſaid judgments. Which *Gould* juſtice agreed. But *(per Holt)* if the executor pleads three judgments, *&c.* and the plaintiff takes judgment to have execution when aſſets happen farther than what will ſatisfy the three judgments, the executor at the ſame time having but 20*l.* and afterwards 40*l.* aſſets come in to the executor; the executor ſhall not be liable, until more aſſets happen, becauſe the plaintiff did not take judgment to have execution of aſſets generally when they ſhould happen, but of aſſets over what would ſatisfy the judgments. But the more ſafe and juſt way for an executor, is to plead truly, how much is really due upon a judgment. And *Holt* cited *Paſch.* 23 *Car.* 2. *B. R. Rot.* 339. *Walpole v. Prideaux*, in point. Judgment was given for the plaintiff. *Gould* juſtice cited *W. Jon.* 91. *Veal v. Gateſdon*, as a caſe in point, and which had been always approved.

PARKER v. ATFIELD.

(*a*) S. P. Salk. 312 R. acc ante, 263. Sed vide 2 Saund. 49. Com. 206. Carth. 196. 431. and Com. Pleader. 2 D. 9. 2d. Ed. vol. 5. p. 20.

Almanſon *verſ.* Davila.

S. C. Com. 94.

UPON a motion in this caſe *Holt* chief juſtice ſaid, that he had known it held by the court, that where the plaintiff was nonſuit for (*a*) want of a declaration, and afterwards brought another action for the ſame cauſe, that he ſhould have but common bail to the ſaid action.

Vide 2 Will. 93. 381. Str. 1216. Burr. 2502.

(*a*) According to the report in Com. 94. there was a nonſuit in this caſe for a fault in the declaration.

Weeks *verſ.* Peach.

REPLEVIN. Avowry thereupon. And a ſpecial demurrer to the avowry. Motion was made at the ſide bar, to have leave to amend, *loci* inſtead of *locus in quo*, *&c.* there being two places in the declaration. And a rule was made, to ſhew cauſe, *&c.* And Sir *Bartholomew Shower* ſhewed cauſe, that they demurred for this reaſon, and that ſuch amendment cannot be made after demurrer, without conſent, and he would not aſſent. *Cur' accord.* And the rule was diſcharged (*a*).

Vide ante, 668.

(*a*) Such amendments are now made every day on payment of coſts. *Note to the third edition.*

May

May *verſ.* King.

S. C. more at large, but with ſome difference, 12 Mod. 527.

Intr. Paſch. 13 Will. 3. B. R. Rot. 165.
A plea to an indebitatus aſſumpſit that the parties ſtated an account and agreed to be quit one againſt the other except as to the balance, amounts to the general iſſue. Vide Burr. 9.

INdebitatus aſſumpſit for 50*l.* The defendant pleaded, that the plaintiff and he came to an account, and that the plaintiff was found in arrear 5*s.* and that then it was agreed between them, that the one ſhould be quit againſt the other, except the 5*s.* The defendant demurred. And exception was taken to this, that it amounted to the general iſſue. Againſt which *Carthew* ſerjeant for the defendant cited 1 *Mod.* 205. 2 *Mod.* 43. as a caſe in point, that ſuch plea is good. And at another day Sir *Bartholomew Shower* for the defendant ſaid, that this was but form, and therefore good upon a general demurrer, it not being ſhewn for cauſe. He cited 21 *Ed.* 3. *c.* 17. 3 *Cro.* 900. *Cro. fac.* 130. *Raſt. Entr.* 429. 10 *Co.* 88. There are ſeveral things which may either be pleaded ſpecially, or given in evidence upon the general iſſue, as a releaſe, *&c.* But *per Holt* this ought not to be pleaded ſpecially, but amounts to the general iſſue, and might have been given in evidence upon it. But at another day the plea was waved by conſent, and the defendant pleaded to iſſue.

The Preſident and College of Phyſicians *verſ.* Salmon.

Intr. Mich. 8. Will. 3. B. R. Rot. 349.
A corporation may ſue by its name of incorporation notwithſtanding an expreſs power given it to ſue by another. S. C. Salk. 451. 3 Salk. 237. but no judgment. 5 Mod. 327. R. acc. ante, 153.
Matter alleged under a ſcilicet, if repugnant to preceding matter is ſurpluſage. R. acc. poſt. 819. D. acc. Gilb. C. B. 131.
In debt upon a penal ſtatute, it is ſufficient to deſcribe the offence in the words in which the ſtatute deſcribes it.

THE plaintiffs by the name of the preſident and college or commonalty, *&c.* brought an action of debt againſt the defendant for 5*l. per* month, for (*a*) having practiſed phyſic without licence. Upon demurrer to the declaration, Mr. *Montague* for the defendant argued, 1. That this action could not be brought as here, but ought to be brought in the name of the preſident alone, or of the college alone; the words of the charter of *Henry* VIII. of incorporation being, *quod ipſi per nomina praeſidentis collegii ſeu communitatis, &c.* might ſue and be ſued, which words, *per nomina*, in the plural number, and not *nomen*, ſhew that they are two diſtinct names. Beſides, that the preſident and college are diſtinct; for by 32 *H.* 8. *c.* 40. the preſident of the college, *&c.* ſheweth, *&c.* 1 *Mar.* 2. *c.* 9. enacts, that when the preſident of the college, *&c.* ſhall ſearch, *&c.* The charter of *Elizabeth*, which gives power to have a body, *&c.* to anatomize, grants to the preſident *collegii ſive communitatis*; whereas if they had been incorporate with him, it ought to have been *collegio.*

A man who inſiſts upon a ſtatute need take no notice of a ſubſequent one which excepts particular caſes from its proviſions. Vide ante, 119. and the caſes there cited. A perſon to whom a ſtatute gives a certain penalty may maintain an action of debt for it, though the action is not in terms given him by the ſtatute. In actions by bill no objection can be taken upon demurrer to the memorandum at the top of the iſſue. Such memorandum is amendable. Where part of a penalty is given to the king, and part to another perſon, ſuch perſon may in an action for it ſtate that he ſues "as well for the king as himſelf." If a ſtatute prohibits from doing certain acts, all perſons not licenſed under the ſeal of the head *or* body of a corporation, it is ſufficient for the aſſignment of a breach to allege that a man did the acts without a licence under the ſeal of the head *and* body of the corporation. Vide the note in page 683.

(*a*) Vide 14 & 15 H. 8. *c.* 5. ſ. 1. p. 13.

Againſt

Against which it was argued for the plaintiffs by Mr. *Cheshyre*, that they being incorporated by the name of the president and college or commonalty, and having capacity given them to purchase by the said name; in consequence it gives them power to be sued, and to sue by the said name. For where a corporation is created, with ability to purchase, they shall have power to sue as incident. 10 *Co.* 30. *b.* 1 *Roll. Abr.* 513. Then the subsequent clause which follows, *&c.* is not restrictive, but only additional, and will not take away the right, to sue by the name of the corporation. 11 *Hen.* 7. 28. *Fitzh. brief* 485. 5 *Edw.* 4. 20. 16 *Hen.* 7. 14. 29 *Hen.* 6. 4. 44 *Edw.* 3. 6. *b.* 13 *Hen.* 7. 14. He agreed, that the action might be brought by the president alone, or by him and the college or commonalty, as here; but there is no precedent of an action brought by the college. And the whole court held the action well brought here. And *per Holt* chief justice, if it had been a new case, he should have been of opinion, that the action could not be brought in the name of the president only, but by the reason of the law they all ought to join, because they are made a body aggregate of a president and commonalty and have power to purchase, and it is proper for them to bring actions in the name of the head and body, especially the penalty here being given to the president and college; but it has obtained, to bring it in the name of the president alone. *Cro. Car.* 256. But the manner here is more proper. And the resolutions in *Cro. &c.* are founded upon a mistake, for the word *nomina* in the said clause means only that they are several words, though as a name of corporation they are but one; and the word *et* is omitted, which is in the name of the corporation. *Coke* says in *Sutton*'s hospital case, 10 *Co.* 29. *b.* that a corporation must have a name, which is true; but that *(a)* ought to be understood, either by patent of incorporation, or arising from the nature of the thing; as if the king should incorporate the inhabitants of *Dale*, and give them power to elect a mayor; though no name of corporation be mentioned in the patent, yet their name ought to be, mayor and commonalty, or mayor and burgesses. The corporation of the town of *Norwich* have been, ever since the time of *Heury* IV. known by the name of the mayor, sheriffs and commonalty, the patent having destroyed the four bailiffs that they had before, and erected this new corporation of mayor and sheriffs, and yet no such name is given them by the said charter.

President, &c. of PHYSICIANS v. SALMON.

(a) S. P. 3. Salk. 102. Holt 171.

2. A second exception was, that it was said in the declaration, that the defendant by the space of so many months *ante exhibitionem billae, scilicet* the twenty-third of *August* practised physick, *&c.* which was impossible; but it ought to

President, &c. of PHYSICIANS v. SALMON

to have been from the twenty-third, &c. To which it was answered, and agreed by the court, that the words, twenty-third of *Auguſt*, coming in after a *ſcilicet*, if they were repugnant to that which went before, ſhould be rejected, and then the declaration would be good for ſo many months *ante exhibitionem billae.*

3. A third exception was, that the declaration was ill, becauſe it ſays, that the defendant *exercuit et adhuc exercet*, which is too general; for it ought to have ſpecified, in what he exerciſed phyſick, to the end that the court might judge whether he exerciſed phyſick or not. Farther, that 34 & 35 *Hen.* 8. *cap.* 8. gives power to particular perſons, as perſons having knowledge of the nature of herbs, to practiſe ſome ſorts of phyſick, *viz.* to adminiſter drinks for the ſtone, &c. without incurring any penalty; and perhaps the defendant practiſed within the ſaid act, and then he will be exempt from any penalty of 5*l. per* month. Beſides, that the jury cannot be proper judges of what is practiſing phyſick; nor can the defendant know what defence to make to a charge ſo general. And in *Raſt. Entr.* 426. it is ſhewn in what, &c. To which it was anſwered for the plaintiffs, and agreed by the court, that the offence, made ſuch by the act, is the exerciſing phyſick, and it is ſufficient to lay it in the words of the act. As in an indictment upon 5 *El. c.* 4. it is ſufficient to ſay that the defendant *exercuit* ſuch a trade, without ſhewing what peculiar act he did. And the generality of the charge is no inconvenience to the defendant, becauſe the proof is incumbent upon the plaintiffs. And if there is any thing contained in another act for the benefit of the defendant, he ought to plead it; or he may give it in evidence upon *nil debet* pleaded.

4. A fourth exception was, that debt will not lie, it not being given by the ſtatute, but an information at the ſuit of the king. Debt is given by 25 *Car.* 2. *c.* 2. for the penalties for not having taken the oaths, and uſually in all penal ſtatutes. To which it was anſwered, that where a certain penalty is given by a ſtatute, the perſon to whom, &c. ſhall have debt by conſtruction of law. And the caſe upon 2 & 3 *Edw.* 6. *c.* 13. of tithes is a ſtronger caſe, the treble value ſounding in damages, and not being given in certain to any perſon by the words of the ſtatute. And the caſe in *Cro. Car.* 256. is as the preſent caſe is. Which was agreed by the court. But *Holt* chief juſtice ſaid, that the caſe of debt for tithes upon the ſtatute of *Edward* VI. was at firſt a ſtrain, becauſe it gave an action of debt, whereas the ſtatute gave but treble damages; but the party ſhould rather have had an action upon the ſtatute.

5. A

5. A fifth exception was, that the action was brought *Hil.* 5 *Will. & Mar.* the entry *Mich.* 8. which was two years after the death of the Queen; and the *memorandum* was, that they profecute for the King and the late Queen. But to that *Holt* chief juſtice anſwered, that it was no part of the declaration, and might be amended. President, &c. of PHYSICIANS v. SALMON.

6. A ſixth exception was, that this action ought not to be brought *tam quam*, no action being given to the King. *Sed non allocatur.* For *per curiam*, the precedents are the one way and the other.

7. The ſeventh exception was, that the charter confirmed by the act is, that no perſon ſhall practiſe, *&c.* without licence under the ſeal of the preſident (*a*) or college; and the averment is, that he had no licence under the ſeal of the preſident and college; which is a variance. But held well enough. And judgment was given for the plaintiff, *niſi*, *&c.*

(*a*) The word uſed in the charter according to Ruffhead was "*and.*" Vide 14 & 15. H. 8. c. 5. ſ. 1. p. 13.

Between the Pariſhes of Caiſter *and* Eccles.

S. C. Salk. 68.

UPON orders removed by *certiorari*, the caſe was thus: A poor child was bound apprentice to a man at *Caiſter*. He aſſigned him to *B.* who lived at *Eccles*; and there he completed the ſervice of the reſidue of his apprenticeſhip. And the queſtion was, whether the child ſhould not be ſettled at *Eccles*, where his ſecond maſter lived, to whom he was aſſigned? And the juſtices at the ſeſſions held that he ſhould not, becauſe the (*a*) apprentice is not aſſignable. But *per Holt* chief juſtice, though that be true, yet the firſt maſter might aſſign his apprentice; and though that would not paſs his intereſt in the apprentice, yet it is a good contract, that the apprentice ſhould ſerve the ſecond maſter during the time, though the words are only grant and aſſign; like the caſe of aſſigning a bond, though it be not aſſignable in point of intereſt, yet it is a covenant, that the aſſignee ſhall receive the money to his own uſe. To the ſame purpoſe is the caſe of *Deering v. Farringdon*, 26 *Car.* 2. 3 *Keb.* 304. So here this aſſignment is a good agreement between the firſt and the ſecond maſter, that the apprentice ſhould ſerve the time with the ſecond. And ſo it is a ſervice as apprentice, and ſo makes a good ſettlement.

An apprentice who is aſſigned may as ſuch gain a ſettlement in the pariſh in which he ſerves the maſter to whom he is aſſigned. R. acc. 1 Will. 96. vide Com. Juſtices. B. 72. 2d ed. vol. 4. p. 110. Burn's Juſtice. Poor. v. 14th ed. vol. 3. p. 377.

Note, that the binding in the apprenticeſhip was in 1686, the aſſignment in 1688, before 3 & 4 *Will. & Mar.*

(*a*) Vide Burn's Juſtice Apprentice X. 14th Ed. Vol. 1. p. 74.

Between the Pariſhes of CAISTER and ECCLES.

c. 11. but the chief juſtice did not regard the time, in delivering the reſolution of the court.

Blackborough *verſ.* Davies.

S. C. Salk. 38. nearly verbatim 1 P. Wms. 41. More at large. 12 Mod. 615.

Adminiſtration committed to a wrong perſon is not for that cauſe void, but only voidable. S. C. Com. 96. R. acc. 6 Co. 18. b. Cro. El. (459) pl. 5. Moor. 396. pl. 517. And a mandamus is not grantable to compel the commiſſion of it to the right perſon, until he has inſtituted a ſuit in the ſpiritual court for the repeal of the former commiſſion. S. C. Com. 96.

A grandmother is nearer of kin to her grandſon than an aunt to her nephew. R. acc. Salk. 251. pl. 2. Holt 43. 12 Mod. 619. 1 P. Wms. 45. Prec. Chan. 527. 1 Eq. Abr. executors and adminiſtrators. E. pl. 5. 4th Ed. p. 249, &c. D. acc. 2 Vez. 215.

Dawbeney Bentley being poſſeſſed of a conſiderable perſonal eſtate, died inteſtate leaving his grandmother and an aunt his next of kindred. The ſpiritual court granted adminiſtration to the grandmother. Upon which a motion was made for a *mandamus* to be directed to the ſaid ſpiritual court, to command them to grant adminiſtration to the aunt, as more near of kindred than the grandmother. And this caſe was ſeveral times ſtirred at the bar by Mr. *Broderick* and ſerjeant *Darnall* for the *mandamus*, and by Sir *Bartholomew Shower* and Mr. *Cheſhire e contra*. And it was argued for the *mandamus*, that the aunt is more near of kindred than the grandmother, and therefore the ſpiritual court has no authority to grant adminiſtration to the grandmother, being contrary to the ſtatute of 21 *H.* 8. *c.* 5. *ſ.* 3. That the ordinary having granted adminiſtration wrongfully, he ought to rectify it. That this could not have been queſtioned before 31 *Edw.* 3. *c.* 11. becauſe until the ſaid time the adminiſtrator was but a ſervant of the ordinary; but now by the ſaid ſtatute the ordinary is obliged to commit adminiſtration to the neareſt and moſt lawful friends of the deceaſed. The 21 *H.* 8. *c.* 5. gives him election, to ſuch of the neareſt in equal degree as he will. But if the neareſt of kindred at the time of the death of the inteſtate be diſabled by attainder, *&c.* and afterwards the ſaid diſability is removed, the ordinary ought to grant adminiſtration to him; but if he has granted adminiſtration before, pending the diſability, it is made a queſtion, in 1 *Sid.* 371. *Offley v. Beſt*, if the adminiſtration ought not to be repealed, before it be granted in the ſaid caſe to ſuch next of kin, becauſe an intereſt is veſted. But the difference is, where adminiſtration is committed to the next of kin, and where to a ſtranger. In the latter caſe a new adminiſtration ought to be granted without repeal of the former, and the very act of the new grant will be a repeal. 1 *Anderſ.* 303. *Ow.* 50. *Cro. Eliz.* 460. becauſe the ordinary has never well executed his authority. And therefore, though in *Packman's* caſe 6 *Co.* 18. *b.* it was done upon citation, yet it does not follow, that it might not have been done without it; of which opinion is *Popham*, 1 *Cro. Eliz.* 460. And if the ordinary ought to do it without citation, the king's bench will grant a *mandamus*, to command him to do it, and the rather ſince he has proceeded contrary to the ſtatute. Beſides that the *mandamus* does not confine him to do it in any particular manner; therefore they may do it

it by citation, if that be more proper. Farther, administration may be granted in vacation time, before application can be made here for a *mandamus*. But after great consideration a *mandamus* was denied by the whole court. And *per Holt* chief justice, in vacation time one may resort to the chancery, and upon suggestion that the spiritual court proceeds to grant administration to a wrong person, may have a prohibition issuing from thence returnable in the king's bench or common pleas. The authorities cited are grounded upon a reason that is not law at this day; for now the administrator is not a servant to the ordinary, but has a fixed interest, as well as an executor who is appointed by the party himself. Though the ordinary is not restrained by the statute 21 *H.* 8. *c.* 5. to grant administration to the next of kin, yet he is not so far restrained, as to make a nullity of the administration, if it be committed contrary to the direction of the act; for if it were void, all dispositions of the goods of the intestate, pending the administration, and before it was repealed, would be void; and after it was repealed, the second administrator might have trover for the goods, which cannot be. If administration be committed to a creditor, and afterwards repealed at the suit of the next of kin, the creditor shall retain against the rightful administrator, and all (*a*) dispositions of the goods, *&c.* pending the citation shall be good. And it is not like the case of a grant of administration by the bishop of an inferior diocese, where the intestate had *bona notabilia in diversis diocesis*; for (*b*) there such administration is absolutely void, but here there must be a citation to repeal the letters of administration. It would be a good return to a *mandamus*, that administration is already committed, and there is not any *lis pendens*. He said, that he would not say that he would grant a *mandamus*, if there was a citation depending; but doubtless before that, the motion is too soon made. In the case of Sir *George Sandys*, administration was granted to the brother, and he continued administrator for some time; then one pretended to be the wife of the intestate, and commenced a suit in the spiritual court to repeal the administration committed to the brother, because it ought to be committed to the wife; and the brother moved in the king's bench for a prohibition, because the ordinary had power to (*c*) grant administration either to the wife, or to the next of kin; and it was held, that he should not repeal the administration committed to the brother, because the ordinary had executed his authority. There was a case between *Duncomb* and *Mason*, where a *feme covert* died intestate, leaving debts due to her, which the law would not give to her husband, and administration was granted to her next of kin, and the husband sued in the spiritual court, to repeal that administration; and a prohibition was granted, and a declaration made upon it; and the question was, whether the husband could repeal that administration

BLACKBOROUGH *v.* DAVIES.

(*a*) R. acc. 6 Co. 18. b. Cro. El. 459. pl. 5. Moor, 396. pl. 517, Vide 3 T. R. 125.

(*b*) R. acc. Moor. 145. pl. 288. D. acc. 5 Co. 30. a.

(*c*) Vide 21 H. 8. c. 5. f. 3.

Blackborough v. Davies. (a) Vide Com. Adminiſtrator. B. 6. ad. Ed. vol. 1. p. 261. 29 Car. 2. c. 3. ſ. 25. 1 Atk. 458.

niſtration? And it was held, that he (a) could; but againſt that the caſe of Sir *George Sandys* was cited; but it was held that it did not affect the ſaid caſe, becauſe the huſband had an original right by 31 *Ed.* 3. *c.* 11. and was not within 21 *H.* 8. *c.* 5. and the ordinary has no election in the caſe of the huſband. This caſe was in the common pleas in the time of *Bridgman* chief juſtice.

(b) D. acc. 2 Bl. Com. 226. Co. Litt. 8. a. 13th. Ed. n. 2.

2. They held, that the grandmother was as near as the aunt; for in this caſe in deſcent of lands it would be a mediate deſcent, and the ſame medium to both, *viz.* the father. It is enough to ſay, *frater* (b) *et hæres*, or *ſoror et hæres*, which was the grand reaſon in the caſe of *Collingwood v. Pace*, 1 *Vent.* 413. 1 *Sid.* 193. 1 *Lev.* 59. And the grandmother ſeems to have the advantage, becauſe ſhe is of the right line, the aunt of the collateral line. And for theſe reaſons the *mandamus* was denied. And Sir *Bartholomew Shower* cited a caſe between *Burton* and *Sharp*, the laſt *Trinity* term, where an adminiſtration was ſued to be granted to the great grandmother; and the aunt moved for a prohibition in the common pleas, to ſtay the ſuit in the ſpiritual court, and it was denied.

Lancaſhire *verſ.* Killingworth.

S. C. 12 Mod. 529. 3 Salk. 342. Com. 116.

Intr. Trin. 12 Will. 3. B. R. Rot. 359. Where an act cannot be compleated without the concurrence of the party for whom it is to be done, if the party who is to do it does as much as he can without ſuch concurrence, he does what is equivalent to an actual performance of the act. R. acc Dougl. 659, 666. 1 T. R. 6: 8. R. cont. ante, 440. And may inſiſt upon any recompence he was to have upon ſuch performance. R. acc. Dougl. 659. 665. R. cont. ante, 440. A tender cannot amount to a performance, unleſs it is actually rejected. S. C. Salk. 623. or unleſs it is to be made at a particular place and the party to whom it is to be made does not attend. S. C. Salk. 623. A man who would inſiſt on a tender at a particular place, and a non-attendance by the party to whom it was to have been made, muſt ſhew that he was at the place the laſt moment the tender could properly have been made. S. C. Salk. 623. D. acc. 5 Co. 114. b.

IN covenant for 2000*l.* the plaintiff declared that the defendant's teſtator covenanted with the plaintiff, upon two days notice to be given to him, to accept at any time (a) within the year, 1000*l.* of the joint ſtock of the *Hudſon's Bay* company at the *Hudſon's Bay* houſe in, *&c.* and upon the tranſfer thereof to pay to the plaintiff 2000*l.* and the plaintiff avers, that upon the ſecond of *November* 1692, he left notice in writing at the teſtator's houſe, requiring him, the fourth of *November* following (which was within the year) at the *Hudſon's Bay Houſe* to accept the 1000*l.* ſtock; and that the plaintiff was ready there at the day, and offered to transfer the ſtock, but that the teſtator did not come to accept it; notwithſtanding the ſaid teſtator or the defendant paid to the plaintiff the 2000*l.* Upon demurrer to the declaration, and argument at the bar two or three times, the whole court held the declaration ill, and that judgment ought to be given for the defendant. And *Holt* gave the reaſons of it. He ſaid, that though the 2000*l.* were payable upon the tranſfer, yet if a legal tender had been made by the plaintiff, he would have been as well intitled to the 2000*l.* as if he had made an actual tranſfer. But here the tender ſhewn in the declaration is no legal tender.

(a) Vide 8 & 9 W. 3. c. 29. ſ. 34.

The

The plaintiff says, that he was ready at the time and place, and offered to transfer; but the defendant's testator did not accept it. Now if the defendant's testator had been there, the plaintiff should have averred a refusal, as well as a tender, 16 *Ed.* 3. *c.* 31. 17 *Ed.* 3. 11 *Sid.* 13. *Ball v. Peake*, aided by a verdict. 2 *Saund.* 350. *Peters v. Opie.* Averment of a tender, without averment of refusal, or that it was hindered by the defendant, held ill; but aided by verdict. 2 *Vent.* 109. The other way of pleading a tender is (where there are time and place for the doing of it,) that he came and offered to do, &c. but the other did not come to receive, &c. *Yelv.* 38. *Hughes*'s case. But in this last case, where the party to whom the act was to be done did not come at the time and place appointed, the other ought to shew, that he came at the last time of the day, which (*a*) time of day the law has appointed for the doing the act, and therefore if he came before, he ought to continue there the last time; which ought to be shewn in pleading, which is not done here. 5 *Co.* 114. *Wade*'s case. 2 *Cro.* 423. But in pleading of tender and refusal, any (*b*) time of the day is sufficient. It has been a question heretofore, where a tender has been pleaded in the absence of the party, whether one ought not to aver, that no person came, &c. on his behalf, as well as one ought to aver, that he did not come himself, &c. and it was pleaded without such averment, and a question made of it, but held well enough. *Cro. El.* 754. *Yelv.* 38. because it shall not be intended, if he did not come himself, that any came on his part; and if any did come on his part, he ought to shew it of his side in pleading. The reason of all which is, because when a man has agreed to do a thing, he ought to use his utmost endeavours to do it; and if it be not done, he ought to shew why it was not done. Now here the plaintiff says that he offered to do it; why then was it not done? He ought to shew, either that the testator refused, or that he did not come to the place where, &c. at the last time, when it was appointed by the law. And this is agreeable to the reason of the law in other cases. 8 *Co.* 92. *Francis*'s case. *A.* is bound in a bond, conditioned to infeoff *J. S.* the obligee disseises *A.* this is no plea to the bond, because he might have entered, and made the feoffment, and the obligor is bound to do all that he can; but it would have been a good plea, that the obligee held him out by force, so that he could not enter. 3 *Cro.* 694. *Blandford v. Andrews. Intr. Pasch.* 41 *El. Rot*, 351. a case very remarkable to this purpose. And *Hob.* 77. *Austen v. Gervas*, where the consideration of a promise was, to be bound in bond, &c. he was bound to fix the seal upon the wax, and deliver it as his act and deed, to make a sufficient tender. The law requires, that every one do all that he can, to intitle himself to an action, or to excuse himself from a penalty.

LANCASHIRE v. KILLINGWORTH. Tender pleaded.

(*a*) Vide 5 Co. 114. b. Str. 777. Com. Pleader. C. 51. 2d. Ed. vol. 5. p. 45.

(*b*) D. acc. 5. Co. 114. b.

Objection.

Lancashire v. Killingworth.

Objection. In these cases of transfer of stocks made in the company's books, they only attend at certain hours, as from seven to twelve, or from three to seven: and therefore it would be vain, to aver attendance at the last hour of the day, when at the said time a transfer could not be made. And this objection was made in the case of *Shales v. Seignorett.* *Ante*, 440.

Answer. The law appoints the last time of the day sufficient for the doing the thing in; but if there is such particular usage, that ought to be averred, otherwise the court cannot take notice of it; as for the purpose, that they never stay at the office after six o'clock; and then they ought to shew that they were there the last time allowed by the usage, and tendered, and that would be good. But in this case, for the reasons aforesaid, the declaration is ill, and therefore judgment ought to be given for the defendant; and so it was.

Lacy *verf.* Kinaston.

S. C. Salk. 575. 12 Mod. 548.

A contract defeasanced as to one of many joint and several contractors, is defeasanced as to all S. C. 12 Mod. 415. Holt, 218. acc. 2 Roll. Abr. 412. 18 Vin. 352. pl 5. and see the books there cited. An undertaking from a man with whom many persons have entered into a joint and several contract to indemnify one of them against the contract, it is no defeasance. S. C. 3 Salk. 298. Holt. 178. R. acc. ante 418. and see the cases there cited. An undertaking to indemnify a sole contractor is. S. C. 3 Salk. 298, Holt, 178. 12 Mod. 415. Holt, 218. R. acc. ante, 418. and see the cases there cited.

COVENANT brought by the plaintiff, as administratrix of *Lacy*. The plaintiff declared upon an indenture bearing date the first of *May* 1676, made between *Thomas Killigrew* and the defendant, and others, of the one part, and the intestate of the other part, reciting, that certain articles had been made before between the same parties; and it was thereby agreed, that they should cease and become void from thenceforth; and thereupon they jointly and severally covenanted with the plaintiff's intestate, that if he should have a desire to desist from acting, and of such his intention should give notice by three months to the company, that he should be paid 6*s.* and 3*d.* per day for his life; and that after his death 100*l.* should be paid within three months to his executors; but if he died before he should give notice, that then 100*l.* should be paid to his executors within six months: that the intestate continued an actor until his death, and because the 100*l.* was not paid within the six months after his death, the action was brought. The defendant craved oyer of the deed, and upon oyer several agreements were shewn; and the defendant pleaded that after the sealing and delivery of the deed in the declaration, *viz.* the first of *May* 1676, another indenture was made between *Killigrew* the intestate and others, of the one part, and the defendant of the other, in which deed there is the same recital, and the same articles and covenants

as in the deed in the declaration; but that upon which he insisted, was a covenant by *Killigrew* and the testate, &c. with the defendant, jointly and severally, that if the defendant should have a desire to quit acting, and should give notice, &c. that he should receive, &c. as in the covenant to the testate, and this farther covenant, which is also in the testate's indenture shewn in the declaration, that if the defendant should give three months notice of his intention to quit acting, or should die, that then he should be free and discharged from all debts and sums of money, contracted, borrowed, or took up, or which at any time thereafter should be contracted, &c. and that *Killigrew* the testate, and the others, after such notice given or death, should indemnify and save harmless the defendant from all such debts and sums of money, bonds, contracts, and securities, contracted or entered into, by him alone, or jointly with any other of the same company, on behalf of the company, for any matter or thing relating to the company; and that no persons should be admitted into the said company, but such persons as should enter into such engagements; that the 6*s.* and 3*d.* *per* day during their lives, and the 100*l.* after their deaths, should be in full of their shares of the clothes, scenes and other ornaments, &c. Then the defendant shews, that he gave notice regularly in 1677 (which was before the death of *Lacy*) and so became discharged from being of the company: *et petit judicium*, &c. The plaintiff demurred. And after several arguments at the bar, the chief justice pronounced the resolution of the court, that judgment should be entered for the plaintiff.

LACY v. KINASTON.

The question is, whether this last indenture be a defeasance of the covenant to *Lacy*? And they all held it was not. Because it is a covenant made by the testate and others with the defendant, to save him harmless from all covenants, agreements, &c. entered into on behalf of the company; and therefore it can only be a covenant, because the testate is joined with others, and the covenant is joint and several, and it cannot be more than a covenant as to them; for though the like deeds may have been made with the others, yet they do not appear, and the court cannot take notice of them. Then if this covenant of *Lacy* be held a defeasance, the other covenants will be void; and there is no need of the covenant of the others, because the covenant of the defendant is absolutely void. And therefore this construction would destroy the covenants of the others.

2. By the frame of the deed it appears to be a good covenant, because they designed to trust one another upon the agreements in the deeds; which appears, because care is taken to save them harmless from all agreements upon the account of the company, and debts, and therefore there are of necessity some things upon which it could not operate by

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KINASTON.

way of defeasance. And though this covenant be admitted to be within the agreement (which perhaps is a question,) yet it is plain that they relied upon the mutual covenants.

3. This covenant in its nature is not a defeasance, because it wants the words to be a defeasance; for in case of a defeasance the words are, that the thing to be defeated shall be void: and since there are no such words here, it must be understood to be a defeasance from the nature of the thing, and not the words; and the consequence of that would be, to leave *Lacy* without remedy; for if a covenant be defeated as to one, it will be defeated as to all; for every defeasance, when the terms upon which it is made are performed, operates as a release; and if the covenant had been that from the death, or leaving off to act, by the defendant, the covenants made by him should be void, that would have discharged all. As if a release had been made to the defendant, all (*a*) of them might have pleaded it. And where a covenant is joint and several, a release to one of the covenantors is a release to all. Like the case of a joint trespass, which is joint or several at the election of the plaintiff, a release to one trespasser is a release to all. *Hob.* 66. *Cock v. Jenner. Lit. s.* 376. *Co. Lit.* 232. Then if a defeasance operates as a release, and discharges the lien as much, then if the covenant be defeated as to one, it will be defeated as to all, as much as if it had been released. 34 *H.* 8 *Bro. estranger al fait*, 21. Then to construe this covenant to be a defeasance, is to destroy the deed, and therefore it would be a repugnant, absurd and injurious construction, to destroy a man's assurance.

(*a*) Vide March. 103.

Objection. That a perpetual covenant never to take advantage of a covenant, &c. is a release. He agreed it, for avoiding circuity of action. As if *A.* be bound to *B.* in a bond, &c. *B.* covenants never to sue *A.* upon this bond, this will be a bar in debt brought upon the bond, because *B.* has bound himself against all the remedy that he might have upon the bond. But if *A.* and *B.* be jointly and severally bound to *C. C.* covenants never to sue *A.* this is no defeasance, because he has a remedy against *B.* but *A.* will have only covenant, &c. This case is like 43 *Assiz. pl.* 44. of a defeasance of a warranty, *viz.* that if the collateral ancestor of the disseisee release to the disseisor with warranty, and the disseisor makes a deed, reciting the release with warranty, and covenants, that though he be impleaded or ousted, yet he will not take advantage of the deed or warranty, that is a defeasance; and if the disseisor pleads the release with warranty in bar of an action brought by the disseisee, he shall be rebutted from the warranty by his own deed: but in the said case if the disseisor had covenanted only,

only, not to bring a *warrantia chartae*, or not to vouch, there it would have been only a covenant, becauſe there would have remained a remedy upon the warranty. So though the inteſtate covenanted not to ſue *Kinaſton*, yet he has a remedy againſt the other covenantors; therefore it is a covenant only. 2 *Vent.* 217. *Gawden v. Draper.* There are expreſs words, that the original payment ſhould ceaſe, yet that was not held to be a defeaſance; and yet there could have been no miſchief, becauſe there were no other parties to the deed: if the 300*l.* in the ſaid caſe had been a rent, he ſhould have been of opinion, that the ſecond deed there would have amounted to a grant of the rent for the ſaid time: if it had been a rent for years, not for life, it would have been a grant to the leſſee for the ſaid time, and a ſuſpenſion of the rent; but there it was only a ſum in groſs, which nevertheleſs is defeaſible; but held the contrary, which is a ſound judgment, upon which he relied much. And for theſe reaſons judgment was given for the plaintiff. *Ex relatione m'ri Jacob.*

LACY v. KINASTON.

Oliver *verſ.* Hunning.

ERROR upon a judgment *in C. B.* in an action againſt two. And one of the defendants was outlawed. And exception was taken to the writ of error, becauſe it mentioned the writ to be brought againſt one only. But it was held good, becauſe the writ as to the other was determined by the outlawry. *Ex relatione m'ri Jacob.*

Pierce *verſ.* Paxton.

Intr. Paſch. 13 Will. 3. B. R. Rot. 94.

S. C. Salk. 519.

DEBT upon bond. The defendant pleaded *puis darrein continuance* in (*a*) abatement, payment of part with acquittance. The plaintiff demurred. And *per Holt* chief juſtice, this is no plea in abatement, but in bar for part. *Cro. El.* 342. *May v. Middleton.* And the reaſon is, becauſe that which is a bar before the action brought is a bar after, becauſe the time cannot make a difference. 34 *H.* 6. *c.* 1. 6. 7 *Ed.* 4. *c.* 15. *Style*, 212. is an obſcure caſe, but there it is pleaded in bar of the whole, which cannot be. The caſe of entry into part of the land pending a real action is different from this caſe; becauſe there pending that the plaintiff ſues at law, he makes himſelf his own judge; but here he purſues his demand, and the defendant here conſents, which he does not do in the other caſe. There is a

In debt upon a bond payment of part can only be pleaded in bar. S. C. Holt 560. and rather differently reported 12 Mod. 541.

A neglect to make a profert in curiam where neceſſary is fatal upon a general demurrer. Sed nunc vide 4 Ann. c. 16. ſ. 1.

(*a*) In 12 Mod. the plea is ſtated to have been a plea in bar

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difference also between this case and the case of a foreign attachment, which was the case of *May v. Middleton*, because that is by compulsion of law. 2. The plea was ill, because the defendant had not produced the deed of acquittance in court. Which was held to be substance, and ill upon a general demurrer. And *respondeas ouster* was awarded.

Ferrer *verf.* Beale. Ante 339.

SIR *Bartholomew Shower* moved in this case for judgment for the plaintiff, because this special subsequent damage is a sufficient foundation for an action, and that for great reason, because the jury could not have consideration of it in giving damages. And he compared it to the case of a nuisance, that a man might have an action for every new dropping of the water from the eaves of the house. 2. There is a maim laid here, and therefore the prior recovery in the action of assault cannot be a bar. Mr. *Montague*, of the same side said, that if *A.* breaks a sea wall, and the owner of the land recovers damages for it in an action, and erects a new wall, and before it is dry and settled the sea throws it down again, and overflows the land, *&c.* for this special subsequent damage the owner may have a new action. *Holt* chief justice. This is a new case to which there is no parallel in the books. Every one shall recover damages in proportion to his prejudice which he hath sustained; and if this matter had been given in evidence, as that which in probability might have been the consequence of the battery, the plaintiff would have recovered damages for it. The injury, which is the foundation of the action, is the battery, and the greatness or consequence of that is only in aggravation of damages. In some cases the damage is the foundation of the action, as in the action by the master for battery of his servant, *per quod servitium amisit*, but here the battery only is the foundation of the action, and this damage, which might probably ensue, might and ought to have been given in evidence, and must be intended to have been given in evidence in the former action, and that the jury gave damages for all the hurt that he suffered; for if the nature of the battery was such, as probably to produce this effect, the jury might give damages for it before it happened. As to the case of the sea wall, the plaintiff would recover damages enough in the first action, to rebuild it; and if he rebuilds it ill, the fault is his own. And as to the nuisance every new dropping is a new nuisance. As to the maihem, that is nothing; for a recovery in battery, *&c.* is a bar in appeal of maihem, 4 *Co.* 43. *a.* because in battery the plaintiff may give a maihem in evidence, and recover damages for it. And *Holt* chief justice said, that the original cause was tried

tried before him eight years ago, and the plaintiff and defendant appeared to be both in drink, and the jury did not well know which of them was in fault, and therefore they gave the leſs damages. The plaintiff could not obtain judgment, the court inclining ſtrongly againſt him.

FERRER v BEALE.

Barber *verſ.* Palmer.

S. C. Salk. 178. 12 Mod. 539.

Intr. Hil. 9 Will. 3. B. R. Rot. 535.

DEBT upon bond of 26*l.* dated the ſecond of *April* 1695. The defendant, after a ſpecial imparlance, craves *oyer* of the bond, and condition, which was for payment of 13*l.* 3*s.* the tenth of *January* following. And then he pleads the act of the eight of this king for compoſition by two thirds in number and value of the creditors; and pleads a compoſition accordingly, &c. in abatement of the bill. To which plea the plaintiff demurs. And it was adjudged, that this matter is matter of bar, but cannot be pleaded in abatement. And therefore judgment was given, that the defendant ſhould anſwer over. And then the defendant pleads the ſame matter in bar. Upon which the plaintiff demurs. And the defendant joins in demurrer. And *quia curia nondum adviſatur*, day is given to the parties *uſque diem Veneris proximæ poſt craſtinum Trinitatis* 10 *Will.* and ſo continuances were entered from thence till *Monday proxime poſt tres ſeptimanas ſancti Michaelis*, and from thence to *Monday proxime poſt octabas Hilarii*. At which day the defendant pleaded (*a*) a plea *puis darrein continuance*, which he intended to be a defeaſance of the debt. But upon demurrer the court adjudged, that it amounted but to a covenant. And now it was argued for the defendant by Mr. *Place*, that the court nevertheleſs ought to conſider the plea in bar; and if that was good, the plaintiff could not have judgment. *Heb.* 81. *Stoner v. Gibſon*, in point. But the court gave judgment for the plaintiff, *niſi*, &c. holding that the pleading of the latter plea was a waiver of the former plea in bar. And the laſt day of this term *Raymond* urged the ſame caſe in *Hobart* for the defendant; and alſo that it is laid down as a rule in many books, that the court muſt judge upon the whole record; and therefore if it appears upon the whole record, that the plaintiff ought not to give judgment, the court cannot give it for him. *Hob.* 56. 7 *Ed.* 4. 31. *per Choke* 10 *Ed.* 4. 7. *a.* But notwithſtanding this the chief juſtice ſaid, that without doubt it was a waiver of the former plea; and if it were not ſo, pleading would be infinite. Therefore the cauſe ſhewn for the defendant was diſallowed. And judgment was given for the plaintiff.

Matter in bar cannot be pleaded in abatement. R. acc. ante, 345. R. cont. 1 Mod. 14. By pleading puis darrein continuance a defendant waives his former plea. D. acc. Jenk. 160. caſe 2. Vide Cro. El. 49. pl. 4. Str. 1106. 4 Ann. c. 16. § 4.

(*a*) Vide Moor, 871. ante, 265.

Slaney

Slaney *verſ.* Slaney.

S. C. 12 Mod. 524.

Q. Whether a plea beginning in bar and containing matter in bar, but concluding in abatement, ſhall be conſidered as a plea in bar, or a plea in abatement only.

IN debt upon bond the defendant pleaded outlawry in the plaintiff, and began it, *actio non*, and concluded in abatement. And Mr. *Mulſo* moved, to try the opinion of the court, whether this ſhould be taken to be a plea in abatement, or a plea in bar; if in abatement, then it did not come in in time, otherwiſe if a plea in bar. Beſides, that if it ſhould be adjudged to be a plea in abatement, and the plaintiff ſhould reply as to a plea in bar, it would a diſcontinuance. For which the caſes of *Biſſe v. Harcourt*, 3 *Mod.* 281. *Bonner v. Hall*, *ante*, 338. and *Meaina v. Stoughton*, *ante*, 593. were cited. In which laſt caſe the defendant in his plea prayed judgment *de narratione*, and it was objected, that this was a concluſion in bar; and the plaintiff demurred, and concluded as to a plea in bar; and yet judgment was given, that he ſhould anſwer over. But to that the court ſaid, that they gave ſuch judgment, becauſe if it were erroneous, that the defendant could not take the advantage of it, no more than of allowing an eſſoin, where an eſſoin ought not to be allowed, which is for the defendant's advantage. *Adjournatur* (*a*).

(*a*) According to the report in 12 Mod. 524. the court afterwards ordered the defendant to ſhew cauſe why he ſhould not amend the concluſion.

Mich

Michaelmas Term

3 Will. 3. B. R. 1701.

Parſons *verſ.* Gill.

S. C. but very differently reported, Com 117.

MR. *Broderick* made a motion to refer the regularity of an execution to be examined by the maſter, *&c.* alleging it to be irregular for this, that the writ of execution bore *teſte* the firſt day of *Hilary* term, returnable the *Eaſter* term following, and the judgment was of *Hilary* term; ſo that the writ of execution might have been ſued perhaps before the judgment given. Beſides, that the judgment was ſigned after the death of the defendant, for the defendant died the firſt of *April*, and the judgment was aſſigned the ſecond of *April*, which being before the oſſoin day of *Eaſter* term, related to *Hilary* term; and therefore altogether irregular. But the motion was denied, becauſe (*per curiam*) the practice is always ſo, and well enough.

A writ of execution may bear teſte the firſt day of the term of which the judgment is entered. If the defendant in an action dies after the plaintiff is intitled to judgment, but before it is actually ſigned, and it can be ſigned as of a day before his death, it may. R. acc. poſt. Fawkes v. Atkinſon.

766. 849. Str. 882. 3 P. Wms. 398. Northern v. Oliver. 2 Barnes, 205. 2 Barnes, 209. Vide Burr. 2277. Str. 1081. 17 Car. 2. c. 8. ſ. 1.

Sir Richard Leving *verſ.* Lady Calverly.

S. C. but very differently reported, 12 Mod. 561. Com. 118.

ERROR *C. B.* The error was aſſigned for want of an original, and upon a *certiorari* ſued the return was, that no original, *&c.* Upon which the defendant in error ſuggeſted, that there was an original of another term; and upon a *certiorari* ſued by him, an original was returned, and an entry made thereof upon the roll. And Mr. *Broderick* moved, that it was irregular, becauſe the defendant ſhould have given notice in writing to the plaintiff's attorney before he ſued the *certiorari*. That the practice was ſo; and in a caſe between *Nayden* and *Winterbottom*, *Mich.* 10 *Will.* 3. ſuch a rule was granted. But *Holt* chief juſtice ſaid, that it could be no prejudice in the writ of error. To which Mr.

If the want of an original is aſſigned for error, and upon a certiorari a return is made that there is no original, the defendant in error may upon a ſuggeſtion that there is an original of another term ſue out a ſecond certiorari without giving any notice to the plaintiff's attorney.

LEVING v. CALVERLY.

Mr. *Broderick* anſwered, that the writ of error was brought for this reaſon, and therefore he ought to have his coſts, which he would loſe, if the judgment ſhould be affirmed. But to that the chief juſtice anſwered, that if the lord keeper had been of opinion, that the plaintiff ought to have had his coſts, he would not have granted the liberty of filing an original, before coſts were paid by the defendant. And the motion was denied.

Nailor's Caſe.

S. C. 12 Mod. 562. Holt, 494.

The king's bench may grant a habeas corpus to bring up a man who is in the ſheriff's cuſtody upon a ne exeat regno, and turn him over to the marſhalſea.

NAILOR, an attorney of the common pleas, was arreſted in *London* upon a plaint levied in one of the ſheriffs courts of *London*, and was carried to the counter. A writ of *ne exeat regno* iſſued out of chancery againſt him, and was delivered to the ſheriff whilſt he was there. Upon which *Nailor* made application to Mr. juſtice *Turton* at his chambers, and afterwards to my lord chief juſtice *Holt*, to have a *habeas corpus* to remove himſelf into the *Marſhalſea*, actions being entered againſt him in the king's bench. And an order was made, that it ſhould be moved *in B. R.* And now Mr. *Broderick* moved, that the *habeas corpus* ought not to be granted in this caſe. 1. Becauſe the writ of *ne exeat regno* commands the ſheriff to take ſecurity, and to tranſmit it into chancery; which he cannot do, if this *habeas corpus* ſhall iſſue out of this court. 2. They in chancery only know what ſecurity is ſufficient, being only conuſant upon what ground this writ was granted. 3. They in chancery can only grant a *ſuperſedeas*. *Sed curia contra*, that the *habeas corpus* ought to be granted; that the king's bench may receive and judge of the ſecurity taken, and that he ought to remain there, and that they may then grant a *ſuperſedeas*. *Sed adjournatur*.

Byne *verſ.* Dodderidge.

A cuſtom to pay in lieu of tithes 2s. in the pound out of the rent reſerved is a bad modus. R. acc. poſt. 1158.

MR. *Cheſhyre* moved againſt a rule for ſetting this aſide' being granted to diſcharge another rule before made, by which a prohibition was granted to the ſpiritual court, to ſtay a ſuit there for tithes, upon ſuggeſtion of a *modus*; and this laſt rule was made upon allegation, that the plaintiff had had a prohibition granted before, and that he had (*a*) declared upon it, and that iſſue had been joined upon it, and a verdict found in it againſt the plaintiff. And that which Mr. *Cheſhyre* now urged againſt this rule was, that this *modus*, upon which the rule was made for the granting of a prohibition, varies from the *modus*, upon which the prohibition had been granted before, and the verdict had, &c.

(*a*) See the record, Lill. Ent. 311.

And

And therefore that this caſe was not within 50 *Ed.* 3. *c.* 4: For the preſent *modus* ſuggeſted is, that they have uſed to pay 2*s.* in the pound of the rent reſerved; whereas the former *modus* was, that they uſed, *&c.* to pay 2*s.* in the pound of the profits received. And he cited *Hob.* 192. Againſt this, Mr. *Broderick* ſaid, that this *modus* was not good; for as it is laid in the ſuggeſtion, if the plaintiff keeps the lands in his own hands, he ſhall pay nothing to the parſon; for the *modus* is laid to be paid out of the rent reſerved. 2. He may let a leaſe at a ſmaller rent upon payment of a fine. And he cited 1 *Roll. Rep.* 378. 2 *Ventr.* 47. But (*per Cheſhyre*) that would be a fraud. *Curia contra.* It would not be a fraud. And *per Holt* chief juſtice, 1. This cannot be a *modus*, it amounting to as much as the tithes in kind; but it may be a compoſition. 2. A cuſtom cannot be applied to rents reſerved from time to time upon frequent new reſervations. And the rule for diſcharging of the rule granted for the prohibition was made abſolute.

BYNE v. DODDERIDGE.

Baſs *verſ.* Firmen.

IN debt upon a bond made in this manner, *Noverint univerſi per praeſentesme——— Firmam de Perth Amboy in provincia de Weſt Jerſey teneri et firmiter obligari* to the plaintiff in 80*l. legalis monetae praedictae, &c.* the plaintiff demanded 80*l.* of the money of *England.* And upon *non eſt factum* pleaded, at the trial before *Holt* chief juſtice at *Guildhall, Paſch.* 13 *Will.* 3. the plaintiff was non-ſuit; the chief juſtice holding, that this bond bound the defendant in the money of *Weſt Jerſey*, not of *England*; the condition of the bond being alſo for payment of 40*l.* of the ſaid province. And now the plaintiff brought a new action upon this bond in the *detinet* as of foreign coin *ad valorem* of ſo much of the money of *England.* And this term ſerjeant *Hall* moved, that the plaintiff might not proceed, before he had paid the coſts of the former nonſuit. Which was oppoſed by *Raymond* for the plaintiff, and denied by the court. Becauſe the merits did not come in queſtion in the trial, upon which he was nonſuit, but he was nonſuit only upon the variance. And the ſaid rule is grantable generally only in ejectment.

Upon a bond in which a foreigner binds himſelf by his deſcription as a foreigner in ſo much legalis monetæ prædictæ with a condition for the payment of foreign money, he is only bound in foreign money.

The proceedings in an action are not to be ſtayed becauſe the plaintiff has not paid the coſts of a former action for the ſame cauſe between himſelf and the defendant unleſs the merits were decided in ſuch

5 Law Rep. 486

former action. R. acc. Str. 878. 3 Wilſ. 149. Bl. 809. Lazanes v. Pritchard. 1 Barnes, 100. Vide poſt. 1308. Bl. 741. Except in ejectment. Vide Str. 1152. Holdfaſt v. Jackſon. 2 Barnes, 107. Bl. 904. 1158. 1180. Lawſon v. Law. B. R. H. 25. G. R. 1 T. R. 492.

Rowland

Rowland et al. *verſ.* Hockenhulle et al'.

In the Exchequer.

ROWLAND and others bring an ejectment in *Cheſter* againſt the defendants. Upon which the defendants exhibited their bill in the court of exchequer of *Cheſter*, which is the chancery there, againſt the plaintiffs. And to procure an injunction, they ſuggeſt in their bill, that one of the defendants in the bill plaintiffs in the ejectment, dwells out of the county palatine, and therefore they pray, that ſervice of the injunction upon the attorney of the defendants in the bill may be good ſervice. And an order was made accordingly. Upon which Mr. *Cheſhyre*, upon producing a copy of the bill and order, moved in the exchequer for a prohibition. And a rule was made that they ſhould ſhew cauſe why, *&c.* And now Mr. *Ward* ſhewed cauſe. *Sed non allocatur*, becauſe, 1. They cannot ſerve the proceſs of their exchequer upon a man out of the juriſdiction. 2. They cannot make a ſupplemental order, to ſupply this defect of the juriſdiction. 3. They cannot proceed, where part is out of their juriſdiction. And the rule for a prohibition was made abſolute.

Holdin *verſ.* Sutton.

S. C. 12 Mod. 565.

An action in the debet and detinet which ought to have been in the detinet only, is objectionable after verdict. An action of debt by a man as executor ought to be in the detinet only. Vide 5 Co. 31. *b.*

DEBT was brought by the plaintiff upon an eſcape done by the defendant marſhal of this court in the time of the teſtator, and it was brought in the *debet et detinet*. Upon *nil debet* pleaded verdict for the plaintiff. And now ſerjeant *Hall* moved in arreſt of judgment, that this action cannot be maintained in the *debet and detinet*, but ought to have been brought in the *detinet* only. And it was admitted, that after demurrer it would have been ill. But at another day Mr. *Peere Williams* and Mr. *Boulſ* for the plaintiff argued, that this was aided after verdict by 16 & 17 *Car.* 2. *c.* 8. And for that they cited 1 *Sid.* 342. *Comber v. Watſon*, debt againſt the heir brought in the *detinet* only upon a bond of the anceſtor, in which he bound himſelf and his heirs, good after verdict, though it ought to have been in the *debet* and *detinet*; and 1 *Sid.* 379. *Fruen v. Porter.* But the court ſeemed to the contrary, becauſe it would alter the nature of the action, and therefore the right was not tried. And judgment ſtayed, *niſi*, *&c.*

Rex

Rex *verſ.* Symonds.

S. C. 12 Mod. 566. Holt 406.

Symonds was brought into the king's bench upon a *habeas corpus* directed to the keeper of the *New priſon*. And by the return thereof it appeared that ſhe was committed by Mr. *Perry* a juſtice of peace to *New priſon*, becauſe ſhe was a lewd, idle and diſorderly perſon, for that ſhe was found in a reputed bawdy-houſe. And Mr. *Eyre* moved, that ſhe might be diſcharged, becauſe the commitment was illegal; 1. Becauſe the bare being found in a bawdy-houſe was no cauſe of commitment. 2. Becauſe (*a*) the juſtices of peace could not commit to *New priſon*. And *per Holt* chief juſtice, the barely being in a ſuſpected houſe at a time not unſeaſonable, ſhall never be cauſe of commitment; but the juſtices may commit a lewd, idle, and diſorderly perſon; therefore a general commitment, that ſhe was an idle and diſorderly perſon, had been good. But here the juſtice of peace aſſigns (*b*) that for cauſe of idleneſs and diſorderlineſs which is no cauſe, *viz.* the being found in a houſe of ill repute; and therefore this commitment ſeems ill. But then upon reading ſeveral *affidavits* concerning the debauchery and obſcene actions, &c. of the defendant, the (*c*) court refuſed to diſcharge her without bail found. And therefore becauſe ſhe could not find bail, ſhe was committed to the *Marſhalſea*.

(*a*) Ante 66.

(*b*) Vide 1. T. R. 261.

(*c*) Vide ante 48.

The Inhabitants of the Pariſh of St. Andrew's Underſhaft in London *verſ.* Jacob Mendez de Breta.

THE defendant being a *Jew* had an only daughter, who was converted from *Judaiſm*, and embraced *Chriſtianity*. Whereupon (*a*) the defendant turned her out of his doors, and refuſed to allow her any maintenance. Upon which on complaint made to the juſtices at the general quarter-ſeſſions, they reciting that ſhe was the daughter of the defendant, and that he was a man able to maintain her, made an order for the defendant (being very rich) ſhould allow her 20*s.* *per* month for her maintenance, under the penalty of 12*l.* And this order they founded upon the 43 *Eliz. c.* 2. *ſ.* 7. And now Mr. *Dee*, Mr. *Cowper* and Sir *Bartholomew Shower* made a motion to quaſh this order, becauſe the juſtices have not any juriſdiction to make ſuch an order, it not being within the ſaid ſtatute, becauſe it was not alledged that ſhe was poor, or likely to became chargeable to the pariſh. And the order was quaſhed.

An order upon a father to make his daughter an allowance muſt ſtate that ſhe is either poor, or likely to become chargeable. Vide 43. Eliz. c. 2. ſ. 7.

(*a*) Vide Ann. St. 1. c. 30.

Chauncey

Chauncey *verſ.* Winde et al'.

Intr. Trin. 13. Will. 3, B. R. Rot. 82.

S. C. Salk. 628.

To a juſtification under a warrant granted on a public ſtatute though it ſet out the act, the plaintiff may take the general traverſe. S. C. Holt 409. and more at large 12 Mod. 580. Vide Com. Pleader. F. 18. &c. 2d Ed. vol. 5. p. 106.

If a ſtatute impoſes a penalty for neglects relative to a particular ſpecies of any commodity, a juſtification under the act for raiſing the penalty muſt ſhew that the commodity in reſpect of which the neglect was committed was of that particular ſpecies.

TReſpaſs for taking of the plaintiff's ſalt. The defendant juſtified under a warrant from the commiſſioners of the duty upon ſalt, by virtue of an act of parliament lately made, 10 and 11 *W.* 3. *c.* 22. *ſ.* 10, which prohibits the lading of ſalt upon any ſhip, before it has been weighed by the officers of the duty, under penalty, *&c.* The plaintiff replied, that the defendant ſeiſed it of his own wrong, *abſque tali cauſa*, generally. The defendant demurred. And Mr. *Ward* for the defendant argued, that the replication was ill, becauſe the defendant juſtified as ſervant, and therefore the ſpecial matter ought to be traverſed: and ſuch general traverſe is not good. 8 *Co.* 67. *Crogate*'s caſe; 1 *Roll. Rep.* 47. and held accordingly, *Hill.* 6 *Will. & Mar.* between *Thorne* and *Birch*, intr. *Trin.* 6. *Rot.* 819. 2 *Keb.* 266. *Lambert v. Kellum accord. Cro. Eliz.* 539. 2. The defendant juſtifies by authority given by the law, and therefore ſuch general traverſe is not good. 2 *Roll. Abr.* 694. And this is proved by the ſtatutes of the commiſſioners of ſewers, becauſe there liberty is given, where juſtification is made under the ſaid act, to make ſuch replication, *de ſon tort demeſne abſque tali cauſa*; which implies, that without ſuch proviſion made by the act, it could not have been pleaded ſo generally. Againſt this it was argued by Mr. *Eyre* for the plaintiff, that the replication was good. He agreed, that where a juſtification is made under matter of record, a ſpecial anſwer ought to be given to it; as where a juſtification is made under a *capias*, *fieri facias*, *&c.* and a replication *de ſon tort demeſne abſque tali cauſa* is not good. But the ſaid rule is not general, but liable to ſome diſtinctions; as where the matter of record is but inducement to the action, there ſuch ſpecial anſwer is not requiſite. 2 *Leon.* 102. And in this caſe this ſtatute is but inducement to the juſtification, for the defendant had no need to have pleaded it, it being a general ſtatute; but it would have been a good plea, to have ſaid, that the ſalt was carried on board of the ſhip after the ninth of *May*, *&c.* unweighed by the officers; and therefore here all the ſubſtantial part of the plea is matter of fact, and the record is not involved in the traverſe, which is the reaſon that ſuch traverſe here is good; *contra* where the record is involved in the traverſe with the matter of fact. Beſides, that this rule ought to be underſtood, where the matter of record may be traverſed; but a general act of parliament cannot be traverſed, becauſe it is matter of law, and matter of law cannot be traverſed. Objection: That here the defendant juſtifies under an authority derived from the law, and therefore ſuch general traverſe

traverſe cannot be good. Anſwer: The third reſolution in *Crogate*'s caſe contradicts the firſt. 16 *Hen.* 7. *c.* 2. That ſuch traverſe is good. And as the caſe in *Rolle's Abridgment* cited by Mr. *Ward* (by him) it is not law, becauſe ſuch general traverſe is aided by verdict. *Raym.* 50. *Collins v. Walker.* And in *Co. Entr.* 643. in treſpaſs and aſſault, the defendant juſtified under the ſtatute *de malefactoribus in parcis*, the plaintiff replied as here, and held good. To which Mr. *Ward* for the defendant replied, that in this caſe the ſtatute is not inducement, but the point of the juſtification, and therefore ſuch traverſe is ill. And he cited *Bro. de ſon tort. demeſne* 21. And (by him) the third reſolution in *Crogate*'s caſe does not contradict the firſt, becauſe the proceedings in a court baron are but matter of fact, not of law. And *per Holt* chief juſtice, the replication ſeems good, becauſe the ſtatute is a general act, and had no need to be pleaded. But then exception was taken to the plea, that it does not appear what ſort of ſalt this was; and perhaps it was bay ſalt, which is not within the act; and therefore the plea is ill, becauſe it does not ſhew, that the ſalt was ſuch as the act extended to. And for this reaſon judgment was given for the plaintiff, *niſi*, &c.

CHAUNCEY v. WINDE.

Warner *verſ.* Green.

S. C. 12 Mod. 580.

CASE for continuance of a nuiſance. The defendant pleaded, that the plaintiff was excommunicate, and did not ſhew (*a*) the certificate, nor for what cauſe the excommunication was; and concludes his plea with a prayer, that the parol *remaneat ſine die*, without ſaying (*b*) *quouſque*. The defendant demurs. And for theſe reaſons *reſpondes ouſter* was awarded.

(*a*) Vide Lutw. 19.

(*b*) Vide 8 Co. 62. *b.* 69. *a.* Co. Litt. 134. *b.*

Pink *verſ.* Rudge.

Intr. Trin. 13 Will. 3. Rot. 43.

CASE upon ſeveral promiſes. The defendant pleaded the ſtatute of limitations. The plaintiff replied a *clauſum fregit* ſued, returnable *in C. B.* before the ſix years, *ea intentione* to declare in this action upon the caſe; and did not ſhew, that the writ was continued. And upon demurrer, judgment for the defendant.

Vide ante 432.

Roberts

Roberts *verſ.* Price et al', manucaptores Brook.

IN *ſcire facias* upon a recogniſance of bail, the defendant pleaded that no *capias* iſſued againſt the principal. The plaintiff replied, and ſhewed a *capias*, returnable *coram domino rege apud Weſtmonaſterium craſtino Aſcenſionis.* The defendant rejoined *nul tiel record.* And upon producing of the record it agreed with the record pleaded *in omnibus*, only in the words *apud Weſtmonaſterium*, inſtead of which there was the word *ubicunque.* And held no failure of the record. *Ex motione m'ri Broderick*, who cited 16 *Aſſiſ. pl.* 9. *Hob.* 55. 36 *Hen.* 6. 2.

Rex *verſ.* Marks.

MR. *Eyre* moved for the quaſhing of an indictment for the unlawful taking *vi et armis* of ten pounds *in pecuniis numeratis* of *J. S.* 1. Becauſe an action lies. 2. Becauſe it ought to have been ſhewn, how many ounces theſe ten pounds countained, and therefore it was uncertain. *Sed non allocatur*; becauſe the court knows well enough how much money makes a pound, and it is certain enough.

Hopkins *verſ.* Squibb.

A plea of priviledge by an officer of any of the courts at Weſtminſter need not ſtate the cuſtom of the court which entitles him to his privilege, it is ſufficient if it ſhews that the defendant is an officer and that his attendance on the court is neceſſary.

IN an action upon the caſe, the defendant pleaded, that by cuſtom, time whereof, *&c. reſindentes, &c.* (inſtead of *reſidentes*) *in ſcaccario domini regis, et negotiis ipſius aemini regis ibidem jugiter intendentes, ac eorum miniſtri, &c. alibi non traherentur in placita quam in ſcaccario praedicto quamdiu idem ſcaccarium apertum foret*; and then he ſhews, that he at the time of the filing of the bill was, and now is, clerk of the *nichils*, *&c.* and that he attended there *perſonaliter*, *&c.* and ſhews the writ, *&c.* The plaintiff demurs ſpecially. And Mr. *Southouſe* urged, that the plea was ill. 1. Becauſe there was not any ſuch word as *reſindentes*, but it ought to be *reſidentes*. *Raſt. Entr.* 473. 2. The cuſtom extends only to perſons *jugiter intendentes*, *&c.* and the averment is of an attendance perſonally, which is not within the cuſtom. *Sed non allocatur.* For *per Holt* chief juſtice, it is enough to ſay, that the defendant was clerk of the *nichils in ſcaccario*, and his reſidence neceſſary there, and then to ſhew the writ; and the other is but recital, and not neceſſary. And therefore judgment was given for the defendant, that the plea ſhould be allowed.

Pollard

Pollard *verſ.* Gerard.

S. C. Salk. 333. Holt, 596. and rather more at large, 12 Mod. 608.

A Motion was made for a prohibition to be directed to the court of the archdeacon of *Middleſex*, to ſtay a ſuit there by *Gerard* againſt the plaintiff for fees, *viz.* 4*s.* due to him as regiſter from *Pollard*, being ſworn before him churchwarden of the church of, *&c.* upon ſuggeſtion, that the office of regiſter is a temporal office, and all profits and fees due to it ſuable at common law. And a rule was made, that they ſhould ſhew cauſe, why a prohibition ſhould not be granted. And now Mr. *Broderick* ſhewed cauſe againſt it. And he agreed, that (*a*) prohibitions had been granted, to ſtay ſuits there for fees due to the proctors; but in this caſe the ſpiritual court may make a better judgment, whether the fees in demand are due and reaſonable. Beſides, that they are ſo ſmall, that it would not be worth while to bring an action at common law for them; and in ſuch caſe this court will not drive the party to the tedious and expenſive remedy of an action. In this court the door-keepers claim fees by cuſtom, and fees are due to the marſhal, cryer, *&c.* at the aſſizes; and in ſuch caſes if the parties, who ought to pay their fees, refuſe to do it, this court, or the judge of aſſize reſpectively, exert their authority, and commit perſons refuſing to pay their fees, and do not drive the party grieved to their action; and (by him) this is the conſtant practice. But *per Holt* chief juſtice, He knew of no ſuch practice; and (by him) he could not commit a man, for not paying the ſaid fees. If there is right, there is remedy; and *indebitatus aſſumpſit* will lie, if the fee is certain; if uncertain, *quantum meruit*. It was held, 15 *Car.* 2. *in ſcaccario*, that a regiſter cannot ſue for his fees in the ſpiritual court. And therefore a prohibition ſhall be granted, and if the parties will, the plaintiff ſhall declare upon it, to the end that the matter may be determined more judicially.

The regiſter of a ſpiritual court, cannot ſue there for his fees. Vide Com. Prohibition. F. 5. 2d. Ed. vol. 4. p. 493.

(*a*) Vide 4 Mod. 254.

A judge cannot commit a man for refuſing to pay court fees. S. P. 12 Mod 608.

Watſon *verſ.* Huddleſton.

Intr. Trin. 13 Will. 3. Rot. 332.

ERROR of a judgment given in the court of *Carliſle* in debt upon two bonds. The plaintiff declared there upon a bond, dated the tenth of *February* 6 *W. & M. annoque Domini* 1693. Judgment by default. And upon error brought, and the general errors aſſigned, Mr. *Ward* for the plaintiff in error argued, that there was no ſuch day as the

If a man in deſcribing the date of a bond offers to ſtate the year of the king as well as that of our Lord, and mentions as that of the king a year until which the king did not reign, the year of the king ſhall be conſidered as ſurpluſage. Vide ante, 638. poſt. 791. 795. In an action on ſeveral bonds it is ſufficient by way of breach to ſtate that ſums contained in all of them were not paid, without adding that none of them were. A writ to remove proceedings before a mayor, aldermen, bailiffs and citizens, will not remove proceedings upon a plaint levied at a court held before the deputy mayor and bailiffs only.

tenth

WATSON v HUDDLESTON.

tenth of *February* 6 *W. & M.* becauſe the queen died before the tenth of *February*, in the ſixth of her reign, *viz.* the twenty-ſeventh of *December*. And therefore the date being impoſſible the plaintiff ſhould have declared upon the delivery. *Co. Lit.* 46. and other books. And of that opinion *Holt* chief juſtice ſeemed to be. But *Powys* and *Gould* held, that the *anno Domini* 1693 was ſufficient, and that the reſt ſhould be rejected. Another error was aſſigned, that this action was brought upon two bonds of 16*l.* each, and the plaintiff has averred, that the 32*l.* were not paid, but does not ſay, that any part thereof was not paid; now it may be, that the plaintiff was ſatisfied for one entire bond, *viz.* 16*l.* Indeed it is not neceſſary to ſay, that any part of one bond is not paid, where the demand is only upon one entire bond, becauſe if the whole is not paid, the debt continues. But here there are two bonds, and therefore there is a difference, becauſe one of them perhaps is intirely ſatisfied. But all the court held, that this was well enough, and did not regard any difference between one bond or two bonds as to this matter. But the writ of error was quaſhed for an exception taken to it by Mr. *Ward*. For the writ was directed *majori aldermannis ballivis et civibus civitatis Carlioli*, to remove the record of a judgment given *in quadam loquela* before them, *&c.* and the record removed was of a plaint levied at the court held before the deputy mayor and bailiffs. And therefore this was held a material variance. *Ward* counſel with the plaintiff in error. *Raymond* with the defendant.

Spencely *verſ.* Sutton marſhal. B. R.

The marſhal of B. R. is reſponſible for the eſcape of a priſoner charged in execution, tho' a committitur is not entered in his books, nor perſonal notice given him of it. Vide 1 Sid. 220. Salk. 272. pl. 3. 12 Mod. 583. Imp. B. R. 4th. Ed. p. 516. 1 Crompt. 2d. Ed. 383. Sed Q. Whether the court would not ſtay the proceedings in an action for ſuch eſcape at any time before verdict. Semb. Salk. 272. pl. 3. 12 Mod. 583.

ESCAPE againſt the defendant for the eſcape of, *W. &c.* Upon not guilty pleaded, verdict for the plaintiff. The evidence upon the trial was, that *W.* was in the priſon of the *Marſhalſea*, and that a *committitur* was entered upon the roll. And it was objected by the defendant's counſel, that though ſuch *committitur* entered upon the roll is all the record made of ſuch commitment by the court, yet by the practice of the court the plaintiff who recovers, *&c.* ought to make ſuch entry in the marſhal's book kept for that purpoſe, and that the marſhal keeps a clerk to make ſuch entries; and the intent of it is, that the marſhal ſhall have notice of ſuch commitments, and that without that he ſhall not be chargeable in eſcapes. For though a *committitur* be entered upon the roll, yet perhaps the marſhal has no notice of it; and it is unreaſonable, that he ſhould be liable for an eſcape, without notice that the man was committed in execution. The like practice in caſe of a *reddidit ſe* in diſcharge of bail; for though the *reddidit ſe* is entered in parchment, and filed with the proper officer; yet ſuch entry is made alſo in the marſhal's book, to the end that he may have

have notice of it. Now in this case no such entry was made in the marshal's book, and therefore he is not chargeable in escape. But *Holt* chief justice, before whom this cause was tried at *Guildhall*, held the entry of the *committitur* upon the roll, &c. as aforesaid to be good evidence. And a verdict was given for the plaintiff. But *Holt* gave leave to the defendant, to move it *in B. R.* And afterwards he moved for the reason aforesaid to set aside the verdict. But it was denied by the whole court. For (by them) trials shall not be set aside, because the defendant might have prevented it before the trial, as in this case he might have moved the court. And it seems to be a trick, to keep it in secret, to set aside a verdict, if it were not according to the defendant's desire. But if the defendant had intended to act rightly, he should have given notice of this irregularity to the plaintiff; but it will not set aside the verdict, when the plaintiff has proved all his declaration. And the motion *in B. R.* was denied, and the plaintiff had his judgment.

Spencely v. Sutton;

Rex *versus* Worsenham et al.

AN information was preferred against the defendants being custom-house officers, for forging of a bond supposed to be given by a merchant to the king for his customs. And motion was made on behalf of the prosecutor, to have the custom-house books in which the entries were made, &c. brought into court, to convict the defendants. But the motion was denied, because the said books are a private concern, in which the prosecutor has no interest; and therefore it would be in effect, to compel the defendants, to produce evidence against themselves. And the court never make such rules, but only of records, or deeds of a public nature.

The court will never compel a defendant in a criminal prosecution to produce evidence against himself. R. acc. Str. 1210. Bl. 37. 1 Wilf. 239. D. acc. Burr. 2489. The court will not compel the production of books of a private nature in favour there cited. See Benson v. Cole. of a person who has no interest in them. R. acc. ante 153. and see the books also ante 252. The custom-house books are books of a private nature. Vide cit. Bl. 40.

Walgrave *verf.* Taylor.

THE motion was to have judgment set aside in trespass after judgment by default and writ of inquiry executed; because the essoin day of *Easter* term was *Sunday*, which not being *dies juridicus*; it was held on the *Monday*, and the declaration in this case was delivered on the *Sunday*, which could not be by the 29 *Car.* 2. *c.* 7. which restrains process in law from being executed upon *Sundays*. 2. If this should be allowed, the plaintiff would gain a term by

A Declaration may be delivered on a Sunday. S. C but no judgment. 12 Mod. 606. D. cont. Comb. 22. Vide Comb. 286. W. Jon. 156. Salk. 626.

post. 1028. Burr. 1598. Bl. 1273. 1 T. R. 285. Com. Temp. B. 3. 2d Ed. vol. 5. p. 523. At least the court will not listen to an objection on that account after the defendant has suffered judgment by default and permitted a writ of inquiry to be executed.

WALGRAVE v. TAYLOR.

it, where the ſaid day ought to be the eſſoin day of *Eaſter* term, and therefore it ought to be but a declaration of the ſaid term; but the declaration being delivered before the eſſoin day, which was held on *Monday*, it will be a declaration of *Hilary* term. But againſt this it was urged by Mr. *Mead* for the plaintiff, that the delivery of a declaration was not ſervice of proceſs. And that *Hil.* 11 *W. B. R.* between *Alleſon* and *Brookbank*, *Carth.* 504. 12 *Mod.* 275. it had been held, that the ſervice of a citation upon a *Sunday* was good, and not reſtrained by the act of *Charles* 2. Which was agreed by *Holt* chief juſtice, but he ſeemed to incline, that the delivery of a declaration upon the *Sunday* was ill; becauſe the ſaid act intended to reſtrain all ſorts of legal proceedings. But *Powys* and *Gould* juſtices *contra*, becauſe ſuch delivery was but *quaſi* a notice; and as a letter, and not a proceſs. But it appearing to the court, that the defendant had appeared, and that a writ of inquiry had been executed, they would not intermeddle, and ſaid that that had made all good. And judgment ſtood.

A citation may be ſerved upon a Sunday.

Rex *verſ.* Fitzgerald.

S. C. with ſome little difference. 12 Mod. 562.

Fitzgerald was bound in a recognizance, to appear the firſt day of this term, and an information was preferred againſt him for a libel before the eſſoin day of the term. And upon motion by the attorney general that he might plead in this term, it was ruled by the advice of the clerks, that he ought to imparle until next term. The ſame law if he comes in upon attachment. But upon a *capi* returned to a *capias* he ſhall plead *inſtanter*.

Hilary

Hilary Term

13 Will. 3. B. R. 1701.

Staples *verſ.* Heydon.

S. C. Salk. 579. 6 Mod. 1.

Intr. Mich. 13 Will. 3. B. R. Rot. 370.

In a cauſe in which iſſue is joined a repleader cannot be granted until after verdict for a fault which a verdict might cure.

TRESPASS. The defendant juſtified by a term for years, beginning it with a general *poſſeſſionatus*, *&c.* The plaintiff replied, and an immaterial iſſue was joined. And now ſerjeant *Darnall* moved for a repleader. And he was oppoſed by Mr. *Ward*, becauſe a repleader cannot be granted before verdict. And for that he cited 3 *Keb.* 664. *Cox v. Milliſh* in point. But *Holt* chief juſtice ſeemed to be of a contrary opinion. And a day was given to hear counſel of both ſides. And afterwards at another day upon conſideration, *&c.* of this, *Holt* chief juſtice delivered the opinion of the court to be, that now a repleader ought not to be granted before trial; becauſe now by the ſtatute of 16 *&* 17 *Car.* 2. *c.* 8. of *jeofails* many defects are aided by verdict; and therefore granting of a repleader may be prejudicial to the plaintiff. And a repleader was denied. See *poſt. Trin.* 2. *Ann. B. R.* 922. S. C.

Leighton *verſ* Theed.

S. C. 3 Salk. 222. pl. 1.

Either party may determine a leaſe at will when he pleaſes. S. C. Salk. 413. D. acc. 2 Bl. Com. 145. But if it is determined on any other than a rent

UPON a motion for a new trial, it was ſaid by *Holt* chief juſtice, that if there be a tenant at will rendering rent quarterly; the leſſor may determine his will when he pleaſes; but then he will loſe all the rent, that would be due for the quarter, in which he determines his will. So the leſſee at will may determine his will when he pleaſes, but then he ſhall pay the rent for all the quarter, in which day he who determines it loſes the accruing rent. S. C. Salk. 413. Vide 2 Bl. Com. 147. A leaſe from year to year ſo long as both parties ſhall pleaſe, cannot be determined except at the end of a year. R. acc. 1 Term. Rep. 159.

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he determines his will. But if *A.* makes a leaſe to *B.* for a year, and ſo from year to year, *quandiu ambabus partibus placuerit*; *A.* may determine his will at the end of any year, but if any new year be begun, it cannot be determined before the end of the year. He ruled the ſame point accordingly at a trial upon evidence, the ſummer aſſizes at *Lincoln* 1699, between *Lely* and *Green*. Salk. 413. pl. 4.

Ingram *verſ.* Foot.

Intr. Paſch. 13 Will. 3. B. R. Rot. 136.

THE plaintiff brought an action of debt upon a bond of 50*l.* againſt the defendant as executrix to, *&c.* The defendant pleaded that the teſtator was alſo bound to *Mary Mead* in a bond of, *&c.* and that ſhe in *Hilary* term 12 *Will.* 3. exhibited her bill in this court againſt the defendant, and obtained judgment againſt her; and alſo that her teſtator bound himſelf in a recognizance to the king at the aſſizes in *Eſſex* held before *Treby* chief juſtice of the common pleas, with condition that *J. Heſſop* ſhould appear at the next aſſizes, *&c.* and then ſhe ſhews, that *Heſſop* did not appear, whereby the recognizance became forfeited to the king; which recognizance appears by the plea to be acknowledged before the laſt act of general pardon, but the defendant avers that it was not pardoned; and the defendant farther ſays, that ſhe *tempore exhibitionis billae praedictae Mariae praedictae plene adminiſtravit, &c. et non habet* goods above enough to ſatisfy the ſaid judgment and recognizance. The plaintiff demurs. And exception was taken to this plea. 1. That it appears that this recognizance was before the general act of pardon, and therefore pardoned; and the general averment, that it was not pardoned was not enough. But it was argued for the defendant, that this act of pardon ſhould have been replied by the plaintiff; and the plaintiff ought to have averred, that this recognizance was not excepted in any of the exceptions of the act. For, 1. The court is not obliged to take notice of an act of pardon, unleſs it be commanded in the act itſelf, that every perſon ſhall take notice of it. But this act of pardon has nothing in it concerning notice to be taken of it by the court, *&c.* unleſs concerning proceſs in ſome particular caſes there mentioned, or upon a plea of the general iſſue. 2. It is a rule in law, that he who will take advantage of an act ought to ſhew himſelf not to be within the exception; now here the plaintiff takes advantage of the act, and therefore of his part he ought to ſhew, that this recognizance was not excepted out of the benefit of the act. 3 *Inſt.* 234. As to the objection,

Courts cannot take notice ex officio of private acts of parliament. S. C. 12 Mod. 611. R. acc. ante 30. 390. D. acc. 1 Bl. Com. 86.

An act of pardon is a private act. S. C. 12 Mod. 611.

In debt upon a bond a plea of plene adminiſtravit muſt ſhew that the defendant had adminiſtred before the commencement of the plaintiff's action.

A plea to an action by bill that after the commencement of the plaintiff's action I. S. exhibited a bill and recovered judgment againſt the defendant as executor, &c. and that before the exhibiting of the ſaid bill of the ſaid I. S. the defendant had fully adminiſtered, does not.

that

that the defendant ought to aver, that this recognizance was not within the ſaid act. Anſwer. The ſtatute does not alter the method of pleading; as in caſes of leaſes made by deans and chapters, &c. one has no need to aver, that the rent reſerved was the ancient rent; but if it was not the ancient rent, that ought to be ſhewn of the other ſide. And there will be the ſame reaſon, for the defendant to aver, that this recognizance was not within the ſtatutes of gaming or uſury. But if the plaintiff had replied the act, &c. then the court would have taken notice of it, and the averment might have been according to the old rules of law in the ſaid caſe of pardon, which is a particular caſe. Againſt which it was argued for the plaintiff by Mr. *Broderick*. And he admitted that he who would take advantage of a pardon in a plea, ought to aver, that he is not excluded from the benefit of it by any exception contained in it. And that does not drive him to a difficulty, becauſe making his defence by the pardon, he will eaſily take notice of the exceptions. But (by him) there is a difference between perſons and offences in ſuch caſe; becauſe as to perſons, without ſuch averment the court will not take notice, whether he be the ſame perſon pardoned, or excepted, or not; but otherwiſe of offences. *Noy*, 99. *Moor*, 619. *Poph.* 93. *Moor*, 303. 2. The court will take notice of the ſaid act, becauſe it may be given in evidence upon the general iſſue. But *per Holt* chief juſtice, this court is not obliged to take notice of an act of pardon, unleſs the act compel this court to take notice of it (for an act of pardon is not a general act) which this act does not compel us to do. And it is no conſequence, that, becauſe a man may give it in evidence upon the general iſſue pleaded, therefore this court ſhall take notice of it in collateral caſes. Now in a *ſcire facias* upon this recognizance the defendant ought to have pleaded this act of pardon, otherwiſe this court could not have taken notice of it. And *Holt* ſaid, he was not ſatisfied with the caſes, where it is held, that a man pleading an act of pardon, ought to aver, that he is not within the exceptions; but (*a*) the ſaid matter ought to be replied by the plaintiff, or the attorney general, as the caſe happens to be. And it is ſo in all caſes of private acts of pardon whatſoever, and the caſes to the contrary are not founded upon ſolid reaſon. Then Mr. *Broderick* took another exception to the plea, *viz.* that the declaration was of *Mich.* 12 *Will.* 3. and that the bill of *Mary Mead* was of *Hil.* 12 *Will.* 3. which was afterwards; and that the defendant pleaded, that ſhe had fully adminiſtered at the time of the exhibiting of the bill of *Mary Mead*; ſo that perhaps ſhe had not fully adminiſtered at the time of this action brought. But to that it was anſwered, that it was *tempore exhibitionis billae praedictae Mariae praedictae*; and therefore if it had been only *billae praedictae*, it had been good, becauſe it would have referred to the

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9 Law Rep. 127.

(*a*) Vide ante, 119. and the books there cited.

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the bill of the plaintiff; and therefore *Maria praedicta* ſhall be rejected as ſurpluſage. *Sed curia contra.* For though this action was brought by bill, yet no bill is mentioned in the record but the bill of *Mary Mead*, and therefore it ought to refer to that. And therefore judgment was given for the plaintiff.

Clifton *verſ.* Wells.

S. C. 12 Mod. 633.

Charging a perſon with having the French pox is actionable. Vide com. action on the caſe for defamation. D. 29. 2d. Ed. vol. 1. p. 184. Calling a woman a pocky whore, and ſaying ſhe carries the pox along with her is equivalent to ſaying ſhe has got the French pox. Vide Carth. 55. and Com. ubi ſupra.

CASE for theſe words, "Thou art a pocky whore, and "carrieſt the pox (*innuendo* the *French* pox) along with "you." Upon not guilty pleaded, verdict for the plaintiff. And laſt *Michaelmas* term ſerjeant *Hall* moved in arreſt of judgment, that theſe words are not actionable, becauſe they ſhall be underſtood only of the ſmall pox. And ſtayed until, *&c.* And now this term, upon cauſe ſhewn by Mr. *Cheſhyre*, that the coupling of theſe words, pocky with whore, demonſtrates, that the defendant meant the *French* pox; and therefore they are actionable. Like the caſe where theſe words were held actionable, 1 *Lev.* 205. "You have the "pox, and got it of a yellow haired wench in *Moorfields.*" And all the court were of the ſame opinion, and judgment was given for the plaintiff.

So is it to ſay a man has the pox, and that he got it of a particular woman.

Rex *verſ.* Burgum Andover.

Yam 1. 115. 218. 68.

A man who has power to remove an officer at his diſcretion need not aſſign a reaſon for the removal. Vide Com. Franchiſes. F. 32. 2d. Ed. vol. 3. p. 408.

A *Mandamus* was granted to the defendants, commanding them to reſtore *J. S.* to the office of a common councilman. They return, that by their charter of incorporation they may remove the common-councilmen *per diſcretiones ſuas toties quoties et quandocunque illis placuerit, &c.* and that they removed *J. S.* by their diſcretions, *&c.* And Mr. *Montague* for the king urged, that they ought to have ſhewn ſome reaſon, why they removed *J. S.* But afterwards upon conſideration it was held a good return without ſhewing any reaſon, having power to do it according to to their diſcretions.

Rex *verſ.* Morgan et al'.

If the caption of an indictment ſhews that the jury found the bill upon their oath, it need not ſtate that they were ſworn and charged.

AN indictment found againſt the defendants for a riot was removed *in B. R.* and upon not guilty pleaded, was tried at the aſſizes, and verdict for the king. And now motion was made in arreſt of judgment, and many exceptions were taken and over-ruled. But one, upon which the defendants principally relied, was, that there was an omiſſion of *juratorum et oneratorum* in the caption. To which

which Mr. *Broderick* anſwered, that there is a great difference between a record made for *niſi prius*, which is always made briefly, and an indictment removed with an intent to be quaſhed; that the words *ſuper ſacramentum ſuum* ſupply the omiſſion of *juratorum et oneratorum*. *T. Jon.* 180. 2 *Keb.* 59. *Rex v. Ambler*. And afterwards this term *Holt* ſaid, that the whole court were of opinion, that it was good without ſaying *juratorum et oneratorum*.

Rex v. Morgan.

Johnſon *verſ.* Bewick.

A Rule was made for a prohibition, to be granted, *niſi &c.* to the conſiſtory court of the biſhop of *Winton*, to ſtay a ſuit againſt the plaintiff by the defendant, for having ſaid to the defendant, "Thou art a whore," and for having ſaid to the defendant's huſband, "You have married "an old whore, and therefore have no children;" upon ſuggeſtion of the cuſtom of *London* to cart whores, and that theſe words were ſpoken in *London*. And now *Raymond* ſhewed cauſe againſt this rule, why a prohibition ought not to be granted. 1. That this cuſtom of *London* was obſolete, and never put in practice. 2. That it appeared here upon the face of the ſuggeſtion, that as well the plaintiff as the defendant lived out of the juriſdiction of *London*, *viz.* at *Bewick* in *Middleſex*, and *Johnſon* in the pariſh of *St Olaves Southwark*. And therefore it would be hard to deprive the defendant of puniſhing the plaintiff, for having ſpoken theſe malicious and defamatory words, in a court where ſhe may proceed, to drive her to another court where ſhe cannot proceed, the plaintiff living out of the juriſdiction of the court. And of that opinion was the whole court. And *Holt* chief juſtice ſaid, that if in ſuch caſe a prohibition were granted, it would give licence to all the market women, when they were in *London*, to defame their neighbours without fear of puniſhment. And the rule was diſcharged. Afterwards the ſame motion was made in the exchequer by Mr. *Nelſon* for a prohibition, and upon a rule made there to ſhew cauſe why a prohibition ſhould not be granted; upon Mr. *Raymond*'s motion it was diſcharged, *Paſch.* 1 *Ann. reginae*.

A prohibition is not to be granted to a ſuit in the ſpiritual court for calling a woman "whore" in London on ſuggeſtion of the cuſtom of London, unleſs the offender lives within the juriſdiction of London.

Rex *verſ.* Croſs et ux'.

S. C. 12 Mod. 634.

AN indictment was found againſt the defendants for having received ſtolen goods, knowing them to have been ſtole. Upon not guilty pleaded the defendant *Croſs* was found not guilty, and his wife was found guilty. And now it was moved in arreſt of judgment, that this fact, whereof the

After a ſtatute has made a fact which was before a miſdemeanor, felony, an indictment will not lie for it as a miſdemeanor.

Stat. Rep. 528

Rex v. Cross.

the defendants are indicted, amounts to felony by the late act of parliament, 3 *W. & M. c.* 9. *ſ.* 4. *viz.* acceſſory after the fact; and therefore it is not indictable as a miſdemeanour, as in this caſe it is: for if it were ſo, then a man might be twice puniſhed for the ſame offence; for conviction upon an indictment for a miſdemeanor cannot be a bar in an indictment for life. And this was urged ſtrongly by Sir *Bartholomew Shower*. Againſt which it was argued for the king by Mr. *Montague* and Mr. *Lechmere*, that if the law were according to what *Shower* ſaid, then the late act, inſtead of diſcouraging the receipt of ſtolen goods, would encourage it. For generally ſpeaking, the felons themſelves are unknown (who ſtole the goods,) and therefore no proceeding can be againſt them, and conſequently no proceeding can be againſt the receiver, for the acceſſory cannot be tried before the principal. 2. This was not felony at common law, becauſe it is not ſaid, that he knew the perſon, *&c.* to be a felon. 9 *H.* 4. 1. But if it be now a felony, the king has liberty to proceed againſt the defendants, either as for a miſdemeanor, or for felony. 18 *Ed.* 4. 10, *pl.* 28. An indictment held good for treſpaſs, where it was ill for felony. 4 *Ed.* 4. 14. 3 *Keb.* 818. *Rex v. Thompſon. Et adjournatur.* And afterwards *Holt* chief juſtice pronounced the opinion of the court to be, that judgment ought to be arreſted. Becauſe now this fact being made felony by the ſtatute, is not indictable as a treſpaſs. And *per Holt* chief juſtice, it would have been the ſame at common law, becauſe this fact would have been good evidence of having been acceſſory to the felony after the fact at common law. And judgment was arreſted.

Rex *verſ.* Roberts.

AN information was exhibited againſt the defendant for having made wooden buttons, contrary to the late act of parliament, 10 *W.* 3. *c.* 2. Upon not guilty pleaded, it was tried before *Gould* juſtice at *Lincoln*, being judge of aſſize; and a ſpecial verdict was found there, *viz.* that all the button was of wood, but there was in it a ſhank of wire. And after argument by Mr. ſerjeant *Neve* for the king, and Mr. ſerjeant *Munday* for the defendant, judgment was given for the king, *viz.* that this was a button of wood, notwithſtanding the ſhank, which is no eſſential part of buttons; for buttons of ſilk and hair have no ſhanks.

Adjudged accordingly *Paſch.* 5 *Ann. B. R. Dunne qui tam, &c. verſ. Hinchly. Poſt.* 1275.

Roſewell

Roſewell *verſ.* Prior.

Intr. Trin. 13 Will. 3. B. R. Rot. 158.

S. C. but with ſome ſmall difference. 12 Mod 635. Pleadings Lill. Ent. 82.

IN an action upon the caſe the plaintiff declared, that he the ſecond of *October*, the ninth of this king was, and long before had been poſſeſſed for a certain term of years, *adtunc venturo et adhuc inexpirato*, in an ancient meſſuage, in which there then was, and time whereof, &c. had been, twenty-one ancient lights; that the defendant was poſſeſſed of a piece of ground near adjoining to the ſaid houſe; and that he the ſaid ſecond of *October* erected there a new houſe, and occupied and continued it until the twentieth of *October* the tenth of this king, which ſtopped the ſaid lights by all the time aforeſaid, *per quod* the plaintiff loſt the benefit of the ſaid lights. Upon not guilty pleaded, it being tried at the ſittings at *niſi prius* at *Weſtminſter*, before *Holt* chief juſtice of the king's bench; the fact upon the evidence appeared to be, that the defendant was not occupier of the new houſe the ſaid ſecond of *October*, nor at any time after, but that he had before built the ſaid houſe, and had demiſed it to *Shuttleworth* rendering rent, who had occupied it for all the time aforeſaid. And the queſtion was, if this evidence would maintain the declaration? for it was objected by the defendant's counſel, that it would not; becauſe, as the fact appeared to be, an action would lie againſt the defendant, but it ſhould have been brought againſt *Shuttleworth*. Upon which this fact was ſtated in a caſe, and reſerved for the opinion of the chief juſtice by (*a*) a rule made by conſent, and in the mean time the verdict (*b*) was for the plaintiff, ſubject to the direction of the chief juſtice. And it was urged by direction of the chief juſtice ſeveral times at the bar of the king's bench by Mr. *Montague*, Sir *Bartholomew Shower*, and Mr. *Weld* for the defendant; and by Mr. *Northey*, ſerjeant *Darnall*, and Mr. *Williams*, for the plaintiff. And it was urged for the defendant, that this action is only to recover damages, and will not lie againſt the defendant, who has only a reverſion in the term; but the action ought to have been brought againſt *Shuttleworth*. *Cro. Jac.* 373, *Ryppon v. Bowles*. *Cro. Jac.* 555. *Brent v. Haddon*. For though the plaintiff receives damage, yet it is not from the defendant but from *Shuttleworth*, and it is no objection to ſay, that an action will not lie againſt *Shuttleworth*, becauſe he cannot pull down this houſe, becauſe it would be waſte; for doubtleſs he might have pulled it down, and abated the nuiſance, for a ſtranger may abate a nuiſance, and it will not be waſte in him. 2. By the alienation of the builder of the nuiſance, the aſſize of nuiſance failed at common law. 2 *Inſt.* 405. but the party

If a man erects a building againſt the ancient lights of another, and lets it, an action will lie againſt him for the injury it occaſions while in the occupation of his leſſee S. C. Salk. 460. pl. 6. Semb. acc. 1. Roll. Rep. 221, 222. Cro. Jac. 373. 1 Mod. 27. Vide Cro. Eliz. 520. pl. 46. and 9 Co. 55. a. An action will lie for the wrongful continuance of a building after a recovery in an action for the wrongful erection of it. R. acc. ante.

(*a*) Vide Lill. Ent. 83. (*b*) Vide Lill. Ent. 516.

prejudiced

Roswell. v. Prior.

prejudice might have a *quod permittat* againſt the alienee being tenant; the reaſon of which will govern the preſent caſe, being an action upon the caſe. And now by *Weſtm.* 2. 13. *ed.* 1. *ſt.* 1. *c.* 24. aſſize of nuiſance lies againſt the erector and the alienee, which would not lie before the ſaid act. This continuance of the nuiſance may be compared to an impriſonment, where every detainer amounts to a new impriſonment; nevertheleſs the man who firſt made the arreſt, is not anſwerable for the whole. 1 *Roll. Rep.* 241. 4. If the defendant is liable for the continuance and the erection, it ſhall be intended, that all the damages as well for the continuance as for the erection, were given in the action brought before for the erection; like the caſe of *Fetter v. Beale*, ante 339, 692.

Againſt this it was argued for the plaintiff, that this is the only action the plaintiff can have; for he being only leſſee cannot maintain an aſſize or a *quod permittat*, and therefore caſe will lie. *F. N. B.* 183. And the action lies more properly againſt the defendant, than againſt his leſſee; becauſe ſince the plaintiff erected the nuiſance, and then leaſed it for years, it is a continuance by him; for by his leaſe he has put it into the hands of a man who cannot abate it for fear of waſte, and therefore it is a continuance by him. 2. The action will not lie againſt *Shuttleworth*, *Cro. Ja.* 373. *Ryppon v. Bowles*, for he has done nothing; and if he ſhould abate it, waſte would lie againſt him, if his leſſor hath the inheritance. 3. It is againſt the rules and juſtice of the law, that a man ſhall take advantage of his own wrong, and deprive another, whom he has injured, of a remedy which the law has given againſt him, by his own act. 4. He has a rent from the tenant, in conſideration of this nuiſance; and therefore it is more juſt, that he ſhould be liable for the prejudice that he has done. To which it was anſwered by the defendant's counſel, that the benefit of the rent which the defendant hath, cannot be a reaſon to maintain this action; for the ſame reaſon would maintain the action againſt the heir or executor of the defendant, as the caſe might happen, for the continuance in their time. But that cannot be pretended, for being a perſonal wrong, it would die with the perſon; and yet ſuch heir or executor would have the rent reſerved.

And this term judgment was given for the plaintiff, for admitting that the action would lie againſt the defendant or againſt his leſſee *(per curiam)* then the ſheriff ſhould have his election, and a recovery againſt the one would (*a*) be a bar in an action brought againſt the other. *Yelv.* 209, *Spencer v. Com. Rutland.* And it is very reaſonable, that the action ſhould lie againſt the defendant, becauſe he erected

(*a*) Vide Burr. 1345. Bl. 373. 387.

erected it and for ſome time continued the enjoyment of it, and then demiſed it to *Shuttleworth*, rendring rent, ſo that he has made an agreement with *Shuttleworth*, that it ſhould continue, and he has a rent for it. He likened it to the caſe, where *A.* diſſeiſes *B.* and then *A.* makes a feoffment in fee to *C. C.* takes the profits, then *B.* re-enters; *B.* in treſpaſs againſt *A.* ſhall recover all the mean profits received by *C.* 11 *Co.* 51. *a. Lifford's* caſe. This action cannot be maintained againſt the heir or executor of the defendant, becauſe it is a perſonal wrong, and (*a*) dies with the perſon. As to the caſe put of impriſonment, *Holt* chief juſtice ſaid, that if *A.* wrongfully arreſts *B.* and then *A.* delivers *B.* to *C.* *A.* is guilty of the continuance of impriſonment. And as to the objection, that damages may be intended to have been recovered in the action for the erection. 1. No ſuch action now appears to have been brought, but in the caſe of *Fetter v. Beale* the former recovery was pleaded. 2. The damages for the continuance of the nuiſance cannot have been recovered in the action for the erection, becauſe they were not then ſuſtained; but the battery was the ſame at the time of the action brought, and being a tranſient act did not lie in continuance, and therefore all the damages were given for it in the firſt action. And judgment was given for the plaintiff.

ROSEWELL v PRIOR.

(*a*) Vide Cowp. 371.

Foreland *verſ.* Hornigold.

Intr. Hill. 11 Will. 3. B. R. Rot. 164, or 564.

S. C. Salk. 72. Holt, 80. and more at length 12 Mod. 533.

DEBT upon a bond, conditioned to perform the award of *J. S.* The defendant pleaded, *nul agard fait.* The plaintiff replied, and ſhewed part of the award, and pleaded it with a *profert in curia*, and aſſigned a breach. The defendant demurred for variance; and the variance being material, *viz.* in the ſubſtantial part of the award, the court gave leave to the plaintiff to diſcontinue, upon payment of coſts. But if the plaintiff had ſhewn all the part of the award that was good, and had omitted to ſhew part of the award that was ill in itſelf and void; upon iſſue of *nul agard*, that would not have been a material variance. And ſo *Holt* chief juſtice ſaid, that it had been ruled before upon evidence at a trial at *niſi prius* at *Guildhall.* And *Gould* juſtice ruled it accordingly at the ſummer aſſizes in the home circuit. And *per Holt* chief juſtice, the judges made no diſtinction between the good part and the bad part of an award till the time of king *James* I.

A party who offers to ſet out the whole of an award may omit ſuch part of it as is void. But he muſt not omit any other part.

Vincent

Intr. Mich. 13 Will. 3. B. R. Rot. 183.

It a defendant pleads to part only of the plaintiff's charge or demand, the plaintiff muſt take judgment on nihdicit as to the reſidue otherwiſe the whole ſuit will be diſcontinued. R. acc. poſt. 841. Salk. 180. Acc. Gilb. C. B. 62. 155. 160. Vide ante 231. But though he replies immediately he may take ſuch judgment at any time within the the term of Which the defendant pleaded unleſs he previouſly enters a continuance. R. acc. Salk. 180.

Vincent *verſ.* Beſton.

Aſſumpſit upon three promiſes for 55*l.* each. The defendant as to the 55*l.* mentioned in the firſt count pleads, that the plaintiff ought not to have his action, for that the ſaid three ſeveral aſſumptions *in narratione ſuperius mentionatae*, were for the ſame ſum of 55*l.* which ſum of 55*l.* the defendant had paid to the plaintiff before the action brought; and for this he prays judgment, if the plaintiff ought to have his action againſt him. The plaintiff replied, that the defendant did not pay, *&c.* The defendant demurred. And the court held, that the whole was diſcontinued, becauſe the defendant pleaded only to the firſt of the promiſes, aud therefore the plaintiff ſhould have taken judgment by *nihil dicit* upon two of them; but not having done it, the whole is diſcontinued; for the defendant had fixed his plea by the beginning to the firſt promiſe, and therefore the ſpecial matter which follows will not aid it. 1 *Roll. Rep.* 177, 406. But afterwards, this being all done in *Michaelmas* term, and no continuance being entered upon the roll, the plaintiff entered up judgment by *nil dicit* upon the two promiſes to which the defendant did not plead. And this was approved by the court, upon a report made of it by the maſter after reference to him, and judgment was this term given for the plaintiff upon the demurrer. Mr. *Cheſhyre* councel with the plaintiff. Mr. *Brantbwaite* with the defendant.

Intr. Hill. 8 Will. 3. B. R. Rot. 664.

The entry of ceſtuy que truſt is ſufficient to avoid the ſtatute of limitations. In an action againſt ſeveral defendants, though they plead jointly, yet if their plea is in its nature ſeverable, the plaintiff may enter a nolle proſequi as to one, and proceed againſt the reſt. S. C. 456. 12 Mod. 651. Vide Carth. 21. This entry may be made at niſi prius before the trial of the cauſe, S. C. Salk. 456. 12 Mod. 651. And the judge of niſi prius may record it. S. C. 12 Mod. 651, &c.

Gree *verſ.* Rolle and Newell.

THE plaintiff brought an ejectment againſt the defendants Sir *John Rolle* and *Newell*, for lands of *Devonſhire*. The defendants appeared, and entered into the common rule in ejectment, and pleaded jointly not guilty. The cauſe being brought to trial at the aſſizes at *Exeter*, Sir *John Rolle* appeared, and confeſſed leaſe, entry and *ouſter*, but *Newell* did not appear. Upon which the plaintiff entred a *non proſ.* againſt *Newell* at the ſaid aſſizes, and as to Sir *John Rolle* the jury found a ſpecial verdict; upon which the ſingle queſtion was, whether the entry of *ceſtuy que truſt* would be ſufficient to avoid the ſtatute of limitations, 21 *Jac.* 1. *c.* 16? And it was held clearly by the whole court, that ſuch entry was ſufficient to avoid the ſtatute and they would not hear an argument upon the point. And a rule was made

1st Mich. 363 & 358 that

that the plaintiff ſhould have judgment, unleſs the defendant ſhewed cauſe to the contrary before the end of *Trinity* term laſt paſt. Upon which Mr. *Broderick* moved to ſet aſide the ſaid rule; becauſe (by him) the *retraxit* is irregularly entered; and the plaintiff, after the entry of it, ought not to have proceeded, ſuppoſing that it had been regularly entered; becauſe by his declaration he ſuppoſes, that he has right only againſt both jointly, which ſuppoſal he has falſified by the entry of the *retraxit*, confeſſing thereby, that he has no right at all againſt *Newell*. *Sed curia contra*, as to this laſt matter. For if an ejectment be brought againſt two, and iſſue be joined, and then one of them dies, and a *venire* is awarded as to the two defendants, and a verdict againſt two, yet upon ſuggeſtion of the death of one of them upon the roll, the plaintiff ſhall have judgment for the whole againſt the other, *Cro. Jac.* 303. 274. 2 *Keb*, 845. becauſe this action is grounded upon torts, which are ſeveral in their nature, and one may be found guilty, and the other acquitted. Then Mr. *Broderick* argued, that this *retraxit* was entered irregularly, for (by him) the *non prof.* muſt be interpreted a *retraxit* or nothing; for it cannot be a nonſuit, for if it were a nonſuit, then the plaintiff, being nonſuit againſt one, ſhall be nonſuit againſt both. And as a *retraxit* it cannot be good, becauſe the defendants have joined in plea, and therefore neither the plaintiff nor the judge of aſſiſe can ſever them; and all the caſes, where *retraxits* have been adjudged good, were where the pleas were ſeveral, and not joint. *Long.* 5 *Ed.* 4. 108. *Bro. Judgment.* 77. In treſpaſs againſt ſeveral, if the plaintiff enters a *non prof.* againſt one, he cannot proceed againſt the reſt, unleſs they ſever in plea. 2. The judge of *niſi prius* could not enter a *retraxit* to be good, becauſe upon the entry of it judgment ought to be immediately, that the defendant againſt whom the *retraxit* is entered *eat inde ſine die*; which the judge of *niſi prius* cannot do, and ſo this *retraxit* is irregular; the conſequence of which is, that *Newell* continued defendant notwithſtanding this *retraxit*, and nevertheleſs the judge tried the iſſue only againſt one of the defendants. He cited alſo 2 *Vent* 195. *Fagg v. Roberts*, that the plaintiff ought to have been nonſuit, becauſe both the defendants did not confeſs leaſe, entry and *ouſter*: and 1 *Sid.* 76. *Boulter v. Ford*. *E contra* it was argued for the plaintiff by Mr. ſerjeant *Darnall*, that a *retraxit* may be entered before the judge of *niſi prius*, becauſe the parties are all amendable there, and have day, and their appearance is at the beginning recorded. That ſuch a judge may record a protection. *Co Ma. Chart.* 425. 17 *Ed.* 3. 22. The ſame law of a *receipt prior*. That he may receive a plea *puis darrein continuance*, *Yelv.* 181. but cannot give judgment upon it. That he may record a demurrer to the evidence, or a plea to the challenge of the jury. And for the ſame reaſon he may record a *non prof.*

Gree v. Rolle.

Raſt. Entr. 66. 72.

Greg v. Rolle.

prof. In *Co. Entr.* 172. a *relicta verificatione* with a *cognovit actionem* is entered at *nisi prius*, and judgment given upon it *in C. B.* in dower, which is ſtrong in point. If in this caſe the defendants had ſevered in plea, a *nolle proſequi* might have been well entered. *Cro. Car.* 243. Now this plea is ſeverable in its nature. See 11 *H.* 7. 6. *per Keble.* And he cited 20 *Aſſiſ.* 20. 2 *Roll. Abr. tit. Trial*, 630. *pl.* 13. *Hob.* 70. 180. 3 *Keb.* 136. But *per Holt* chief juſtice, upon the *non prof.* entered againſt one of the defendants, judgment ought to have been entered for him, which could not be done at *niſi prius*; and before ſuch entry he is not diſcharged, and the plaintiff ought not to have proceeded againſt the other. He had never ſeen ſuch a *retraxit* as this; and he was of opinion, that a *retraxit* cannot be entered againſt one of the defendants, where they join in plea. Beſides, that before the ſtatute of *York*, 12 *Ed.* 2. *ſt.* 1. *c.* 4. the plaintiff could not have been nonſuit at *niſi prius*, becauſe he was not demandable there; and therefore now he cannot enter a *non proſ.* there. And therefore he held, that this *retraxit* was irregularly entered, and that the plaintiff ought not to have his judgment. But *Powys* and *Gould* juſtices held the contrary. 1. Becauſe the plea is in its nature ſeverable, and therefore a *retraxit* may be well entered as to one of the defendants. 2. That the judge of *niſi prius* may receive ſuch entry. And judgment was given for the plaintiff. And afterwards error was brought upon this judgment in parliament. And the judgment of the king's bench was affirmed *Saturday* 18 *April* 1702, and 50*l.* coſts given to the defendant in error.

Pullen *verſ.* Birbeck. Ante 346.

S. C. Salk. 563. and with ſeveral arguments of counſel, and very much at large 12 Mod. 355.

If more than a moiety of the defendant's lands is extended upon an elegit, the execution is abſolutely void. D. acc. 1 Sid. 91. pl. 12. And the plaintiff may ſue out a freſh writ of execution.

IN a *ſcire facias* ſued by the plaintiff againſt the defendant, the writ ſhewed, that the (*a*) plaintiff had recovered judgment againſt the defendant for 600*l.* and that he ſued an *elegit* thereupon, directed to the ſheriff of *Weſtmoreland*, to which the ſheriff returned, that he had levied goods to the value of 66*l.* and that the inquiſition found, that the defendant was ſeiſed of two farms, the one of 40*l.* *per annum*, the other of 60*l.* and that he had ſeiſed the farm of 60*l.* *per annum*, &c. that by the ſaid return it appeared, that the execution was void, becauſe he ſeiſed more than a moiety; and therefore this writ commanded the defendant to ſhew cauſe, why the plaintiff ſhould not have a new execution. To this writ the defendant demurred. And it was argued by *Pratt* ſerjeant, that the execution was not void, but voidable, at the election of the defendant, who was prejudiced by it. And for that he cited many caſes of leaſes

(*a*) In Salk. 563. the ſci. fa. is ſtated to have been in the common form, and the defendant is repreſented to have inſiſted on the former execution by way of plea. But the ſtatement in 12 Mod. agrees with the ſtatement here.

made

made by infants, by *feme coverts*, jointly with their husbands, tenants in tail, bishops, &c. that they were only voidable. 2. That the plaintiff was estopped by his acceptance, to say that the execution was void. And to prove that he cited 22 *Ed.* 3. 14. 44 *Ed.* 3. 2. 5. *E contra* it was argued by serjeant *Hall* for the plaintiff, that the execution was void, because the sheriff had but a bare authority, which he had not pursued, and therefore his act is void. 22 *Ed.* 4. 3. *a.* *Dier*, 135. *pl.* 14. *March*, 8. *pl.* 20. 117. *Co. Lit.* 49. *b.* 52. *a.* *Cro. Car.* 335. 1 *Leon.* 35. *Hardr.* 421. And that this case resembles the case in 7 *Ed.* 4. 3. as the plaintiff had a new *capias* there, he ought to have a new *elegit* here. 2 *Brownl.* 96. 7. 1 *Sid.* 91. *Cro. El.* 160. 8 *Ed.* 4. 4. Trespass lies against the sheriff, if he exceeds his authority. 1 *Sid.* 184. 1 *Vent.* 105. 261. That such *elegit* executed in such manner is void. 1 *Sid.* 239. As to the opinion 2 *Inst.* 396. that an extent cannot be avoided, after it is filed; that is, where there does not appear to be more than a moiety upon the extent itself. And so it is explained by *Hale*, 1 *Ventr.* 259. 3 *Keb.* 313. And therefore he concluded that the plaintiff ought to have a new execution. And of that opinion was the whole court, after several arguments at the bar. And this term they said, it was a plain case, that the execution was void, the sheriff having exceeded his authority. And judgment was given for the plaintiff.

PULLEN v. BIRRICK.

Vasper *verf.* Eddowes.

Intr. Pasch. 12 Will. 3. B. R. Rot. 316.

S. C. Salk. 248. Holt, 256. 12 Mod. 21. Blencowe's MSS. Rep. vol. 1. p. 214. with the arguments of counsel, and much at large, 12 Mod. 658.

TRrespass for his close broken, and depasturing of his grass with cattle, &c. *viz. porcis*, &c. As to all the trespass, except with one hog, the defendant pleads not guilty; and as to that he pleads in bar, that the plaintiff distrained the said hog then damage feasant, and impounded it in the common pound of the manor *nomine districtionis*, &c. The plaintiff replied, confessing the distress, and the impounding, that the hog, without the assent of the plaintiff, escaped out of the said pound, the plaintiff *adtunc nec adhuc*, not being satisfied for the said damage. The defendant demurred. And *Raymond* argued for the plaintiff, that it appears, that the plaintiff had no satisfaction for the said trespass, and therefore may maintain this action. That the hog, though distrained, was but in nature of a pledge; and that upon tender of the damages by the defendant to the plaintiff, he ought to have permitted him to have the hog. *Cro. El.* 162. 2 *Leon.* 174. *pl.* 211. *Annesley v. Johnson.* Replevin after a writ of second deliverance, the defendant avowed for damage feasant, upon which issue was joined, and verdict

If cattle distrained for damage feasance escape out of the pound, the owner will not be liable to an action for the damage, unless (*a*) he either occasioned the escape or gets his cattle back.

(*a*) In the reports on this case in Salk. Holt, 12 Mod. and 12 Mod. the three justices are represented to have held, that the owner would have been liable to an action, if the escape had happened without the fault of the distrainor.

for

VASPER v. EDDOWES.

for the avowant, and damages were aſſeſſed, and return awarded, the ſheriff returned *averia elongata*, upon which a *withernam* was awarded of the cattle of the plaintiff, upon which the plaintiff came into court, and tendered the damages aſſeſſed by the jury, and brought the money into court, and prayed a ſtay of the *withernam*, the court impoſed a fine of 3*s.* and 4*d.* for his contempt, and then granted his prayer. So 2 *Inſt.* 341. if return irrepleviſable be awarded, the owner may offer the arrearages, and in the defendant refuſe to deliver the diſtreſs, the plaintiff may have detinue, becauſe the diſtreſs is only in nature of a pledge. 13 *H.* 4. 17. 4. 2 *Inſt.* 107. *Cro. Jac.* 148. The diſtrainer cannot uſe it. *Yelv.* 96. *Noy* 119. He cannot tie them in the pound. 27 *Aſſiſ.* 64. If cattle diſtrained die in the pound, the diſtrainer ſhall have an action of treſpaſs; or may diſtrain again, if the diſtreſs was for rent. *Doct. and Stud. cap.* 27. which ſeems a ſtrong caſe in point. As to the objection, that *levy per diſtreſs* is a good plea, he anſwered, that ſuch plea ought to mention, *quod adhuc detinet*, or *quod ſit nil debet*, otherwiſe it will not be good, which ſuppoſes ſatisfaction. See 28 *H.* 6. 6. 35 *H.* 6. 10. 36 *H.* 6. 48. *Raſt. Entr.* 175. *Co. Entr.* 49. *b.* And therefore he concluded, that ſuch diſtreſs being become by the fault of the defendant (for he ought to have made ſatisfaction for the treſpaſs) ineffectual, the plaintiff may have treſpaſs.

And after this caſe had been ſtirred many times at the bar, this term the court gave their judgment. And *Gould* juſtice, for the reaſons aforeſaid, was of opinion, that the plaintiff ought to have judgment. But *Holt*, *Turton*, and *Powys*, juſtices, gave judgment for the defendant, becauſe it did not appear, that the hog eſcaped by the default of the defendant; for perhaps it eſcaped by a fault in the pound; and it would be very hard, that the defendant ſhould loſe his pig, and alſo make other ſatisfaction to the plaintiff for the damage done by it. Note, that *Holt* chief juſtice always, when this caſe was ſtirred, was angry, by reaſon of the ſmallneſs of the cauſe of action, and ſaid, that it was a vexatious ſuit, more worthy to be brought in the county court than in the king's bench. Judgment was given for the defendant.

Milner *verſ.* Petit.

Debt lies againſt bail upon their recognizance. R. acc. ante 83. Proceedings ſhall be ſtayed in ſuch action on a render of the principal within eight days in full term after the return of the proceſs. Acc. Imp. Pr. B. R 4th. Ed. 409.

DEBT was brought againſt the defendants as bail upon their recogniſance. The judgment againſt the principal was given in *Trinity* term; and if the plaintiff had ſued a *ſcire facias*, the bail would have had time to bring in the defendant, until the return of the *ſcire facias*, whereof

they

they are deprived by this means. And therefore Mr. *Montague* prayed, that the defendant might have an imparlance. And he ſaid, that ſome books are, that in ſuch caſe debt does not lie. And for that he cited *Raym.* 14. But *per curiam*, the bail ſhall have the ſame time for the render of the principal, as if they had been ſued by *ſcire facias*; and a rule ſhall be made accordingly. In the *ſcire facias* they cannot (*a*) plead the render after the return of the *capias ad ſatisfaciendum*, becauſe the condition of the recognizance is broken by the return of *non eſt inventus* upon the *capias ad ſatisfaciendum*. And they ſaid, that the bail ſhould have fifteen days in the term; and in vacation they ſhould have as much time as they would have had, if they had been ſued upon a *ſcire facias* to render the principal. But afterwards at the end of the term *Holt* chief juſtice ſaid, that the judges had made a (*b*) rule, that if the plaintiff in the original action brings debt againſt the bail upon their recognizance, the bail ſhall have eight days after the return of the writ, to render the principal; and if there be but four days in the term after the return of the writ, he ſhall have four days in the following term.

MILNER v. PETIT.

(*a*) R. acc. ante 156.

(*b*) Tr. 1 Ann.

Rex *verſ.* Cranmer.

S. C. 12 Mod. 647.

AN indictment was found againſt the defendant. And after he had pleaded not guilty, and it had hung up untried for ſome time, the proſecutor diſcovering a fault in the indictment, being for perjury, went to Mr. *Harcourt*, ſecondary of the crown office of the king's bench, and perſuaded him to procure Sir *Samuel Aſtrey*, clerk of the crown, to enter a *nolle proſ.* Upon which Mr. *Raymond* moved the king's bench, that ſuch *nolle proſ.* might not be entered without leave of the attorney general. And of that opinion was the whole court. And the *nolle proſ.* was ſet aſide.

The clerk of the crown cannot enter a nolle proſequi on an indictment for perjury without leave from the attorney general.

Philip Philips.

Hil. Vacation 14 Will. 3.

S. C. 1 P. Wms. 34. 2 Vern. 430: Cha. Prec. 167. not very correctly; 1 Eq. Abr. Joint tenants and tenants in common. A. pl. 6. 4th Ed. p. 292.

A. Seiſed of lands in fee, deviſed them to *B.* and *C.* and their heirs, in truſt that his wife *Elizabeth*, and her daughter *Martha*, ſhould have the profits equally divided between them during the life of *Elizabeth*, and afterwards to *B.* and *C.* and their heirs, in truſt for the heirs of the body of *Martha*, afterwards to his right heirs; *Martha* died before *Elizabeth* without iſſue. *Elizabeth* took out adminiſtration to *Martha*. And upon a bill in chancery, the cauſe being heard by the maſter of the rolls, he held, that *Eliza-*

Under a deviſe in truſt that A. and B. ſhall have the profits equally divided between them, they take as tenants in common. Vide ante, 624. and the caſes there cited

Under a deviſe in truſt for A. and B. during the life of A. as tenants in common, with an immediate remainder in truſt for the heirs of the body of B. B. takes an intereſt pur auter vie, which in caſe ſhe dies before A. without iſſue will devolve upon her perſonal repreſentative.

PHILIPS v. PHILIPS.

beth and *Martha* were joint-tenants, and that the whole ſurvived to *Elizabeth*. Afterwards upon appeal to *Somers* lord chancellor, he held, that *Elizabeth* and *Martha* were tenants in common, and that the eſtate as to *Martha* determined by her death, and then he in remainder would come into poſſeſſion for her moiety. Afterwards, upon a re-hearing before *Wright* lord keeper of the great ſeal, he held them to be tenants in common; but he was of opinion, that an eſtate by implication aroſe to *Elizabeth*, after the death of *Martha*, for her life. But he made a reference of it to the opinion of the judges of the common pleas. And they held, that they were tenants in common, and that *Martha* had an eſtate *pur auter vie*, and that ſo the ſpecial occupant ſhould have it, *viz. Elizabeth*, as her adminiſtratrix; that *Martha* had no eſtate tail in the truſt, becauſe equity never makes a *merger*, but prevents it; contrary to that which lord *Somers* held.

Rex *verſ.* Dawes.

The ſheriff may take a bail-bond upon an arreſt under an attachment iſſued out of a court of law for a contempt S. C. Salk. 608. R. cont. Com. 264. and vide Waddington v. Fitch. 1 Barnes, 54. but ſee alſo Bl. 955.

If a man who has given bail to the ſheriff neglects to appear at the return of the writ, the court cannot prevent the party on whoſe account he was arreſted from proceeding againſt the ſheriff. S. C. Salk. 608. 12 Mod. 579. R. acc. 12 Mod. 447. Vide Imp. Pr. B. R. 3d Ed. 109. Imp. Pr. C. B. 2d Ed. 168. Crompt. 2d. Ed. fol. 1. p. 82. But if the man who gave bail be in town, the court will grant a tipſtaff to bring him into court, ſedente curia.

AN attachment iſſued out of this court againſt the defendant, for a contempt committed by him, directed to the ſheriff of *Cumberland*. Upon which the defendant being arreſted, *Thomas Lamplugh* eſquire, ſheriff of the ſaid county, took a bail-bond (in which perſons very ſufficient were bound for his appearance at the return of the attachment) and let him go at large. The defendant refuſed to appear at the day of the return of the writ, which was *die Veneris proxime poſt craſtinum ſanctae Trinitatis* laſt paſt. Upon which the ſheriff was amerced; though he offered to the plaintiff in the action to aſſign him the bail-bond, which he refuſed, alleging that the ſheriff could not take a bail-bond upon an attachment. Upon which the ſheriff, thinking he was oppreſſed, moved by Mr. *Raymond* laſt *Michaelmas* term, that the court of king's bench would compel the plaintiff to accept the aſſignment of the bail-bond. And he urged, that it was very reaſonable, that ſuch a rule ſhould be made; for the ſheriff is compellable by the ſtatute, to let a man arreſted upon an attachment go at large, upon a bail-bond given; and when he is at large, the ſheriff cannot ſeize him again after the return of the writ; and conſequently it is not then in his power to bring him in at the return of the writ. It will then be very hard, that when he has done his duty, and no more, he ſhall be liable to amercements, for not doing that, which the law ſays, he cannot do lawfully. That no action lies againſt him in ſuch caſe. 2 *Saund.* 54. *Poſterne v. Hanſon.* 1 *Sid.* 23. And if no action lies, no more ought he to be amerced for it. *Sed non allocatur.* For *per curiam*, this court cannot make ſuch a rule,

that

that the plaintiff ſhall accept the aſſignment of the bail-bond; for he may either accept it, or proceed againſt the ſheriff by amercements; and the ſheriff may reimburſe himſelf by ſuing the bail-bond: and if the bail-bond is not ſufficient (as here it was but of 40*l.*) he is without remedy. But it was clearly agreed that he may take a bail-bond upon an attachment. See *Stile* 212. 234. *Burton v. Lowe.* 2 *Vent.* 237. *Contra* 3 *Leonard* 208. *Bland v. Riccards.* Afterwards the laſt day of this term, upon alleging that this was a hard caſe, and that *Dawes* was in town, the court granted a tipſtaff, to bring him in *ſedente curia*; but he could not find him. And ſo nothing was done for the relief of the ſheriff.

Rex v. Dawes.

Some Points resolved by *Holt* Chief Justice of the *King's Bench*, upon Evidence in Trials at *Nisi Prius*.

Anonymous.

IN an action brought upon a policy of insurance of a ship, if it appears upon the evidence, that the ship was condemned by process of law, and seized; by this sentence the property and ownership are destroyed, and there is no remedy upon the policy of insurance (*a*). Ruled by *Holt* chief justice, *May* 31, at *Guildhall*, *Pasch.* 10 *Will.* 3. 1698.

(*a*) This doctrine must be understood to apply to those cases only where the forfeiture is not occasioned by barratry; for where it is, it cannot.

Smith, Assignee of the Commissioners of —— a Bankrupt, *vers.* Sir Richard Blackham.

In an action by the assignees of a bankrupt the plaintiff need not prove the petitioning creditor's debt. R. cont. Dougl. 205. D. cont. B. N. P. 4th. Ed. 41. Semb. cont. Bl. 702. 1 T. R. 405. or that the bankrupt was indebted at all in the sum or sums necessary to warrant a commission.

IT was ruled by *Treby* chief justice of the common pleas, at *nisi prius* at *Guildhall*, the sitting after *Michaelmas* term 10 *Will.* 3. upon evidence in trover brought by the plaintiff against the defendant, after argument of the counsel on both sides, 1. That it is not necessary to prove, that the person, upon the petition of whom the commission of bankruptcy was granted, was a creditor of the bankrupt; because upon view of the statutes, they do not require that. 2. That it is not necessary to prove, that the bankrupt was indebted in 100*l.* though the practice has been to do so; because though the chancellor frequently, before he grants a commission of bankruptcy, requires such proof, yet it is only matter of discretion in him.

Cole *vers.* Davies et al', Assignees of Maul a Bankrupt.

The seizure of goods in execution cannot be affected by any subsequent act of bankruptcy by the party to whom they belonged. A seizure after an act of bankruptcy, if a commission is taken out thereon, will. R. acc. Bl. 827. D. acc. Burr. 2. The clandestine removal of goods to preserve them from an execution is not an act of bankruptcy. Vide Cooke, 1st. Ed. p. 65. to 89. The seizure in execution of a part of the goods in a house in the name of all is a seizure of all. Though the vendee of goods under an execution permits the party to whom they belonged to retain the possession, on condition that such party shall repay such vendee as he shall raise the money by the sale of the goods, such permission will not entitle the assignees of such party, if he becomes a bankrupt, to the goods. Vide ante, 286. and the cases there cited. 21 Jac. 1. c. 19. s. 11. Dougl. 303. 3 T. R. 316.

IT was ruled by *Holt* chief justice of the king's bench, *Tuesday*, *January* 31. *Hil.* 10 *Will.* 3. at *nisi prius* at *Guildhall*, upon evidence in a trial, 1. That if the goods of *A.* be seized upon a *fieri facias* issued upon a judgment obtained against *A.* and after the seizure *A.* becomes bankrupt, this act of bankruptcy cannot affect the goods levied in execution as aforesaid. But if *A.* was a bankrupt before the seizure, and after the bankruptcy, the sheriff upon a writ of *fieri facias* to him directed upon a judgment obtained

against

against *A.* seizes the goods and sells them, and a commission of bankruptcy is granted, and the said goods assigned by the commissioners, the assignee of the commissioners may maintain trover against the vendee of the goods; but no (*a*) action will lie against the sheriff, because he obeyed the writ. 2. If a trader, hearing that a writ of *fieri facias* was issued against him, to the intent to preserve his goods from being levied in execution, clandestinely conveys them out of his house, and conceals them privately; that does not amount to an act of bankruptcy. 3. That a seizure of part of goods in a house by virtue of a *fieri facias* in the name of the whole, is a good seizure of all. 4. It was resolved in this case, that if goods of *A.* are seized upon a *fieri facias*, and sold to *B. bona fide* upon valuable consideration; though *B.* permits *A.* to have the goods in his possession, upon condition that *A.* shall pay to *B.* the money, as he shall raise it by the sale of the goods, this will not make the execution fraudulent. And in such case a subsequent act of bankruptcy by *A.* will not defeat the sale. But though the original debt was just, yet if the execution was fraudulent, *viz.* upon any trust, a subsequent act of bankruptcy will defeat it.

(*a*) An action lies against the sheriff for a sale before the issuing of a commission. D. Burr. 32. 3. 1829. If he sells the goods after the issuing of the commission is notorious, an action of trover may be maintained against him. R. Burr. 20. Bl. 65. D. Bl. 1064. though an action of trover cannot. R. 1 T. R. 475.

Young *verf.* ———.

IT was ruled at *nisi prius* at *Westminster*, the first sitting after *Hilary* term 10 *Will.* 3. that every man of common right may justify the going of his servants or of his horses upon the banks of navigable rivers, for towing barges, &c. to whomsoever the right of the soil belongs, and if the water of the river impairs and decreases the banks, &c. then they shall have reasonable way for that purpose in the nearest part of the field next adjoining to the river. And he compared it to the case, where there is a way through a great open field, which way becomes founderous, the travellers (*a*) may justify the going over the outlets of the land not inclosed next adjoining.

The public are at common law intitled to towing paths on the banks of navigable rivers. R. cont. 3 T. R. 253. Vide 6 Mod. 163.

(*a*) Vide Dougl. 716. 2 Show. 28. Lev. 234. 3 T. R. 263.

W. Jon. 296. Dougl. 720.

Anonymous.

PER *Holt* chief justice, the (*a*) inhabitants of every parish of common right ought to repair the highways. And therefore if particular persons are made chargeable to repair the said ways by a statute lately made, and they become insolvent, the justices of peace may put that charge upon the rest of the inhabitants. *Mich.* 10 *Will.* 3. *B. R.*

(*a*) Acc. 1 Vent. 90. 183. 189. 1 Hawk. c. 76. f. 5. 1 T. R. 106. Vide Com. Chimin. n. 2. 2d. Ed. vol. 2. p. 398.

Hockley

Hockley *verſ.* Lamb.

A claim of common for cattle levant and couchant on a meſſuage, is good. Vide poſt. 1015. For cattle levant and couchant on a farm, not Unleſs ſuch farm be an antient one.

IT was ruled by *Holt* chief juſtice at *Wincheſter Lent* aſſizes 10 *Will.* 3. 1. That a man may preſcribe for common for cattle *levant* and *couchant* upon a meſſuage. And he ſaid, that he knew *Hale* chief juſtice to have been of the ſame opinion at *Norfolk* aſſizes. 2. By him a man cannot preſcribe for common appurtenant to a farm; becauſe it is uncertain, of what a farm conſiſts, perhaps of ten acres, or of a hundred acres; but the preſcription ought to be laid, to a meſſuage and ſo many acres of land. But if there is an ancient farm, and the ſame lands always occupied with it; a man may have common of paſture, to depaſture his cattle tilling that farm.

Richards *verſ.* Squibb.

Common appurtenant for a certain number of cattle may be uſed by cattle not levant and couchant. Vide Saund. 327. 2 Lev. 67. Cro. Jac. 574.

IT was ruled by *Holt* chief juſtice at *Dorcheſter Lent* aſſizes 10 *Will.* 3. at a trial at a *niſi prius*, that if a man preſcribes for common for a certain number of cattle, as appurtenant, *&c.* it is not neceſſary, nor material, to ſhew that they were *levant* and *couchant*; becauſe it is no prejudice to the owner of the ſoil, for that the number is aſcertained.

Clerk *verſ.* How.

IT was ruled by *Holt* chief juſtice at *Brentwood ſummer* aſſizes 10 *Will.* 3. upon evidence at *niſi prius*, that if copyhold land be ſurrendered to the uſe of a will, *&c.* and afterwards the will deviſes this land to *B.* and his heirs, upon condition that he pay 100*l.* within ſix months after the death of the deviſor to *J. S.* if the money is not paid *J. S.* ought to be admitted, and then he muſt make an actual entry before he can ſurrender. And therefore in the preſent caſe a ſurrender made by *J. S.* before actual entry was held ill.

Boner *verſ.* Juner.

Coparceners may join in ejectment. Vide ante 64. and the cases there cited.

IT was ruled by *Holt* chief juſtice at *Rygate* in *Surrey*, *ſummer* aſſizes 10 *Will.* 3. upon evidence at a trial, that coparceners may join in ejectment. And (by him) the caſe in *Moor* 682. *n.* 939. is not law.

Palmer

1 Salk. 283 pl. 5 Ld. Raym. 193

Palmer *verſ.* Hooke or Gouche.

IT was ruled by *Holt* chief juſtice, upon evidence at a trial at *niſi prius* at *Norwich ſummer* aſſizes 12 *Will.* 3. that if in *indebitatus aſſumpſit* for goods ſold and delivered, upon *non aſſumpſit* pleaded the defendant gives in evidence, that the debt was attached by foreign attachment in *London* upon a plaint levied by *J. S.* (to whom the plaintiff was indebted) againſt the plaintiff, *&c.* the defendant will be driven to prove, that the plaintiff was indebted to *J. S.* becauſe the plaintiff has no notice of the foreign attachment; and therefore it may be only a contrivance by the defendant and *J. S.* to bar the plaintiff of his preſent action. 2. In ſuch caſe the plaintiff may ſhew in evidence, that the ſuit in *London* was after an original filed by the plaintiff in ſome one of the ſuperior courts; and that will avoid the operation of the foreign attachment. 3. If the original did not iſſue before the plaint was entered in *London*, but only antedated, and bore *teſte* before, and no arreſt was made before upon it; that will not avoid the foreign attachment. But this latter point *Holt* reverſed for his farther conſideration. But (*ut audivi*) he was afterwards of the ſame opinion.

On an indebitatus aſſumpſit if the defendant gives in evidence a ſeizure of the debt under a foreign attachment, he muſt prove that the plaintiff was indebted at the time the attachment iſſued to the perſon who ſued out the attachment.

A debt cannot be attached under a foreign attachment, if an action was commenced for it before the inſtitution of the ſuit in which the attachment iſſued. Vide Salk. 291. pl. 32.

An action by original is to be conſidered as commenced from the time the original iſſues, not from the time it bears teſte. Vide ante 211. and the caſes there cited.

Windle *verſ.* the Hundred of Chelmsford.

IN an action upon the ſtatute of *Wincheſter*, in which the plaintiff ſhewed, that he was robbed of a bank bill, upon evidence at the trial, *ſummer* aſſizes 10 *Will.* 3. at *Brentwood* in *Eſſex*, before *Hatſell* baron of the exchequer, he directed the jury to give damages for the whole value of the bill, which they did accordingly.

Smithies *verſ.* Dr. Harriſon.

IN caſe for words, which imported the committing of adultery by the plaintiff with *Jane at Stile*, the defendant in mitigation of damages may give in evidence, that the plaintiff committed adultery with *Jane at Stile*, but not with any other woman. *Per Holt* chief juſtice at *Brentwood ſummer* aſſizes 13 *Will.* 3. ruled accordingly.

Vide Bull. Ni. Pr. 4 Ed. P. 9.

Haſtead

Haſtead *verſ.* Searle.

Lands may paſs by a deviſe miſrepreſenting the county in which they lie. Vide 2 Bulſtr. 176. Cro. Car. 129. 447. 473. W Jon. 195. 379.

A. Makes his will in theſe words, *viz.* "I deviſe to "*J. S.* all thoſe my lands in *Bramſtead* in the county "of *Surrey* in the poſſeſſion of *John Aſhley*;" whereas in fact *A.* hath not any lands in *Surrey*, but he had lands in *Bramſtead* in *Hampſhire* in the poſſeſſion of *John Aſhley*. And in an ejectment brought by the heir of *A.* for theſe lands in *Hampſhire* againſt the deviſee, it was ruled by *Holt* chief juſtice, that theſe lands in *Hampſhire* would paſs by this deviſe. And the plaintiff was nonſuit. At *Wincheſter Lent* aſſizes 1679. 10 *Will.* 3.

Lord Petre *verſ.* Heneage.

Things which are not ponderous cannot be heir looms. As jewels. Vide 2 Bl. Com. 427

PER Holt chief juſtice, a jewel cannot be an heir-loom, but only things ponderous, as carts, tables, *&c.* Ruled by *Holt* at the ſitting in *Middleſex* after *Eaſter* term 13 *Will.* 3. in trover for a chain of pearl. See *Co. Lit.* 18. *b.* that the ancient jewels of the crown are heir-looms.

Emerſon *verſ.* Inchbird.

An heir ſhall take by purchaſe under a deviſe altering the limitation of the eſtate. R. acc. 2 Sid. 53. 78. 1 Leon. 112. 315. Gouldib. 88. Cro. E. 431. pl. 36 Ow. 65. poſt. 829. Vide 2 Bl. Com. 241. Under a deviſe charging the eſtate only, by deſcent. R. acc. Bl. 22. Atk. 290. D. acc. 2 Bl. Com. 242.

IN debt upon bond brought againſt the defendant as heir to his father, *&c. riens per deſcent* pleaded, the plaintiff replied aſſets, and iſſue thereupon. And the evidence was that the obligor, the defendant's father, deviſed to the defendant his ſon and heir certain meſſuages in *Exchequer Alley* in fee, but chargeable with an annuity or rent charge payable to the defendant's mother. And it was held by *Holt* chief juſtice, that theſe meſſuages deſcended to the defendant, and were aſſets. For (by him) the difference is, where the deviſe makes an alteration of the limitation of the eſtate, from that which the law would make by deſcent; and where the deviſe conveys the ſame eſtate, as the law would make by deſcent; but charges it with incumbrances. In the former caſe the heir takes by purchaſe, in the latter by deſcent. *Trin.* 13 *Will.* 3. *B. R. Guildhall, London.*

The defendant in an ejectment is bound to confeſs the leaſe entry and ouſter, though the demiſe is laid upon a day not arrived at the time of the trial.

IN ejectment the demiſe by the leſſor of the plaintiff to the plaintiff was laid to be the twenty-ſeventh of *April* 1697, which time was not come at the time of the trial; but the tenant had entered into the common rule, to confeſs leaſe, entry and *ouſter*. And the court compelled the

defendant

defendant to confeſs leaſe, entry, and *ouſter*; otherwiſe the plaintiff would have been nonſuit, and then he would have had judgment againſt the caſual ejector; although it was objected, that the plaintiff could not have judgment, though the verdict were found for him. Ruled by the court of king's bench upon a trial at bar. *Mich.* 8 *Will.* 3. *B. R.*

Claxmore *verſ.* Searle, Field, and Falkner.

Claxmore brought an ejectment againſt *Searle*, *Field*, and *Falkner*. *Field* appeared, and confeſſed leaſe, entry and *ouſter*. *Searle* and *Falkner* did not appear, nor confeſs leaſe, entry and *ouſter*. Upon which, by the direction of *Holt* chief juſtice at the *ſummer* aſſizes at *Horſham* in *Suſſex* 13 *Will.* 3. a verdict was given by the jury for the plaintiff againſt *Field* generally: and verdict was given againſt the plaintiff for *Searle* and *Falkner*; and indorſement was made upon the *poſtea* that this verdict was for *Searle* and *Falkner*, becauſe they did not appear and confeſs leaſe, entry, and *ouſter*: and for this reaſon, that they ſhould not have coſts againſt the plaintiff, and that the plaintiff ſhould have judgment againſt the caſual ejector, for ſuch lands as were in the poſſeſſion of *Searle* and *Falkner*.

On the trial of an ejectment where there are ſeveral defendants if any of them refuſe to confeſs leaſe, entry and ouſter, a verdict ſhall be given for them, but the cauſe of ſuch verdict ſhall be indorſed on the poſtea, and the plaintiff ſhall have judgment for the premiſſes in their poſſeſſion againſt the caſual ejector.

Hermitage *verſ.* Tomkins.

IT was ruled by *Holt* chief juſtice, at the *ſummer* aſſizes at *Warwick* 11 *Will.* 3. upon a trial at *niſi prius*, that if *A.* not having any thing in certain land, demiſes it by indenture to *B.* and afterwards *A.* purchaſes the land, this will be a good leaſe by eſtoppel. But if it appear by recitals in the leaſe, that *A.* had nothing at the time of the demiſe, and afterwards he purchaſes the land as aforeſaid, that will not enure by eſtoppel. 1699.

If a man demiſes by indenture lands in which he has no intereſt, and afterwards buys them, he will be eſtopped from ſaying he had no intereſt in them when he bought them. D. acc. 6 Mod. 258. Vide 3 T. R. 370, 371. Com. Eſtates G. 7 2d Ed. vol. 3. p. 254. Unleſs that fact appears upon the leaſe. Vide Com. Eſtoppel. E. 2. 2d Ed. vol. 3. p. 273.

Rex *verſ.* Payne.

S. C. Salk. 281 Holt, 294. Comb. 358.

IT was moved in *B. R.* that the information of *B.* (now dead) taken before a juſtice of peace might be read as evidence for the king in an information againſt the defendant for a libel, upon not guilty pleaded, tried at the bar. But upon conſideration the court denied the motion. For

An information taken before a juſtice cannot be read in evidence after the death of the party who gave it on a proſecution for a miſdemeanor. S. C. 5 Mod. 163. On an appeal of murder, or in a civil action. But on an indictment for felony it may. Vide Hale, Plac. Cor. vol. 1. c. 24. 1ſt Ed. p. 305. c. 50. 1ſt Ed. p. 586. Vol. 2. c. 38. 1ſt Ed. 284, 285, 286.

per

per curiam, in indictments for felony, by (*a*) 2 & 3 *P. & Mar. c.* 20. ſuch informations may be read, the deponent being dead. But in indictments or informations for miſdemeanors, or in civil actions, or appeals of murder, no ſuch information can be given in evidence; nor can (*b*) evidence, which was given for the king upon an indictment, be given upon a trial in a civil action for the party. And the juſtices of the king's bench ſent Sir *Samuel Eyre puiſne* juſtice of the king's bench to the juſtices of the common pleas then ſitting in court, to learn their opinion and they agreed in opinion with the court of king's bench. And the information of *B.* was refuſed to be admitted in evidence.

(*b*) Acc. Bull. 4th Ed. 243.

(*a*) The 20th chapter of 2 and 3. P. & M. has no relation to this ſubject, and the 20th chapter which is the only one in that ſeſſion which has, does not expreſsly authorize the reading of ſuch information, nor can I find any other ſtatute which does.

Pyke *verſ.* Crouch.

IT was reſolved *Mich.* 8 *Will.* 3. *in B. R.* upon evidence in a trial at bar, 1. That (*a*) a legatee cannot be a witneſs to prove the will, becauſe the legacy is deviſed to him, unleſs he has releaſed the legacy. But after ſuch a releaſe he will be a good witneſs to prove the will. But if the counſel of the other ſide have permitted ſuch legatee to be ſworn, and to be examined as a witneſs, without having taken exception againſt him, they cannot afterwards except againſt his evidence for the reaſon that he was a legatee. 2. If the duplicate of a will be written by the direction of the teſtator, and ſent by him to a ſtranger to keep it ſafely, and the ſtranger ſends back a letter to the teſtator, in which he makes mention, that he has received the ſaid will; after the death of the ſtranger ſuch letter may be read as circumſtantial evidence, to prove that ſuch duplicate of the will was ſent by the teſtator to the ſaid ſtranger. 3. If a man produced as a witneſs for the plaintiff in ejectment confeſſes, that there was ſuch a will made as the defendant's counſel pretends, and under which the defendant makes title to the lands in queſtion; yet (*b*) that is not ſufficient proof, to prove that there was ſuch a will; but the will itſelf ought to be produced, or other legal proof made of it. 4. If (*c*) ſeveral eſtates in remainder be limited in a deed, and one of the remainder-men obtains a verdict for him in an action brought againſt him for the ſame land; that verdict may be given in evidence for the ſubſeqnent remainder-man, in an action brought againſt him for the ſame land, though he does not claim any eſtate under the firſt remainder-man, becauſe they all claim under the ſame deed. 5. If a man was ſworn a witneſs at a former trial, and gave evidence, and died; the matter (*d*) that he depoſed at the former trial may be given in evidence at another trial, by any perſon who heard him ſwear it at the former trial.

(*a*) Vide ante 507. and the note there

(*b*) Vide Dougl. 205. but ſee alſo poſt. 732.

(*c*) Vide Bull. 4th Ed. 232.

(*d*) Semb. acc. Str. 161.

Hockley

Hockley *verſ.* Lamb.

IT was ruled by *Holt* chief juſtice, at *Lent* aſſizes at *Wincheſter* 1697-8. That if *A. B. C. D.* and *E.* claim common in a place called *Dale*, excluſively of all other perſons, and the common of *A.* comes in diſpute, *B.* may be a witneſs to prove that *A.* has right of common there; becauſe in effect it charges himſelf, *viz.* he admits another to have common with himſelf. But if the preſcription be, that all the inhabitants of *Blackacre* ought to have common there; one (*a*) of the inhabitants cannot be a witneſs, to prove that another of the ſaid inhabitants ought to have common there, becauſe in effect he would ſwear to give himſelf right of common there.

(*a*) Acc. 1 T. R. 302, 303. 2 T. R. 32, 33. and ſee Bagſhaw *v.* Biſhop of Bangor, coram Price at Staford, Denton at Bridgenorth ſummer aſſizes, 1728, Lord Dartmouth's caſe coram 1728. poſt. 1353. Dougl. 359. 1 T. R. 164.

Anonymous.

IT was ſaid by *Holt* chief *in B. R. Mich.* 10 *Will.* 3. that if a man deſtroys a thing that is deſigned to be evidence againſt himſelf, a ſmall matter will ſupply it. And therefore the defendant having tore his own note ſigned by him, a copy ſworn was admitted to be good evidence, to prove it. Vide Str 70.

St. Legar *verſ.* Adams.

AT a trial in ejectment, *ſummer* aſſizes, 10 *Will.* 3. 1698. at *Canterbury* in *Kent*, upon the evidence it appeared, that a will was made by *William Horn* in 1647, of the lands in queſtion, which will was loſt, but mention was made of it in the calendar (which is the index of the regiſter of the ſpiritual court) and alſo in the ſeal book. A commiſſion iſſued in *April* 1648. to examine the executors upon their oaths, *&c.* and that being returned, probate was granted the eleventh of *May* 1648. which probate was produced in evidence. And *Holt* chief juſtice allowed it to be good proof of the will, but he reſerved it for his further conſideration. Afterwards the parties agreed. But *Holt* chief juſtice afterwards, as well in the king's bench as at *niſi prius*, upon other trials declared, that he held it to be good evidence, and that he continued of his former opinion. And he then ſaid, that without doubt the regiſter's book is good evidence to prove a will.

Ano-

Anonymous.

This ſeems to have been a will of lands, for as to perſonal eſtate the probate is ſuffic ent proof of a will.

AT *Rygate* in *Surrey*, *ſummer* aſſizes 10 *Will.* 3. it was ruled by *Holt* chief juſtice, upon the evidence, that b. cauſe in the ſpiritual court after probate of a will ſix months are allowed to regiſter it, and when it is regiſtered, it is regiſtred by the original, but the probate is ſigned by the regiſter only upon the atteſtation of the proctor and the examination of him; therefore a will proved in 1666 in the archdeacon's court of *London*, and the office was burnt in the fire of *London* ſoon after, and the probate was produced in evidence to prove the will with all theſe circumſtances; it was denied by *Holt* chief juſtice to be good evidence to prove the will.

Kent *verſ.* Wright.

Special matter may be given in evidence on the general iſſue in an action on the caſe for ſtopping lights.

AT a trial at *Hertford*, *ſummer* aſſizes 10 *Will.* 3. in caſe for ſtopping the plaintiff's lights, the defendant pleaded, not guilty; and gave in evidence, that the corporation of *Hertford* were lords of the ſoil where, &c. and preſcribed to ſet up ſtalls there, being near the market-place. And it was admitted by *Holt* chief juſtice to be given in evidence upon the general iſſue, becauſe this is to claim property in the ſoil; but (*a*) where the defendant, or he under whom he claims, claim only a particular benefit, as common, or eaſement, as a way, and not the property in the ſoil; he ought to plead it ſpecially, and cannot give it in evidence upon the general iſſue pleaded.

(*a*) This obſervation muſt not be conſidered as applying to actions upon the caſe; for in them ſuch matter may be given in evidence upon the general iſſue.

Anonymous.

Evidence which would not be ſufficient to prove a fact for a party when given by his own witneſſes, may be ſo when given by his adverſary's. Vide ante 730. Dougl. 752.

IT was ruled by *Holt* chief juſtice, *May* 31. *Paſch.* 10 *Will.* 3. at *Guildhall*, that in an action upon a policy of aſſurance of a ſhip, if the plaintiff's witneſs ſwears, that (*a*) the ſhip was condemned by proceſs of law, it is good evidence to prove it; but if the defendant had offered that matter in evidence by his witneſſes, it would not have been ſufficient without producing the ſentence of condemnation.

(*a*) Vide ante 724.

Pitman *verſ.* Maddox.

S. C. Salk. 690. Holt 298.

IN *indebitatus aſſumpſit* upon a taylor's bill, upon *non aſſumpſit* pleaded, and trial before *Holt* chief juſtice, at the ſittings for *Middleſex*, 14 *Feb.* 11 *Will.* 3. the plaintiff produced in evidence his ſhop-book written by one of his ſervants who was dead. And upon proof of the death of the ſervant, and

and that he uſed to make ſuch entries of debts, &c. It (a) was allowed by *Holt* chief juſtice to be good evidence, without proof of the delivery of the goods, &c. And he ſaid, this was as good proof, as the proof of a witneſs's hand (who was dead) ſubſcribed to a bond, &c. And (by him) notwithſtanding the ſtatute of 7 *Jac.* 1. *c.* 12. ſays, that a ſhop-book ſhall not be evidence after the year, yet he did not hold ſuch book to be good evidence within the year alone.

(a) Acc. poſt. 873. ſed vide Bull. 4th. Ed. p. 282.

Lake *verſ.* Billers et al'.

IN treſpaſs brought againſt the ſheriff for goods taken, upon not guilty pleaded, he gave in evidence, that he levied them in execution by virtue of a *fieri facias*. The plaintiff made title to the goods by a prior execution, but fraudulent, and by bill of ſale made of them to him by the officer, *viz.* the ſheriff predeceſſor to the defendant. And upon this trial before *Holt* chief juſtice at *Hertford*, *Lent* aſſizes 1698. 11 *Will.* 3. it was ruled by him, after argument of the counſel of both ſides, that the defendant, though ſheriff, ought to give in evidence a copy of the judgment. But it would have been otherwiſe, if the treſpaſs had been brought by the perſon againſt whom the *fieri facias* iſſued.

In treſpaſs againſt the ſheriff for ſeizing goods in execution brought by the perſon againſt whom the execution iſſued, the ſheriff need not prove that there was a judgment. In treſpaſs by any other perſon he muſt. R. acc. Bl. 701. Burr. 2631. Vide 1 Lev. 95. 3 Lev. 20. ante, 309.

Anonymous.

IN debt upon bond brought by *J. S.* ſheriff of the county of, &c. The defendant pleaded, that the ſaid bond was acknowledged by *J. N.* to the plaintiff for the office of under-ſheriff, and that he was ſurety in the ſaid bond; and then he pleaded the ſtatute of 5 & 6 *Ed.* 6. *c.* 16. againſt buying and ſelling offices, &c. And upon the trial *A.* was produced as a witneſs, to give an account, upon what occaſion this bond was acknowledged, &c. And *Holt* chief juſtice, before whom the cauſe was tried *Mich.* 5 *W.* & *M.* at the ſittings for *Middleſex*, refuſed to admit *A.* to be a witneſs, becauſe it appeared, that he was privately intruſted by both parties, to make the bargain, and to keep it ſecret. And (by him) a truſtee ſhall not be a witneſs, in order to betray the truſt.

A man is not to be permitted to give in evidence a ſecret intruſted to him in confidence. Vide Bull. 4th. Ed. p. 284.

Anonymous.

IN *indebitatus aſſumpſit* upon an *inſimul computaſſet*, and *non aſſumpſit* pleaded, it appeared upon the evidence at the trial at *Lent* aſſizes at *Eaſt Grinſtead* in *Suſſex*, 1699. 11 *Will.* 3. that the debt for which the account was made, was in right of *A.* to whom the plaintiff was executor. And *Holt* chief juſtice ſeemed to be of opinion, that it was againſt the plaintiff; but ordered that it ſhould be ſaved as a point for his opinion, and that in the mean time the plaintiff ſhould have a verdict ſubject to his opinion.

Goring

Goring *verſ.* Evelin.

IT was ruled by *Holt* chief juſtice at *Lent* aſſizes at *Eaſt Grinſtead*, 11 *Will.* 3. 1699. that if an anſwer to interrogatories in chancery be given in evidence at a trial, they ought to be proved by the examiner himſelf, to have been taken the ſame day that is mentioned upon them.

Sir John Bridgman *verſ.* Jennings.

An old ſurvey of two manors is good evidence of the boundaries of each inter ſe, if both manors belonged at the time when the ſurvey was taken to the perſon who took it, otherwiſe it is not. Vide Bull. 4th. Ed. 248.

IT was ruled by *Holt* chief juſtice at *Summer* aſſizes at *Warwick* 1699. that if *A.* be ſeiſed of the manors of *B.* and *C.* and during his ſeiſin of both, he cauſes a ſurvey to be taken of the manor of *B.* and afterwards the manor of *B.* is conveyed to *E.* and after a long time there are diſputes between the lords of the manors of *B.* and *C.* about their boundaries; this old ſurvey may be given in evidence. And ſo it was done in this caſe. *Contra* if the two manors had not been in the hands of the ſame perſon at the time of the ſurvey taken.

Wood *verſ.* Drury.

(*a*) Vide Str. 1254.

AT *Summer* aſſizes at *Warwick* 1699. a deed was produced, to which there were two witneſſes, one of whom was blind. It was ruled by *Holt* chief juſtice, that ſuch deed might be proved by (*a*) the other witneſs, and read; or might be proved, without proving that this blind witneſs is dead, or without having him at the trial, proving only his hand. And ſo it was done in this caſe.

Sherwood *verſ.* Adderley.

On riens per diſcent pleaded in debt againſt an heir he cannot give in evidence an extent upon a bond to the king without giving in evidence either the bond itſelf or an atteſted copy of it.

DEBT againſt the heir on the bond of the anceſtor, *&c. Riens per diſcent* was pleaded. The heir gave in evidence an extent againſt him upon a debt owing by his father upon bond to the king. And it was ruled by *Holt* chief juſtice, that a copy of the bond ſworn, or the bond itſelf, ought to be given in evidence, the ſuit being by a creditor, otherwiſe the extent ſhould not be allowed. And for want of this *Holt* diſallowed ſuch extent. *Summer* aſſizes 1699. at *Derby*. And next morning, in another trial between *Horne* and the ſaid defendant *Adderley*, the bond acknowledged

knowledged by his anceſtor to the king, was produced in evidence, the iſſue being the ſame as in the other action.

Smith *verſ.* Veale.

AT *Lent* aſſizes at *Thetford*, 12 *Will.* 3. 1699. *Holt* chief juſtice refuſed to admit depoſitions in chancery to be given in evidence, after the bill was diſmiſſed. But it was reſerved as a point for his further conſideration. And after conſideration, and conference had with the practiſers in chancery, he gave his opinion, that notwithſtanding ſuch diſmiſſion of the bill, the depoſitions were good evidence. And ſo he ruled it afterwards at *Guildhall* the ſittings after *Hilary* term, 1 *Annae*.

Depoſitions in a cauſe in chancery are good evidence though the bill is diſmiſſed. Acc. Bull. 4th. Ed. 241.

Anonymous.

IN caſe upon a ſpecial promiſe, to deliver good merchandiſable wheat, upon *non aſſumpſit* pleaded, at the trial, *Lent* aſſizes, 12 *Will.* 3. at *Bedford*, before *Holt* chief juſtice, the plaintiff's witneſs ſwore, that it was agreed, that he ſhould deliver good ſecond ſort of wheat. And *Holt* held this a variance, and the plaintiff was nonſuit.

Proof of a promiſe to deliver good ſecond ſort of wheat will not ſupport a count upon a promiſe to deliver good merchandizeable wheat. Vide Gilb. Law and Eq. 229. Dougl. 14. 640. Bl. 840. Ferrara v. Shulbread. B. R. T. 25 G. 3. 3 T. R. 67,

Anonymous.

THE diſpute was between the lord of the manor and the deviſee of a copyhold of the ſame manor. And it was ruled by *Holt* chief juſtice, *Lent* aſſizes 1693. at *Cambridge*, that the recital of the will in the copy of the admittance was good evidence of the deviſe againſt the lord, or any other ſtranger. But if the ſuit had been between the heir of the copyholder and the deviſee, the will itſelf ought to have been produced. 2. He ruled, that the foul draught of the ſteward of the manor of the admittance was good evidence. *Ex relatione m'ri Place.*

The recital of a deviſe in the admittance to a copyhold is good evidence as between the lord and the deviſee. As between the heir and the deviſee not. The ſteward's foul draught is good evidence of the admittance.

Hampton *verſ.* Lammas.

JUſtices of peace make a warrant to levy a poor's rate upon *J. S.* which was directed to the conſtables of the pariſh of *A. J. S.* had land in *A.* upon which he had no chattels; but his houſe ſtood in the adjoining pariſh of *B.* in the ſame county, in which *J. S.* had goods. The conſtables of *A.* levied theſe goods by virtue of the ſaid warrant. And *Holt* chief juſtice ruled, upon evidence at the trial at *Hertford Summer* aſſizes 1698, that the goods were well levied. *Ex relatione.*

Under a warrant for levying a poor's rate directed to the conſtables of A. they may ſeize goods in B. Vide ante 545. poſt. 736.

——— *verſ.*

—— *verſ.* Norman et al'.

Vide ante, 545. 735.

IT was ruled by *Holt* chief juſtice at *Weſtminſter* 14 *Feb.* 1698, that a conſtable may execute the warrant of a juſtice of peace, *&c.* out of his liberty, but he is not compellable to execute it there.

Rex *verſ.* Woodward.

Trover will not lie againſt a ſheriff for the wrongful ſeizure of goods under an extent.

IF the ſheriff for an extent for the king againſt *A.* ſeizes the goods of *B. B.* cannot have trover againſt the ſheriff, becauſe by the ſeizure the property veſted in the king. Ruled by *Holt* chief juſtice at the *Summer* aſſizes at *Warwick* 1699, 11 *Will.* 3.

Rawlins *verſ.* Turner.

No leaſe by parol is good which imports to convey an intereſt for more than three years from the time of the making. R. acc. Baker v. Reynold. B. R. E. 25 G. 3. Vide Str. 651.

IT was ruled by *Holt* chief juſtice at *Lent* aſſizes at *Kingſton* 1699, that ſuch leaſe for three years of land, as will be good without deed within the 29 *Car.* 2. *c.* 3. *ſ.* 2. muſt be for three years, to be computed from the time of the agreement; and not for three years to be computed from any day after.

Rex *verſ.* Woodward.

In the traverſe of an inquiſition on an extent in aid, if the jury find part for the king and part for the defendant, the defendant muſt pay the court fees.

AN extent in aid found *Andrews* debtor to the king, and *Thomas Woodward* debtor to *Andrews*; upon which the goods of *Thomas Woodward* were ſeiſed in the hands of *John Woodward*; *John Woodward* came in, and traverſed the inquiſition, that they were not the goods of *Thomas Woodward*, but of himſelf; and the verdict was for part for the king, and for part for the defendant. And the queſtion was, who ſhall pay the fees in court, *&c.* becauſe the defendant is actor, for if it were found for the king, no judgment ſhould be given; but if, *&c.* for the defendant, an *amoveas manus* muſt be awarded. And it was ruled by *Holt* chief juſtice at *Warwick Summer* aſſizes 1699, that the defendant ought to pay the fees.

Rex

Rex *verſ.* Goate.

IN an indictment for forgery at common law, though it is not ſhewn, that the party was prejudiced, yet the indictment is good. *Contra* in an action of *forger des faux faits.* Therefore where the indictment was for forgery of a ſurrender of the lands of *J. S.* and it was not ſhewn in the indictment that *J. S.* had any lands; yet *Holt* chief juſtice at *Bury ſummer* aſſizes 12 *Will.* 3. upon motion in arreſt of judgment held it good; and judgment was given againſt the defendant, being an attorney, that he ſhould ſtand in the pillory. Another exception was, that the indictment was, *quod falſo contrafecit falſum ſcriptum*, which is repugnant; yet held good.

An indictment lies for forgery at common law though no perſon was prejudiced by the forgery. R. acc. poſt. 1461. Ante 528.

An action for forging falſe deeds does not, unleſs ſome perſon was prejudiced by it.

Vide Com. forgery. B. 1. 2d Ed. vol. 1. p. 387. An indictment for forgery may ſtate that the party falſly forged a falſe writing.

Anonymous.

IT was ruled by *Holt* chief juſtice at *Dorcheſter*, *Lent* aſſizes 10 *Will.* 3. that if *A.* poſſeſſed of a term for a hundred years, grants the land, *habendum* for forty years, to begin after his death; it is a good new leaſe: and a man poſſeſſed of a term for twenty years may grant the lands for nineteen years, to commence after his death; and it will be good for ſo many of the twenty years, as ſhall be unexpired at the time of his death.

Rex *verſ.* Webb.

IT was ruled by *Holt* chief juſtice at the ſittings at *Weſtminſter*, *Hil.* 9 *W.* 3. *B. R.* in an indictment for a nuiſance, that the building of a houſe in a larger manner than it was before, whereby the ſtreet became darker, is not any publick nuiſance by reaſon of the darkening.

Darkening a ſtreet by enlarging a houſe is no nuiſance.

Waterman *verſ.* Soper.

IT was ruled by *Holt* chief juſtice at *Lent* aſſizes at *Winchester*, upon a trial at *niſi prius* 1697-8. 1. That if *A.* plants a tree upon the extremeſt limits of his land, and the tree growing extend its root into the land of *B.* next adjoining, *A.* and *B.* are tenants in common of this tree. But if all the root grows into the land of *A.* though the boughs overſhadow the land of *B.* yet the branches follow the root, and the property of the whole is in *A.* 2. Two tenants in common of a tree, and one cuts the whole tree; though the other cannot have an action for the tree,

A tree belongs to the perſon or perſons in whoſe land the root grows.

One of ſeveral tenants in common of a tree may maintain an action againſt the others for cutting it down. S. C. cit. 3 Wilſ. 120. Vide Co. Litt. 200. *a*. 200. *b*.

yet he may have an action for the ſpecial damage by this cutting; as where (*a*) one tenant in common deſtroys the whole flight of pigeons.

(*a*) Vide Co. Litt. 200. a.

Spark *verſ.* Spicer.

MICH. 10 *W.* 3. *per Holt* chief juſtice. If a man be hung in chains upon my land; after the body is conſumed, I ſhall have gibbet and chain. Said upon a motion for a new trial.

Anonymous.

S. C. Salk. 126. pl. 5.

A Bank-bill was payable to *A.* or bearer, *A.* gave it to *B.* *B.* loſt it, *C.* found it, and aſſigned it over to *D.* for valuable conſideration, *D.* went to the bank and got a new bill in his own name, *A.* brought trover againſt *D.* for the former bill. And ruled by *Holt* chief juſtice at *Guildhall* 1698, that an (*a*) action did not lie againſt *D.* becauſe he had it for a valuable conſideration. *Ex relatione m'ri Daly.*

(*a*) R. acc. 3 Salk. 70. Burr. 452. 1516. Dougl. 611.

Anonymous.

If an attorney ſuffers a deed he has prepared to be executed before he is paid for it, he cannot afterwards detain it for his fees. Sed Vide Burr. 2218. Dougl. 100.

IT was ruled at a trial at *niſi prius* by *Holt* chief juſtice, *Paſch.* 6 *Will. & Mar.* that where *A.* purchaſed the intereſt of a leaſe for years, and the writings were left in the hands of *B.* an attorney to draw an aſſignment of it; *B.* drew it, and it was ſealed, but *B.* refuſed to deliver it, until *A.* paid for it; upon which *A.* brought trover againſt *B.* for the deed: that the action well lay; becauſe *B.* might have an action for what he deſerved, but he cannot detain for it. *Ex relatione m'ri Place.*

Frith *verſ.* Torin.

S. C. Salk. 67. pl. 5. Holt 675.

Serving an apprenticeſhip abroad will intitle a man to follow his trade here. R. acc. Salk. 67. pl. 2.

IT was ruled by *Holt* chief juſtice at *Summer* aſſizes at *Rygate* 10 *Will.* 3. that the ſervice of an apprenticeſhip ſeven years beyond the ſea, though the defendant was not bound, excuſes from the 5 *Eliz. c.* 4.

Jones *verſ.* Hart.

S. C. Salk. 441. Holt 642.

IT was ruled by *Holt*, chief juſtice at *Guildhall*, *Mich.* 10 *Will.* 3. that if *A.* being a pawn-broker employs *B.* his ſervant in the way of his trade, and *B.* upon a pawn of goods lends money to *C.* *C.* tenders the money to *B.* at the day, and demands the goods, *B.* ſays, that the goods are ſold; trover will lie for *C.* againſt *A.*

IF

IF a ſhip be bound for the *Eaſt Indies*, and from thence to return to *England*, and the ſhip unlades at a port in the *Eaſt Indies*, and takes freight to return to *England*, and in her return ſhe is taken by the enemies; the mariners ſhall (*a*) have their wages for the voyage to the *Eaſt Indies*, and for half the time that they ſtayed there to unlade, and no more. Ruled by *Holt* chief juſtice *June* 4, 1700. at *Guildhall* at *niſi prius*.

If a ſhip is freighted out and home, and captured on her homeward bound voyage, the mariners ſhall be paid for the outward voyage, and for half the time they ſtayed at the port of delivery*.

* Vide Com. merchant E. 3. 2d Ed. vol. 4. p. 230.

(*a*) It ſhould ſeem reaſonable that the mariners ſhould have wages for the whole of the time during which they were unloading becauſe their wages during that time are payable in reſpect of the outfit and carriage which is ſaved.

Anonymous.

S. C. Salk. 441. Holt 642.

THE ſervants of a carman run over a boy in the ſtreets, and maimed him, by negligence; and an action was brought againſt the maſter and the plaintiff recovered. The ſervants of *A.* with his cart run againſt the cart of *B.* in which there was a pipe of wine, *viz.* ſack, and overturned it, whereby the ſack was ſpoiled, and run into the ſtreet; an action was brought againſt the maſter, and held good by *Holt* chief juſtice at *Guildhall*. *Ex relatione m'ri Place.*

Wright *verſ.* Wilſon.

A. Has a chamber adjoining to the chamber of *B.* and has a door that opens into it, by which there is a paſſage to go out; and *A.* has another door, which *C.* ſtops, ſo that *A.* cannot go out by that. This is no impriſonment of *A.* by *C.* becauſe *A.* may go out by the door in the chamber of *B.* though he be a treſpaſſer by doing it. But *A.* may have a ſpecial action upon his caſe againſt *C.* Ruled by *Holt* chief juſtice, in evidence at a trial at the *Summer* aſſizes at *Lincoln* 1699, in an action of falſe impriſonment. And the plaintiff was nonſuit.

An action for falſe impriſonment will not lie againſt a man for faſtening one of two doors in a room in which *A.* is, though *A.* cannot go through the other without treſpaſſing.

Glenham *verſ.* Hanby.

A. Demiſed ground to *B.* which was paſture, except the trees; *B.* put in his cattle to feed, which barked the trees; *A.* cannot have treſpaſs againſt *B.* Ruled by *Holt* chief juſtice upon a point made and referred to him at the aſſizes at *Bury* in *Lent* 12 *Will.* 3. upon hearing of counſel ſeveral times, though at firſt he was of a contrary opinion.

A man who lets land excepting the trees cannot maintain treſpaſs againſt the leſſee, for lettin his cattle bark the trees.

Maſters *verſ.* Butcher.

A collector of the taxes cannot juſtify impriſoning a man under the general printed warrant.

THE officer cannot juſtify the impriſonment of a man for non-payment of taxes under the general printed warrant, which the collectors have, ſigned by two juſtices of peace. But they ought to have a ſpecial warrant. Ruled upon evidence at a trial in falſe impriſonment by *Holt* chief juſtice at *Norwich Summer* aſſizes, 12 *Will.* 3.

Hatcher *verſ.* Fineaux.

A man who has the legal intereſt in a term by joining in an aſſignment of it will prevent the ſtatute of limitations from attaching in favour of the perſon actually in poſſeſſion. Paying intereſt upon a mortgage will prevent the ſtatute of limitations from attaching in favour of the party paying it.

William Denne poſſeſſed of a term for a thouſand years aſſigned it to *Ralph Philpot* for a collateral ſecurity againſt a bond in which *Philpot* was bound jointly with *Denne* for the debt of *Denne* in 1655. *Philpot* died leaving *R. Philpot* his ſon executor. *William Denne* died leaving *Katharine Denne* his wife his executrix, and *Katharine Denne* his daughter his heir. In 1674 *R. Philpot* executor of *Ralph Philpot*, and *Katharine Denne* the executrix of *William Denne*, and *Katharine Denne* the heireſs of *William Denne*, aſſigned this term of a thouſand years to *John Harriſon*, with condition that upon payment of 200 *l.* the conſideration of the ſaid aſſignment, by *Katharine Denne* the executrix, *&c.* *Katharine Denne* received the profits till 1691, and ſhe paid the intereſt to the ſame time. And *per Holt* chief juſtice, it was ruled at *Maidſtone*, *Lent* aſſizes 13 *Will.* 3 in an ejectment brought by the executor of *Harriſon*, 1. That he was not barred by the ſtatute of limitations, becauſe the ſtatute did not prejudice at the time of the aſſignment, there being but nineteen years elapſed; and then the joining of him in the aſſignment, who had the title to take advantage of the ſtatute, gives a new title. 2. *Per Holt* chief juſtice, if a man makes a mortgage for collateral ſecurity, although the mortgagee is not in poſſeſſion for twenty years and more; yet if the intereſt be paid upon the bond according to the agreement of the parties, it ſhall not be barred by the ſtatute of limitations.

Vide Co. Litt. 13th Ed. n.

IT was held, *per curiam*, *Mich. & Will.* 3. *B. R.* that if a term for years of lands be deviſed to executors in truſt for payment of debts, if all the executors renounce, *&c.* and will not convey over to others, to the end that they may execute the truſt, that the truſt and term for years are both loſt. *Ex relatione m'ri Shelley.*

Stocker

Stocker *verſ.* Berny.

IF *H.* has poſſeſſion of land for twenty years uninterrupted, and then *B.* gains poſſeſſion, upon which *H.* brings ejectment; though *H.* is plaintiff, yet his poſſeſſion for twenty years will be a good title for him, as well as if *H.* had been then in poſſeſſion, becauſe poſſeſſion for twenty years now by virtue of the ſtatute 21 *Jac.* 1. *c.* 16. *ſ.* 1. is like a deſcent at common law, which tolls the entry. Ruled by *Holt* chief juſtice, *Summer* aſſizes at *Lincoln*, 11 *Will.* 3. 1699. and at *Ayleſbury*.

An uninterrupted poſſeſſion of lands for twenty years gives a complete poſſeſſory right.

Sparling Executor Sparling *verſ.* Smith.

IN *aſſumpſit*, upon *aſſumpſit infra ſex annos* pleaded, the evidence was, that after the ſix years the defendant aſſumed to pay, if the plaintiff would come to account. And it was ruled by *Holt* chief juſtice at *Hertford*, *Lent* aſſizes 1701, *March* 25, that this did not revive the promiſe, becauſe it was not an actual promiſe.

A promiſe to pay a debt upon which the ſtatute of limitations has attached if the creditor will come to an account, is no anſwer to the ſtatute of limitations. Sed Vide ante 389.

Kirney *verſ.* Smith & al'.

IT was ruled by *Holt* chief juſtice, at *Lent* aſſizes at *Thetford*, 16 *Mar.* 12 *Will.* 3. upon evidence at a trial at *niſi prius*, that a ſhip carpenter is within the ſtatutes of bankrupts. But a caſe was made of it for his farther conſideration. 2. *A.* becomes bankrupt, and then ſells goods to *B.* *B.* ſells them to *C.* which is a converſion; then a commiſſion of bankrupt is ſued, and an aſſignment made by the commiſſioners to *E.* who brings trover againſt *C.* *per Holt*, the action well lies; but that point was alſo reſerved for his conſideration. 3. If the petition to the lord chancellor mentioned in the declaration recites, that the bankrupt was indebted in 300*l.* and the petition produced at the trial recites, that he was indebted in 150*l.* yet that is no material variance. 4. There is no need to produce at the trial the petition made to the lord chancellor, becauſe it may have been by *parol*, though the practice hath been otherwiſe.

A ſhip carpenter may as ſuch be a bankrupt. Vide Cooke 32. The aſſignee of a bankrupt may bring trover againſt a man who bought goods of a vendee of the bankrupt before the aſſignment. Vide Burr. 32. 34. 828. Bl. 829. 1064. In ſtating the petition miſrepreſenting the ſum the bankrupt was aſſerted to owe, is not fatal Vide ante 724. The aſſignees of a bankrupt need not at the trial of an action brought by them produce the petition, Vide ante 724.

Mead

Mead *verſ.* Death and Pollard.

If an order of ſeſſions direct the payment of money, and it is paid accordingly, though the order is quaſhed, an indebitatus aſſumpſit will not lie for the money. Vide Burr. 1005. 1354.

AN order was made at the quarter ſeſſions by the juſtices of peace, that a poor man ſhould be removed from the pariſh of *Otton Belchamp* to the pariſh of *Walter Belchamp*, and that *Walter Belchamp* ſhould pay to *Otton Belchamp* 6 *l.* coſts. The 6 *l.* were paid accordingly. And afterwards the order was quaſhed *in B. R.* being removed thither by *certiorari*. Upon which the churchwardens of *Walter Belchamp*, who had paid the 6 *l.* brought *indebitatus aſſumpſit* againſt the defendants, who had received it. And it being tried before *Tracy* baron of the exchequer, *Lent* aſſizes 1700, *Mar.* 28. at *Chelmsford*, he held that *indebitatus aſſumpſit* would not lie. And he compared it to the caſe where money is paid upon a judgment, and afterwards the judgment is reverſed for error, *indebitatus aſſumpſit* will (*a*) not lie for the money. And the plaintiff was nonſuit. But note alſo, that the 6 *l.* were paid by the churchwardens and overſeers of the poor, and this action was brought by the churchwardens alone.

(*a*) Vide Com. Pleader. 3 B. 20. 2d. Ed. vol. 5. P. 306.

Sir Richard Newdigate *verſ.* Davy.

Indebitatus aſſumpſit lies for money paid under the ſentence of a court which has no juriſdiction.

SIR *Richard Newdigate* had a donative, which he gave to *Davy*; and afterwards he removed *Davy*, and put in *J. S. Davy* cited Sir *Richard Newdigate* in the time of *James* II. before the high commiſſioners, and there Sir *Richard Newdigate* had ſentence againſt him, to reſtore *Davy*, and to pay him all the arrears that he had received. Sir *Richard Newdigate* paid it accordingly. And after the revolution Sir *Richard Newdigate* brought *indebitatus aſſumpſit* againſt *Davy* for this money, as received to his uſe. And it being tried at *niſi prius* in *Middleſex*, before *Treby* chief juſtice of the common pleas, he held, that the action well lay; for when money is paid in purſuance of a void authority, *&c. indebitatus aſſumpſit* lies for it. 4 or 5 *W. & M. Ex relatione m'ri Place.*

Mendez *verſ.* Carreroon.

In an action upon a bill of exchange brought by an indorſor who has been ſued upon it againſt the acceptor, the plaintiff muſt prove that he paid the party who ſued him. And Q. Whether upon a foreign bill he muſt not produce a receipt upon the proteſt?

IN caſe upon a bill of exchange, upon the evidence at the trial before *Holt* chief juſtice at *Guildhall*, *Nov.* 23. *Mich.* 12 *Will.* 3. the caſe was thus. *A.* drew a bill of exchange upon *B.* payable to *C.* at *Paris*; *B.* accepted the bill, *C.* indorſed it, payable to *D. D.* to *E. E.* to *F. F.* to *G. G.* demanded the bill to be paid by *B.* and upon non-payment

G. pro-

G. protested it within the time, *&c.* and then *G.* brought an action against *D.* and it was well brought, and he recovered. Afterwards *D.* brought an action against *B.* and though *D.* produced the bill and the protest, yet because he could not produce a receipt for the money paid by him to *G.* upon the protest, as the custom is among merchants, as several merchants upon their oaths affirmed, he was nonsuit. But *Holt* seemed to be of opinion, that if he had proved payment by him to *G.* it had been well enough.

A bill of exchange cannot be protested before it is payable for non-payment. But it may because the drawee has absconded. Vide Bayley. 30.

THE custom of merchants is, that if *B.* upon whom a bill of exchange is drawn, absconds before the day of payment, the man to whom it is payable may protest it, to have better security for the payment, and to give notice to the drawer of the absconding of *B.* and after time of payment is incurred, then it ought to be protested for non-payment the same day of payment or after it. But no protest for non-payment can be before the day that it is payable. Proved by merchants at *Guildhall*, *Trin.* 6 *W.* & *M.* before *Treby* chief justice. And the plaintiff was nonsuit, because he had declared upon a custom, to protest for non-payment before the day of payment. *Ex relatione Place.*

Taffell and Lee *verf.* Lewis.

IN case of foreign bills of exchange the custom is, that (*a*) three days are allowed for payment of them; and if they are not paid upon the last of the said days, the party ought (*b*) immediately to protest the bill and return it, and by this means the drawer will be charged: but if he does not protest it the last of the three days, which are called the days of grace, there, although he upon whom the bill is drawn fails, the drawer will not be chargeable: for it shall be reckoned his folly, that he did not protest, *&c.* But if it happens, that the last day of the said three days is a *Sunday* or great holiday, as *Christmas* day, *&c.* upon which no money used to be paid, there (*c*) the party ought to demand the money upon the second day; and if it is not paid, he ought to protest the bill the said second day; otherwise it will be at his own peril, for the drawer will not be chargeable. Merchants in evidence at a trial at *Guildhall*, *Trin.* 7 *Will.* 3. before *Holt* chief justice, swore the custom of merchants to be such, which was approved by *Holt* chief justice. 2. There (*d*) is no custom for the protest of inland bills of exchange, nor any certain time assigned by the custom for the payment of them; therefore the money ought to be demanded in reasonable time, after it is payable; and then if it is not paid, the drawer will be charged.

(*a*) Vide Bayley, 34.

(*b*) Vide Bayley, 28, 29. 39.

(*c*) Vide Bayley, 34.

(*d*) Vide Bayley, 39, 40.

See the statute 9 *W.* 3. *c.* 17. 3. If the indorsee of a bill accepts but two pence from the acceptor, he can never after resort to the drawer. 4. The notes of goldsmiths (whether they be payable to order or to bearer) are always accounted among merchants as ready cash, and not as bills of exchange. 5. The time of receiving money upon a goldsmith's note is (*a*) immediately, or else it will be at the peril of him who has the note. He who delivers over the note will not be charged, if the goldsmith fail, as the drawer of a bill of exchange would be; but the receiver is supposed to give credit to the goldsmith, and the note is looked upon as ready money payable immediately; and if he does not like, he ought to refuse it; but having accepted it, it is at his peril. [But note, if the party to whom the note is delivered demands the money of the goldsmith in reasonable time, and he will not pay it, it will charge him who gave the note. *Hopkins* v. *Geary*, *Hil.* 1 *Ann. B. R. Guildhall.*] 6. A (*b*) goldsmith's note indorsed is as a bill of exchange against the indorsor.

(*a*) Vide Bayley, 33, 34.

(*b*) Vide Bayley, 12. ante, 181.

Tiley *verf.* Cowling.

Where a man may in an action to be brought by him give in evidence the verdict to be given in a particular cause, and the proofs upon which that verdict was founded, his wife shall not be a witness in the cause.

MR. *R. Vaughan* sent a box with a hundred guineas, *&c.* in it, by *Tiley* the *Bath* carrier to *London*, upon which box the direction was only, To Mr. *Vaughan* member of parliament. *Tiley* carried the box to *London*, and upon his arrival *Cowling* an inn-keeper in *Piccadilly* came to *Tiley*'s inn for goods directed to be left at *Cowling*'s house. Afterwards this box being lost, *Tiley* pretended that it was delivered to *Cowling* among other goods. Upon which *Tiley* brought an action of trover against *Cowling*. And at the trial at the sittings at *Westminster* before *Holt* chief justice, Mrs. *Vaughan* the wife of Mr. *Vaughan* was produced to be a witness, to prove what was in the box. And *Holt* chief justice refused to admit her to be a witness; because, whether *Tiley* recovered or not, this verdict might be given in evidence by Mr. *Vaughan* in an action to be brought by him against *Tiley*, with oath made of what was sworn for *Tiley* in this trial. 13 *Feb.* 14 *Will.* 3. 1701.

Dike *verf.* Polhill.

A copy of the register of a will is not evidence. A copy of a church register is. And so is a copy of court rolls. Vide ante 154.

IN ejectment, upon the trial at *Lent* assizes at *Maidstone* in 1701, the copy of the register of a will was produced in evidence, to prove a pedigree, and not to derive any title by the will; and also the probate of the same will was offered for the same purpose. But *Holt* chief justice refused to admit them. For, 1. As to the probate, it is only evidence

A probate is only evidence of a will as far as it relates to the personalty. Acc. ante, 154.

of a will as to chattels. 2. He ſaid, that there was the ſame reaſon to admit the copy of the regiſter to be evidence, as the copy of court rolls, or of a regiſter of a church; but the practice has been always otherwiſe, which he would not ſubvert: and therefore the copy of the regiſter not being evidence to prove the will, it cannot prove the pedigree, becauſe that depends upon the credit of its being a will, which is not proved by the copy of the regiſter; therefore the evidence was denied to be admitted by him. But afterwards, the ſame circuit at the aſſizes at *Eaſt Grinſtead*, in an iſſue directed out of chancery to try in a feigned action, heir or not, the ſaid probate was offered to baron *Tracy*, to prove the pedigree; and he admitted it, notwithſtanding the other caſe was cited to be ruled as aforeſaid; becauſe, he ſaid, the other caſe was in ejectment, and this only in caſe; and he could not know, that the title of the land would come in queſtion, *&c.* But it ſeems to me, that there is no difference, becauſe the title to the land was not derived by the will in the ejectment.

Paſch. 6 *W. & M. B. R.* it was ſaid *per curiam*, that a ſhop-book is not evidence for the tradeſman, but is good evidence againſt him, or for a ſtranger. The ſame law of a ſcrivener's book for money paid by him, or received to the uſe of a ſtranger, or the book of a burſer of a college. *Ex relatione m'ri Place.*

Selby *verſ.* Harris.

14 Geo. 2. B.R. 2 Bl. 947.

IT was ruled by *Treby* chief juſtice of the common pleas at *Guildhall*, *Paſch.* 10 *Will.* 3. that if at the trial at *niſi prius* a rule of the court of common pleas or king's bench be produced under the hand of the proper officer, there is no need to prove it to be a true copy, becauſe it is an original. 2. A copy of an entry in the books of the office of faculties was then diſallowed to be evidence, wherefore the book itſelf was produced.

A rule of court ſigned by the proper officer is prima facie to be preſumed correct.

A copy of an entry in the books of the office of faculties is not evidence.

Kingſton *verſ.* Grey.

Paſch. 8 *Will.* 3. at *Guildhall*, a creditor was admitted by *Holt* chief juſtice to prove his bond, and the debt due upon it, upon *plene adminiſtravit* pleaded, he having before received of the adminiſtrator, and delivered up the bond.

Taylor

Taylor *verſ.* Jones.

A copy of the inrolment of a deed to lead the uſes of a fine is ſufficient prima facie evidence of the deed.

MICH. 8 *Will.* 3. *C. B.* in ejectment, a motion was made for a new trial, becauſe the party againſt whom the verdict was given, produced in evidence a fine, and a copy of the inrolment of a deed, which led the uſes of it. And *Rokeby* juſtice, before whom it was tried, refuſed to admit this copy of the inrolment to be evidence. And reſolved *in C. B.* that ſuch copy is evidence *prima facie*; but the party ſhall not be eſtopped by it, as by the record, but may controvert it, as forged, *&c.* becauſe inrolment was at common law, and that for ſome purpoſe. And they relied upon Mr. *Kendal*'s caſe. [See it now reported 3 *Lev.* 387.] And of this opinion *Powell* juſtice was generally. But *Treby* chief juſtice doubted, whether ſuch evidence generally ſpeaking was evidence. But here he agreed with the other juſtices, *viz. Powell* and *Nyeill*, becauſe it was only to lead the uſes of the fine, which might be done by parol.

Chettle *verſ.* Pound.

A tenant who has agreed in writing to hold premiſes at a certain rent may allege that the party with whom he made the agreement never had any intereſt in the premiſes, if ſuch party was never in poſſeſſion. Otherwiſe he cannot.

DEBT for rent. Upon *nil debet* pleaded, the plaintiff gave in evidence a note in writing, by which the defendant agreed, to hold for one year, rendering rent of 15*l.* And in fact he was grantee of a reverſion expectant upon an eſtate for life, which tenant for life was dead at the giving of the note. Which grant was forty years before, and he was never in poſſeſſion during his life. The defendant gave in evidence a *prior* grant of the ſaid reverſion. And it was ruled by *Holt* chief juſtice, that the defendant in this caſe may give in evidence, *nil habuit in tenementis*, the plaintiff having never been in poſſeſſion, notwithſtanding the note ſigned by the defendant, by which he agreed to hold, *&c.* But if the plaintiff had been in poſſeſſion, though but tenant at will, *&c.* then the defendant could not have given this in evidence without having been evicted. *Lent* aſſizes *Maidſtone*, 13 *Will.* 3. 1701. And the plaintiff was nonſuit.

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